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Recent Developments

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Digital Technology and the Future of Privacy: *Carpenter v. United States*

Carpenter v. United States

138 S. Ct. 2006 (2018)

In the modern world, some of our deepest secrets are held by third parties who store data gathered by our computers, cell phones, and smart homes. Under previous doctrine as developed in *Smith v. Maryland* and *United States v. Miller*, an individual had no reasonable expectation of privacy in data voluntarily exposed to third parties.[1] Justice Sotomayor recently called upon the Court to reexamine this third-party doctrine because "this approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[2] In *Carpenter v. United States*, the Court rejected the third-party doctrine's application to historical cell-site location information (CSLI) that can be used to track an individual's historical movements for seven days or more.[3] Moreover, it recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements, and it laid the groundwork for future rulings to protect the privacy of the troves of data collected as a result of "seismic shifts in digital technology."[4]

In a 5-4 decision written by Chief Justice Roberts, the United States Supreme Court held that individuals have a reasonable expectation of in the tracking of physical movement captured CSLI records held by third-party wireless service providers, and the Fourth Amendment protects the privacy of this data. In 2011,

1. 442 U.S. 735, 740–41 (1979); 425 U.S. 435, 443 (1976).
2. United States v. Jones, 565 U.S. 400, 417 (2012) (Sotomayor, J. concurring).
3. 138 S. Ct. 2006, 2216–17 & n.3 (2018).
4. *Id.* at 2217, 2219.

police obtained confessions that implicated Timothy Carpenter in a series of robberies in Michigan and Ohio. They used these confessions to apply for a 2703(d) order under the Stored Communications Act to access Carpenter's historical CSLI for a four-month period when the robberies occurred. The Government obtained data from Carpenter's cell phone service providers that included a historical log showing which cell towers his phone had connected to in order to make or receive calls. In total, the Government obtained 12,898 data points regarding Carpenter's movements.

Before Carpenter's trial for robbery and firearms violations, Carpenter moved to suppress the CSLI, arguing that the seizure of the records violated his Fourth Amendment Rights because it was not based upon a warrant supported by probable cause, but rather upon a 2703(d) order which requires a lower standard, akin to reasonable suspicion. The motion was denied, and the government's experts used the data at trial to produce maps that placed Carpenter's cell phone near four of the robberies. The CSLI was key to Carpenter's conviction. Carpenter appealed to the Sixth Circuit which affirmed the lower court's ruling. The Supreme Court reversed and held that the government's acquisition of CSLI was a Fourth Amendment Search, subject to a warrant requirement.

The *Carpenter* decision is the third recent case grappling with technological developments that allow a heretofore unimaginable intrusion into privacy.[5] In these decisions, the Court has acknowledged that applying precedent that based a reasonable expectations of privacy upon analogies to numbers dialed from a land line,[6] cigarette packs in pockets,[7] and beepers in industrial containers[8] may be akin to "saying a ride on horseback is materially indistinguishable from a flight to the moon."[9]

5. Riley v. California, 134 S. Ct. 2473, 2491 (2014) (requiring a warrant to search a cell phone incident to arrest because a "cell phone search would typically expose to the government far more than the most exhaustive search of a house. . . ."); Jones, 565 U.S. at 411–3 (requiring a warrant to monitor a vehicle's movements through a GPS tracker).

6. Smith v. Maryland, 442 U.S. 735, 740–41 (1979).

7. United States v. Robinson, 414 U.S. 218, 236 (1973).

8. United States v. Knotts, 460 U.S. 276, 281–82 (1983).

9. Riley, 134 S. Ct. at 2489.

Unfortunately, *Carpenter* never hit escape velocity to take us beyond the pull of the third-party doctrine. The Court went out of its way to explain that the ruling was narrow and did "not disturb the application of *Smith* and *Miller* or call into question surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information."[10] Despite the protests, it did indeed cabin *Smith* and *Miller* by "declin[ing] to extend . . . [them] to cover these novel circumstances," namely to "a qualitatively different category of . . . records" that "when Smith was decided in 1979, few could have imagined. . . . "[11]

So, it appears that the third-party doctrine is no longer a bright-line rule that whatever is voluntarily exposed to a third-party has no reasonable expectation of privacy, but rather it has now become a fact-intensive analysis whenever a search involves (1) "an entirely different species of business record"[12] (2) that is "not truly 'shared' as one normally understands the term."[13] "Not truly shared," the Court explains, is when "in no meaningful sense does the user voluntarily assume the risk of turning over a comprehensive dossier of his physical movements" because the information is gathered "without any affirmative act on the part of the user beyond powering up."[14]

The Court is (perhaps intentionally) less clear what belongs within this qualitatively different category of records. Does it include precise location data collected by a cell phone app such as Uber, Google Maps, or Tinder? ECG data from an Apple Watch? Eavesdropping by Siri or Alexa? Cell tower dumps? Real-time GPS tracking? Future litigants will determine the contours of the "world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of . . . information casually collected. . . today."[15] For now, we only know that the Fourth Amendment

10. Carpenter v. United States, 138 S. Ct. 2006, 2220 (2018).
11. *Id.* at 2216–17.
12. *Id.* at 2222.
13. *Id.* at 2220.
14. *Id.*
15. *Id.* at 2219.

protects historical cell phone location data used to track physical movements for seven days or more.[16]

SIGNIFICANT CASES IN BRIEF:

Murphy v. NCAA, 138 S. Ct. 1461 (2018).

The National Collegiate Athletic Associate challenged the Professional and Amateur Sports Protection Act which prohibited additional states from legalizing sports gambling. Federal prohibition of sports was unconstitutional commandeering because it prescribed what a state legislature could and could not do. This state-rights holding has broad implications for sanctuary cities and state legalization of marijuana.

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n., 138 S. Ct 1719 (2018).

A baker challenged Colorado antidiscrimination law when he and his company were found in violation because he refused to bake a wedding cake for a same-sex couple due to his religious beliefs. In an extremely narrow ruling, the Court held that how the Colorado Civil Rights Commission treated the petitioner with prohibited anti-religious animus. The broader significance of the case is the extension of the holding in *Newman v. Piggie Park Enterprises*, Inc. that a business cannot cite religious reasons to avoid public accommodations antidiscrimination requirements to include sexual orientation. *Masterpiece*, 138 S. Ct. at 1727, 1733 n.* (citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)).

Janus v. AFSCME, 138 S. Ct. 2448 (2018).

Petitioner was a state employee who worked in a unionized unit in Illinois state government, but who chose not to join the union. He challenged the requirement that pay an agency fee, claiming it was compelled speech. The Court overruled Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), and held that the First Amendment is offended when nonconsenting public sector

16. Carpenter v. United States, 138 S. Ct. 2006, 2216–17 & n.3 (2018).

employees are required to pay agency fees to unions. This decision undermines public sector unions since they will now have to provide agency services to nonunion members without compensation, and it may raise issues under the Takings Clause.

Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

A California statute required licensed pregnancy counseling centers to disseminate information about how to obtain a state-funded abortion and required unlicensed pregnancy crisis centers to post disclaimers that their services did not include medical assistance. The Christian centers sought injunctive relief, claiming that the requirements constituted compelled speech in violation of the First Amendment. The Court held that the requirement unduly burdened the centers' speech. The decision has significant implications for existing state statutes requiring physicians to give patients state-prescribed information before obtaining an abortion.

South Dakota v. Wayfair, 138 S. Ct. 2080 (2018).

South Dakota challenged the physical presence rule from Quill Corp. v. North Dakota, 504 U.S. 298 (1992) that held that it was a violation of the Commerce Clause to tax goods and services sold to buyers in the state when the seller had no physical presence in the state. The Court overruled *Quill* and held that it did not violate the Commerce Clause to tax goods and services sold to buyers in the state when the seller had no physical presence in the state. The ruling has broad implications for sales over the internet because states can now tax sellers without local presence.

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

Employees entered an agreement with their employers to individually arbitrate employment disputes and waive class and collective proceedings. Employees sued, claiming that the arbitration agreement was unenforceable under the National

Labor Relations Act (NLRA). The Court held that individual arbitration agreements do not violate the NLRA, and agreements to arbitrate under the Fair Labor Standards Act or the corresponding state statues are enforceable under the Federal Arbitration Act. The decision will encourage employers to seek broader arbitration agreements from employees.

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