Harlan Virtual Supreme Court: Carpenter v. US- Heavey and Liu

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Petitioner Brief – Liu and Heavey

To be in the Supreme Court of the United States

October Term, 2017

TIMOTHY IVORY CARPENTER, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

PETITIONER'S OPENING BRIEF

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Oral Argument: https://www.youtube.com/watch?v=3cH1uXpMzqw

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QUESTION PRESENTED: Does the warrantless search and seizure of cell phone records including location data over the course of 127 days violate the Fourth Amendment?

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Statement of Argument: Collection of cellphone data from Timothy Carpenter’s cellphone is in violation of the Fourth Amendment. The Stored Communications Act, 18 U.S.C. § 2703(d),1 was used to circumvent the Fourth Amendment’s requirement for a warrant.2 The scope of the search was excessive. Also, the addition of the Cell Site Location Information violated the precedent set forth in United States v. Jones.3

Furthermore, the third party doctrine as set forth in United States v. Miller,4 does not apply in this context. The user of a cell phone is not consciously turning over their CSLI, to the service provider, public or government, because it is an inevitable part of communication in the digital age, with digital data "automatically transmitted and processed by different computer software and servers."5 This case also shows the connection between the Constitution and modern technological changes. Under the privacy interpretation of the Fourth Amendment, cellphone data is a type of information that the sender still has a vetted privacy interest in despite transmitting it. Also, under the property interpretation of the Fourth Amendment, cell phone data can be viewed as effects, meaning it in protected by the first clause of the Fourth Amendment.6 Between the unreasonable generalness of the information collected, the lack of a warrant, the misuse of the third party doctrine and the evolving complications of the digital age in relation to the Fourth Amendment, the evidence gathered against Mr. Carpenter was done so unconstitutionally.

Arguments

1. The collection of CSLI using the Stored Communications Act, 18 U.S.C. § 2703(d), constitutes a geolocational search, and therefore violates the Fourth Amendment's requirement for a specific warrant.

Even before the United States was independent, there was a requirement for some form of warrant for a search or seizure to occur. In colonial times, this meant a Writ of Assistance, "court orders that authorized customs officers to conduct general (non-specific) searches of premises for contraband."7 These writs were widely disliked for their lack of specificity. A prominent voice against these writs was James Otis. He described them as instruments of "slavery"8 and "villainy."9

These sentiments were carried on by James Madison when he wrote the "Bill of Rights as Purposed."10 This document was later moved into the US Constitution when it was ratified in the Bill of Rights.11 In the 4th amendment, the descendent of the sixth article in the "Bill of Rights as Purposed,"12 there is a clause referred to as the Warrant Clause.13 This clause can be broken into different ideas, each outlined the requirements for a warrant in the US Justice System.

The first idea in this clause is the requirement for "probable cause."14 This idea is explored in more detail in Brinegar v. US.15 The case states that "Probable cause exists where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed."16

Another idea stated in the Warrant clause was the requirement of a warrant to particularly described "the place to be searched, and the persons or things to be seized."17 This directly builds on Otis' hatred of general warrants and is designed as a check against the ability of the government to search and seize without due process and reasonableness. With these ideas in mind, one can take a closer look at Carpenter v. US.

Firstly, the Federal Bureau of Investigation needed to apply for a warrant in order to search the CSLI from Mr. Carpenter. This is action is established as a search as seen with United States v. Jones,18 where tracking one's location is considered a violation of the fourth amendment. Now while the tracking performed in Carpenter v. United States is less accurate than that done in United States v. Jones it remains a form of location tracking that may not have been able to be done by normal police officers. For example, the petitioner may have been in private property in the two mile radius so there would otherwise not have been surveillance on him. Since the government did track Carpenter's location and that is considered a search, a warrant would be required for it to be carried out legally.

This said, the FBI did not apply for a warrant but rather a court order under the Stored Communications Act, 18 U.S.C. § 2703(d).19 There are clear differences in the requirements set forth in the SCA and the Fourth Amendment. The SCA requires the government to provide "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."20 This is a bar much lower than that set by James Madison and John Adams, "probable cause."21 This, defined by Brinegar,22 requires "facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed."23 This is significantly different as the SCA does not require the party being searched to be committing a crime but rather have information that may help an investigation. This collection of information without a warrant or even probable cause shows that the petitioner's Fourth Amendment Rights are being violated.

Another issue with the way this was executed is the amount of data collected. Instead of collecting data that was solely pertinent to the exact times of the robberies or even the days that they occured, the FBI collected all transactional data over the course of 127 days. This

lengthy extent of data collection is in violation of the Fourth Amendment's24 requirement for particularly described places. Historically, Americans have always been against general searches like this, as seen with Otis and even George Mason who is quoted saying "[G]eneral warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."25 This quote is very important as it dives into the flaws in this data collection. The CSLI was collected without an offence being "particularly described and supported by evidence."26 This sort of wide-net, far-reaching, open-ending searching is the exact thing the founding fathers stood against and would call "grievous and oppressive."27

Another error in the collection of the 127 days28 of data by the FBI is the situation surrounding it. If the FBI had time sensitive information that they could have used to protect the safety of the public or a law enforcement officer, there would be more lenciency as far the strict requirement for a warrant. But, the long duration violates every exception to a warrant, specifically the precedent of "Terry Stops."29 which allows a "searches undertaken, (...)limited in scope and designed to protect the officer's safety incident to the investigation."30 This search was neither limited in scope nor to protect the safety of a law enforcement officer. This shows once more that the FBI's disregard for the requirement for a warrant cannot be excused under one of the exceptions.

In summation, the FBI would have needed a warrant to receive the information that they did. As it is location tracking, it is protected by the Fourth Amendment, as seen in United States v. Jones,31 meaning a warrant would be required. Instead of a warrant, the FBI opted to use the SCA to receive a court order that was not based on probable cause and was not finely tailored. This "general warrant" is unconstitutional and starkly opposed to the Fourth Amendment of the Constitution of the United States of America.32

2. The third party doctrine and public disclosure doctrine carry little relevance to Carpenter v. US based upon the conditions set forth in both Smith v. Maryland and US v. Miller, and their continuous application is unsuitable for the digital age.

In Smith v. Maryland, the third party doctrine was established so that, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."33 The relevance of this doctrine to Carpenter is a mixed bag — on one hand, Carpenter's CSLI data was extracted from the third party cell service companies, but on the other, he had little to no control over the forfeiture of the data to the provider. The nature of mobile technology is that sensitive data, including one's location, or call and text records, are automatically transferred to such service providers to be processed by the company's

servers and software.34 The transmission of the data is a necessary part of participating in the digital world, and is a basic requirement for modern communication. As such, it is irresponsible to haphazardly apply the third party doctrine with such a rigid expectation of validity, especially in the digital age.

First, Smith's definition of the third party doctrine conflicts with the facts of the case of Carpenter. The idea that data so unknowingly transmitted such as CSLI can be regarded as voluntary relinquishment of information is a stretch of the original meaning of the doctrine. The origins of the doctrine trace back to the use of government informants "eliciting incriminating statements from unwary criminal suspects", under the premise that once the suspect has voluntarily spoken the statements to the informant, the government can and will use the information against him without a warrant.35 But this application of the doctrine has dramatically expanded over time, extending to the voluntary disclosures made by a user to banks or telephone companies. The fine line between voluntary and coerced disclosure of information to the company is one that should be examined. Some examples of voluntary actions in the context of cell phone usage would be typing in a phone number, making a phone call, or making a search on the internet. Unlike these actions, which are clearly voluntary, the automatic transmission of sensitive data to the cell providers would not be voluntary,

The relational nature of privacy as outlined by Justice Brandeis should also be considered. Essentially, the purpose of the fourth amendment, as envisioned by the Founders, was to shield individuals from actions of the government, no matter the context. Automatically assuming that information revealed to a third party gives total access to the government to that information simply does not advance that purpose.36 Put another way, our willingness to disclose information to one party does not naturally apply to the same extent to another party, as people act with different levels of privacy towards different people. Giving no reasonable expectation of privacy to information disclosed to any third party, even to companies as necessary as cell providers in the digital world, undermines the nature of both the fourth amendment and the American right to personal civil liberties.

The analysis that people who sign up for cell providers knowingly assume the risk that their sensitive information may be turned over to the government is also not so straightforward. First of all, this direct application of the third party doctrine, as seen in the Fifth and Eleventh Circuits, does not meet the same conditions to the Third Party Doctrine as seen in US v. Miller, which takes into account both the sensitivity of the information, the voluntariness of the disclosure, and the scope of the information.37 First of all, the obtaining of Miller's records were much more limited, and did not have the same degree of sensitivity as location. Furthermore, the records that were created were a "negotiable

instrument into the stream of commerce to transfer funds."38 What is seen in Carpenter is both of much higher sensitivity (CSLI is highly personal) and much less voluntariness. Going back to the original point, that people assume the risk of the betrayal of their sensitive information, a recent study found that only about 1 in 4 Americans "expressed even a general awareness that their cell phone companies may track their locations."39 It's clear that in general, most Americans have a reasonable expectation of privacy to their locations, and are not, in fact, voluntarily or consciously aware of the disclosure of their locational information to their cell providers, where its purpose could then be betrayed by the government. Even when that data is transmitted to a service provider, it is an American's expectation that that does not automatically preclude all protection to digital data, which is what the third party doctrine's "all or nothing" function seems to suggest, where once information is exposed in any extent to any member of the public, it becomes instantly accessible to any member, including the government.40

Another doctrine being related to Carpenter is the public disclosure doctrine, which, similar to the third party doctrine, relates to the same idea — that a voluntary action made by an individual may be used against them. This doctrine relates to the idea that a reasonable expectation of privacy is forfeited when a person makes public movements susceptible to visual observation.41 But, like the third party doctrine, it bears little relevance to the circumstances in Carpenter. The key with the public disclosure doctrine is that the police only monitor public movements, as seen in United States v. Knotts, where the police planted a beeper on a suspect's belonging to follow him to his final location.42 But the access to the CSLI of Carpenter in the fourth month time span did not monitor only public movements because he could not have been continuously susceptible to public observation during that period. An even more critical distinction is that Knotts suggested the necessity of a different conclusion if the search lasted for a day or longer.43 While precedent has yet to draw a bright line (whether that be 24 hours, or 6 hours, as determined by the Massachusetts Supreme Court44) between short and long term searches, it can easily be assumed that the four month access to Carpenter's location was not limited to a reasonable time period and therefore does not exempt fourth amendment protection.

Considering the irrelevance and ill-suited applications of these two doctrines to Carpenter, law enforcement's warrantless searches of Carpenter should not be immune from constitutional scrutiny. The factors of sensitivity, length, and discretion involved in Carpenter's location data deem the third party and public disclosure doctrines as having little relevance or applicability to the case. In a more general sense, the Court should be wary of both of these doctrines as they apply to the digital age, where increasingly detailed and sensitive information stored on Americans' cellphones are prone to governmental access. The two doctrines lose aspects of their original meaning when hastily enforced upon

technological information. Most importantly, the American public depends on the expectation that the life they entrust to their digital devices stay private, and not so easily compromised by the government via their cell provider.

3. From both a property and privacy-based interpretation of the Fourth Amendment, the searches of Timothy Carpenter were in violation of the Constitution.

The court's interpretations of the fourth amendment and its accompanying doctrines (third party doctrine, public disclosure doctrine, expectation of privacy), must adapt to the realities of a digital world. As cellphones and digital data become an integral part of modern society and individual life, the same protections to physical property or information should be extended to new technologies. As the definition of what constitutes a search continues to change, it no longer should be limited to strictly physical intrusions, considering the pervasiveness of technology, and how it is essentially a new form of property. Beyond just being an essential form of property to most Americans, there also comes a high personal expectation of privacy to digital information, as established in Katz v. United States.45 From a privacy-based interpretation to the fourth amendment, the collection of CSLI is routinely collected without user knowledge or consent.46 Furthermore, users often cannot avoid the transmission of such sensitive data to third party cell services, but they still expect that data to remain private.

Analyzing the case from a property-based interpretation, there is explicit evidence in federal statute that classifies cell data as a form of private property. The property right to cell data was first established in Section 222 of the Wireless Communication and Public Safety Act of 1999, which states, "every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to … customers."47 The key phrase here is "proprietary information". As such, CSLI can be interpreted as an "effect" of the individual, and thus, the search of the location information by the government violates the fourth amendment individual property right to the data. This is only made worse by the lack of user discretion previously discussed, in forfeiting the data to the third party, with little to no disclosure of the use of the data. In the same way that US v. Jones made 24/7 GPS tracking illegal because of the physical trespass into the automobile, there is a degree of property right to cell information, especially sensitive information such as location data, which is made an important form of property by federal law.48

In terms of the expectation of privacy analysis of the case, an interpretation set forth in Katz, there is an even more compelling argument for a breach of the fourth amendment. Considering both the omnipresence of cellular devices and digital information, as well as

the sensitivity and importance of the data stored electronically in this age, it is hard to doubt that almost every American expects and hopes that the government should not be able to have continuous access to their private information (like their whereabouts). Not only do they expect their digital information to remain private, but they expect that data automatically transmitted to their third party cell providers is not compromised by the government, as outlined in the WCPSA.

The nature of technology in the information age raises concern about a world without a personal expectation of privacy to digital data. First of all, the increasing capability of mobile technology means that collection of CSLI is becoming increasingly detailed and precise.49 As cell phones become a tool for not only communications, having capabilities for photography, email, etc., Americans are carrying cell phones on their persons almost all the time. In fact, one study found that 72% of Americans have their mobile phones within a five-foot reach for the majority of the time.50 As network architecture continues to improve with the ever increasing demands of cell phones, CSLI data is being more constantly collected, and to with greater accuracy. Allowing law enforcement to continue tapping into historic CSLI data, without user knowledge or consent, would effectively becoming a total breach of personal privacy, with location data from every minute of the day being made available to the government. The collection of CSLI data is simply too much of a slippery slope, and it is to every American's interest to have such data remain private. Considering the nature of CSLI collection technology, law enforcement would soon be able to have the ability to track individuals not only in places where it would be uneconomical or inconvenient to do so, but also to have the ability to track them in places where it would otherwise be impossible, such as within one's home, a form of physical property which is of the highest degree of expectation of privacy.51 The tracking of Carpenter's locations over 127 days encompassed both public and private property, and the government inappropriately had the ability to know his location even in places such as his home. Even considering the argument that tracking Carpenter in public would be allowed as he is an exposed individual to plain sight is not entirely valid, because the idea that being exposed to some member of public society forfeits your privacy to any member of society, including law enforcement, is analogous to an extreme and rigid application of the third party doctrine, as discussed previously.

There are significant reasons from both a property and privacy-based approach to the fourth amendment that the long term surveillance of Timothy Carpenter constituted a breach of the fourth amendment. Not only is the CSLI data stored in the servers of third party cell providers a form of personal property, aligning with the Jones decision, but also from a Katz perspective, society has a basic expectation of privacy of their movements over long periods of time. The Court must be able to protect Americans against the increasingly

revealing nature of CSLI, and prevent society from becoming essentially a police state, with law enforcement given far too much power over the free will of the people.52

CONCLUSION

In short, Mr. Carpenter's Fourth Amendment53 rights were violated. There was a warrantless search of his cellphone data including his cell site location information which was unreasonable and was not limited in scope.54

Firstly, the acquirement of such records under the Stored Communications Act55 attempts to replace the "probable cause"56 requirement for a warrant. Furthermore, the records collected were extremely general, covering a span of 127 days of data, including vague location data and other transaction information, for 16 separate phone numbers.57 This lack of specificity is exactly what was feared by the political minds who helped write the Constitution, including Otis,58 Adams,59 Mason60 and Madison.61 There was not even a direct public safety threat that could have excused the requirement for a warrant. Essentially, there is no excuse as to why there wasn't a warrant to receive this sensitive private information.

The application of the third party doctrine and public disclosure doctrine to the circumstances in Carpenter is inappropriate, because of the uniqueness of the digital age. Not only is CSLI data becoming increasingly more accurate and revealing, but Americans are investing more of their sensitive information and effectively their entire lives into their mobile devices. Access to the information by the government via cell service providers should not be classified as an exception to the fourth amendment under the premise that the location data is voluntarily disclosed and that all risk is assumed. In fact, data shows that Americans are largely unaware of both of these factors.

The property and privacy-based interpretations of the fourth amendment, as developed in Jones62 and Katz63 both fit under the contours of Carpenter, and Carpenter's fourth amendment protections should not be forgoed. Carefully considering the nature of technology, and how current federal statutes classify it, technological data sent to service providers is regarded as "proprietary",64 and should be of highest importance. There is an obligation by the cell providers to protect this form of property of the end user, and the government should respect that property right. The most important interpretation towards Carpenter however, is the reasonable expectation of privacy that comes with digital information. It is guaranteed that nearly all Americans would hope that their sensitive information should not be able to be accessed by the government, simply because it requires

transmission to a third party. Allowing CSLI data to be collected without a warrant would directly undermine the goals of the Founders, who designed the fourth amendment to protect Americans' right to be let alone.

ENDNOTES

1 Stored Communications Act, 18 U.S.C. § 2703. http://harlaninstitute.org/lesson-plans/lesson-plan-carpenter-v-united-states/.

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4 United States v. Miller, 425 U.S. 435 (1976)

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