

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

CARPENTER V. UNITED STATES (2018)

View the case on the National Constitution Center's website [here](#).

SUMMARY

In *Carpenter v. United States*, the Supreme Court once again addressed whether the Fourth Amendment's prohibition on unreasonable searches and seizures applied to modern technology—in this case, to cell phones and smartphones. Can the government subpoena third-party telecommunications providers to provide your physical location, transmitted on an almost ongoing basis to the company cell sites? Is the Fourth Amendment well suited to the Internet Age, where most of our possessions and documents can be found in “the cloud” and in the possession of third-party technology companies?

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Chief Justice Roberts

The Court has consistently translated the Fourth Amendment in ways that address new contexts and new technologies. As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to “assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” For that reason, we [previously] rejected . . . a “mechanical interpretation” of the Fourth Amendment and held that use of a thermal imager to detect heat radiating from the side of the defendant's home was a search. Because any other conclusion would leave homeowners “at the mercy of advancing technology,” we determined that the Government—absent a warrant—could not capitalize on such new sense-enhancing technology to explore what was happening within the home. . . .

The question in this case is how to apply the Fourth Amendment to cell phone location information. The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. . . . Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled. . . . [I]n 1979 [when a prior case was decided], few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements. . . .

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The Court will not apply the third-party doctrine to cell phone location data; people have a legitimate expectation of privacy in information about their physical movements; when the government obtains cell phone location information from cell phone companies, such government action qualifies as a “search” for Fourth Amendment purposes. Given 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. Whether the Government employs its own surveillance technology . . . or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell phone site data]. The location information obtained from Carpenter’s wireless carriers was the product of a search. . . .

When the government obtains cell phone location data, it raises massive privacy concerns. As with GPS information, the time-stamped data 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.” These location records “hold for many Americans the ‘privacies of life.’” . . . A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor’s offices, political headquarters, and other potentially revealing locales. Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.

Cell phone location information can even cover periods of time before an investigation begins. Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. . . . Unlike with the GPS device . . . police need not even know in advance whether they want to follow a particular individual, or when. Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years

To obtain cell phone location information, the government must generally get a warrant supported by probable cause. The Government’s acquisition of the cell-site records was a search within the meaning of the Fourth Amendment. . . . [T]he Government must generally obtain a warrant supported by probable cause before acquiring such records. . . .

Excerpt: Dissent, Justice Kennedy

The Court has already established the third-party doctrine. The Court has twice held that individuals have no Fourth Amendment interests in business records which are possessed, owned, and controlled by a third party. This is true even when the records contain personal and sensitive information. So when the Government uses a subpoena to obtain, for example, bank records, telephone records, and credit card statements from the businesses that create and

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keep these records, the Government does not engage in a search of the business's customers within the meaning of the Fourth Amendment.

In this case, the government acted properly under a law passed by Congress. In this case petitioner challenges the Government's right to use compulsory process to obtain a now-common kind of business record: cell-site records held by cell phone service providers. The Government acquired the records through an investigative process enacted by Congress. Upon approval by a neutral magistrate, and based on the Government's duty to show reasonable necessity, it authorizes the disclosure of records and information that are under the control and ownership of the cell phone service provider, not its customer. . . .

The Court's ruling unsettles well-established precedent; the Court should have just applied the third-party doctrine to cell phone location information. In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other. According to today's majority opinion, the Government can acquire 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, in the Court's view, the Government crosses a constitutional line when it obtains a court's approval to issue a subpoena for more than six days of cell-site records in order to determine whether a person was within several hundred city blocks of a crime scene. That distinction is illogical and will frustrate principled application of the Fourth Amendment in many routine yet vital law enforcement operations. . . .

People have less of a reasonable expectation of privacy in their own movements than they did thirty years ago. A person's movements are not particularly private. . . . Today expectations of privacy in one's location are, if anything, even less reasonable than . . . 30 years ago. Millions of Americans choose to share their location on a daily basis, whether by using a variety of location-based services on their phones, or by sharing their location with friends and the public at large via social media. . . .

The cell-site records here don't disclose nearly as much intimate information as the bank and telephone records already covered by the third-party doctrine. What persons purchase and to whom they talk might disclose how much money they make; the political and religious organizations to which they donate; whether they have visited a psychiatrist, plastic surgeon, abortion clinic, or AIDS treatment center; whether they go to gay bars or straight ones; and who are their closest friends and family members. The troves of intimate information the Government can and does obtain using financial records and telephone records dwarfs what can be gathered from cell-site records. . . .

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Cell phones have complex effects on crime and law enforcement; elected legislatures are in a better position to balance the interests involved than courts; in this case, I'd defer to the procedure set out by Congress. Technological changes involving cell phones have complex effects on crime and law enforcement. Cell phones make crimes easier to coordinate and conceal, while also providing the Government with new investigative tools that may have the potential to upset traditional privacy expectations. How those competing effects balance against each other, and how property norms and expectations of privacy form around new technology, often will be difficult to determine during periods of rapid technological change. In those instances, and where the governing legal standard is one of reasonableness, it is wise to defer to legislative judgments like the one embodied in § 2703(d) of the Stored Communications Act. . . .

Excerpt: Dissent, Justice Thomas

The cell phone location information at issue in this case didn't belong to Carpenter; it belonged to the cell phone companies; therefore, the government didn't even search Carpenter's person, house, papers, or effects. This case should not turn on “whether” a search occurred. It should turn, instead, on whose property was searched. The Fourth Amendment guarantees individuals the right to be secure from unreasonable searches of “their persons, houses, papers, and effects.” . . . By obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter's property. He did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them. Neither the terms of his contracts nor any provision of law makes the records his. The records belong to MetroPCS and Sprint. . . .

The Court is wrong to continue to apply the reasonable expectation of privacy test; it has no basis in the Fourth Amendment's text and history, and it empowers courts to make policy judgments. The . . . fundamental problem with the Court's opinion . . . is its use of the “reasonable expectation of privacy” test, which was first articulated by Justice Harlan in *Katz v. United States*, 389 U.S. 347, 360–361 (1967) (concurring opinion). The Katz test has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law. Until we confront the problems with this test, Katz will continue to distort Fourth Amendment jurisprudence. . . .

Justice Harlan simply invented the reasonable expectation of privacy test; there is no basis for it in constitutional text, history, or doctrine. At the founding, “search” did not mean a violation of someone's reasonable expectation of privacy. The word was probably not a term of art, as it does not appear in legal dictionaries from the era. And its ordinary meaning was the same as it is today: “[t]o look over or through for the purpose of finding something; to explore; to

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examine by inspection; as, to search the house for a book; to search the wood for a thief.” The word “search” was not associated with “reasonable expectation of privacy” until Justice Harlan coined that phrase in 1967. The phrase “expectation(s) of privacy” does not appear in the pre-*Katz* federal or state case reporters, the papers of prominent Founders, early congressional documents and debates, collections of early American English texts, or early American newspapers. . . .

The Fourth Amendment is primarily about property, not privacy. Of course, the founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well. But the Fourth Amendment’s attendant protection of privacy does not justify *Katz*’s elevation of privacy as the sine qua non of the Amendment. . . . In shifting the focus of the Fourth Amendment from property to privacy, the *Katz* test also reads the words “persons, houses, papers, and effects” out of the text. . . .

Excerpt: Dissent, Justice Gorsuch

The Court established the reasonable expectation of privacy test and the third-party doctrine in the 1960s and 1970s. In the late 1960s this Court suggested for the first time that a search triggering the Fourth Amendment occurs when the government violates an “expectation of privacy” that “society is prepared to recognize as ‘reasonable.’” Then, in a pair of decisions in the 1970s applying the *Katz* test, the Court held that a “reasonable expectation of privacy” doesn’t attach to information shared with “third parties.” By these steps, the Court came to conclude, the Constitution does nothing to limit investigators from searching records you’ve entrusted to your bank, accountant, and maybe even your doctor.

What is left of the Fourth Amendment if we extend the third-party doctrine to cover data that we share with internet providers and cell phone companies? What’s left of the Fourth Amendment? Today we use the Internet to do most everything. Smartphones make it easy to keep a calendar, correspond with friends, make calls, conduct banking, and even watch the game. Countless Internet companies maintain records about us and, increasingly, for us. Even our most private documents—those that, in other eras, we would have locked safely in a desk drawer or destroyed—now reside on third party servers. . . .

To determine whether a search or seizure triggers the Fourth Amendment, we traditionally asked whether the house, paper, or effect belonged to the challenger; in other words, we asked whether it was theirs under the law; just because we share our papers or effects with someone else doesn’t necessarily mean that we no longer have a Fourth Amendment interest in them. True to those words and their original understanding, the traditional approach asked if a house, paper or effect was yours under law. . . . [T]he fact that a third party has access to or possession of your papers and effects does not necessarily

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eliminate your interest in them. Ever hand a private document to a friend to be returned? Toss your keys to a valet at a restaurant? Ask your neighbor to look after your dog while you travel? . . . Entrusting your stuff to others is a bailment. A bailment is the “delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose.” A bailee normally owes a legal duty to keep the item safe, according to the terms of the parties’ contract if they have one, and according to the “implication[s] from their conduct” if they don’t. . . .

Fourth Amendment doctrine already recognizes this insight. Our Fourth Amendment jurisprudence already reflects this truth. In *Ex parte Jackson*, 96 U.S. 727 (1878), this Court held that sealed letters placed in the mail are “as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles.” The reason, drawn from the Fourth Amendment’s text, was that “[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.” It did not matter that letters were bailed to a third party (the government, no less). The sender enjoyed the same Fourth Amendment protection as he does “when papers are subjected to search in one’s own household.”

These old principles may help us solve new issues like those arising from cell phone location information. These ancient principles may help us address modern data cases too. Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents. . . . [F]ew doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest. . . .

It is possible that cell phone location information qualifies as a “paper” or “effect” under the Fourth Amendment. It seems to me entirely possible a person’s cell-site data could qualify as his papers or effects under existing law. . . .

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**