Carpenter v. United States falls  
Affirmative Brief by Nathaniel Arroyave



Carpenter v. United States has become an increasingly popular application on the Negative, and sees a great likelihood of becoming a staple Negative application as the season continues. Though this may seem like an airtight example of protecting privacy, a closer examination shows us more than a few problems with this application.

In most examples of Carpenter v. United States, the facts are usually stated as follows:

In April 2011, four men were arrested in connection with a string of armed robberies of Radio Shack and T-Mobile stores. One of these men confessed that the group was responsible for the robberies, and that as many as 15 other men had participated in the crimes as getaway drivers and lookouts. He gave the FBI his personal cell phone number and the phone numbers of the others involved. The FBI then used the man’s call logs to identify additional phone numbers he had contacted around the time of the robberies.

The FBI then applied for 2703(d) orders to produce the “transactional records” from 16 phone numbers, including Carpenter’s. The transactional records requested included subscriber information, toll records, call detail records, and numbers dialed, as well as “cell site information for the target telephones at call origination and at call termination for incoming and outgoing calls.” Three magistrate judges found that the FBI had met the standards of suspicion required by the SCA, and issued the requested 2703(d) orders.

Two of the conspirators, Timothy Carpenter and Timothy Sanders, were eventually charged with aiding and abetting robbery affecting interstate commerce and the use or carriage of a firearm in violation of the Hobbs Act. At trial, the FBI explained that the CSLI acquired through 2703(d) orders had placed the two men’s phone within a half-mile to two miles of each robbery. Carpenter and Sanders sought to suppress the CSLI evidence under the Fourth Amendment, but the district court denied the motion. Both men were convicted, and both appealed.[[1]](#footnote-1)

The Supreme Court voted 5-4 in favor of Carpenter’s right to privacy. The Negative will usually go on to explain that this is an example of ‘doing the right thing’ by abiding by these peoples’ privacy, even though there was sufficient evidence to at least charge them with – and likely convict them of – various crimes. This will likely be followed by a brief moralization about how if we don’t do this “we’re no better than them,” or how we need to take some ethereal moral high ground.

The tags used in this brief include:

1. CSLI (Cell Site Location Information)
2. Approved By Federal Judges
3. Not Intended As General Rule
4. Close Decision
5. Doesn’t Predict Legal Precedent
6. Broad Information Collection Still Allowed
7. Net Decrease in Privacy Predicted
8. Decision Not Relevant to Modern and Future Privacy
9. Doesn’t Protect Majority of Privacy of Location
10. Third-Party Doctrine Still Upheld
11. Doesn’t Accurately Reflect the Present Reality of Technology
12. Hamstrings Law Enforcement
13. No Guarantee of Lasting Consensus on Decision
14. Impairs Investigative Juries

Carpenter v. United States Falls

CLSI (Cell Site Location Information)

Bhairav Acharya, Richa Goyal, Jaideep Reddy. “Cell Phone Location Tracking.” National Association of Criminal Defense Lawyers, June 7, 2016

[*https://www.law.berkeley.edu/wp-content/uploads/2015/04/2016-06-07\_Cell-Tracking-Primer\_Final.pdf*](https://www.law.berkeley.edu/wp-content/uploads/2015/04/2016-06-07_Cell-Tracking-Primer_Final.pdf)A cell phone’s location can be detected through cell site location information (CSLI) orglobal positioning system (GPS) data. CSLI refers to the information collected as a cell phone identifies its location to nearby cell towers. CSLI from nearby cell towers can indicate a cell phone’s approximate location. With information from multiple cell towers, a technique called “triangulation” is used to locate a cell phone with greater precision. A cell phone’s GPS capabilities allow it to be tracked to within 5 to 10 feet. Cell phone location information can be “historical” or “prospective.” In addition to the location information cell phones ordinarily generate, a cell phone may be “pinged” to force it to reveal its location.  
HOW IS CELL PHONE LOCATION INFORMATION USED?  
Cell phone companies store historical and prospective CSLI and prospective GPS data, which law enforcement authorities can request from them through court processes. Historical CSLI enables law enforcement to piece together past events, for example, by connecting a suspect to the location of a past crime. Prospective location information, on the other hand, helps law enforcement trace the current whereabouts of a suspect, which can lead to arrest.

Approved by Federal Judges.

Sabrina McCubbin. “Summary: The Supreme Court Rules in Carpenter v. United States.” Lawfare, 27 June 2018,   
 [www.lawfareblog.com/summary-supreme-court-rules-carpenter-v-united-states](http://www.lawfareblog.com/summary-supreme-court-rules-carpenter-v-united-states).

One of these men confessed that the group was responsible for the robberies, and that as many as 15 other men had participated in the crimes as getaway drivers and lookouts. He gave the FBI his personal cell phone number and the phone numbers of the others involved. The FBI then used the man’s call logs to identify additional phone numbers he had contacted around the time of the robberies. The FBI then applied for 2703(d) orders to produce the “transactional records” from 16 phone numbers, including Carpenter’s. The transactional records requested included subscriber information, toll records, call detail records, and numbers dialed, as well as “cell site information for the target telephones at call origination and at call termination for incoming and outgoing calls.” Three magistrate judges found that the FBI had met the standards of suspicion required by the SCA, and issued the requested 2703(d) orders.

Not Intended as a General Rule

Paul Rosenzweig. “Carpenter v. United States and the Law of the Chancellor’s Foot.” Lawfare, July 1, 2018, [www.lawfareblog.com/carpenter-v-united-states-and-law-chancellors-foot](http://www.lawfareblog.com/carpenter-v-united-states-and-law-chancellors-foot).

The court then goes even further, making clear that it is ruling on only a single particular case and not any other:

Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or “tower dumps” (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of Smith and Miller or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security.

Close on Decision

“Carpenter v. United States.” American Civil Liberties Union, ACLU, 22 June 2018, [www.aclu.org/cases/carpenter-v-united-states](http://www.aclu.org/cases/carpenter-v-united-states).

The Supreme Court ruled that the government needs a warrant to access a person’s cellphone location history. The court found in a 5 to 4 decision that obtaining such information is a search under the Fourth Amendment and that a warrant from a judge based on probable cause is required.

Doesn’t Predict Legal Precedent

Paul Rosenzweig. “Carpenter v. United States and the Law of the Chancellor’s Foot.” Lawfare, July 1, 2018, [www.lawfareblog.com/carpenter-v-united-states-and-law-chancellors-foot](http://www.lawfareblog.com/carpenter-v-united-states-and-law-chancellors-foot).

Oliver Wendell Holmes once said that “The prophecies of what the court will do in fact, and nothing more pretentious, are what I mean by the law.” By that standard, I respectfully submit that the Supreme Court’s decision in Carpenter v. United States is not law. Anyone who says they can read the majority opinion and predict with any degree of confidence how the Court will deal with any number of future technologies—be they biometrics, facial recognition, DNA or real-time cell-site location information (CSLI)—is, frankly, just making it up. Rather, Carpenter is the second in a series of decisions penned by Chief Justice John Roberts (the first being Riley v. California) that, with all due respect to the chief, amount to little more than the law of the Chancellor’s Foot—that is, the law that depends exclusively on the predilections and tendencies of the decision-maker.

Doesn’t Prevent Majority of Private Information Collection

*Ott, Chris. “INSIGHT: Cracking Open a Can of Worms: Why Carpenter v. United States May Not Be the Privacy Decision That Was Needed ... or Wanted.” Tech & Telecom on Bloomberg Law, Bloomberg Law, 9 July 2018,* [*www.bna.com/insight-cracking-open-n73014477217/*](http://www.bna.com/insight-cracking-open-n73014477217/)*.*

For one, the decision’s factual scope is explicitly narrow. The Court declined to decide whether obtaining historical CSLI data covering less than one week of activity would require a warrant. Carpenter, 2018 BL 222220, at \*51 n.3. Thus, the decision on its face does not even bar all warrantless CSLI collection. Perhaps more perplexing, the decision does not bar “tower dumps,” which is the download of everyone’s cell service location data—not just a suspect’s—in a wedge-shaped area covering up to four square miles from a particular tower. Carpenter, 2018 BL 222220, at \*17.”

Net Decrease in Privacy Predicted

Ott, Chris. “INSIGHT: Cracking Open a Can of Worms: Why Carpenter v. United States May Not Be the Privacy Decision That Was Needed ... or Wanted.” Tech & Telecom on Bloomberg Law, Bloomberg Law, 9 July 2018, [www.bna.com/insight-cracking-open-n73014477217/](http://www.bna.com/insight-cracking-open-n73014477217/).

In Carpenter, law enforcement sought no process on Carpenter’s data other than the SCA order for the carriers’ CSLI. All that the investigators needed was Carpenter’s proximity to the robberies to pair with the other evidence that they gathered implicating him. However, if they were required to write a search warrant, and they had possession of enough appropriate evidence, there would be no good reason for law enforcement to confine the warrant to CSLI over more revealing evidence, such as the phone itself and its content. If location data is private, then law enforcement will seek more warrants to look inside that private garden. It may be that, in future cases, short historical CSLI orders and “tower dumps” will be deemed searches under the Fourth Amendment as well. However, in many cases, a combination of pen register returns and subpoenaed toll records, none of which require warrants, will likely still support an adequate quantum of individualized suspicion to obtain a warrant. By holding that CSLI location data held by parties is covered by the Fourth Amendment, the Court has raised the risk that more classical Fourth Amendment information will be placed in law enforcement crosshairs.

Decision Not Relevant to Modern or Future Privacy

Ott, Chris. “INSIGHT: Cracking Open a Can of Worms: Why Carpenter v. United States May Not Be the Privacy Decision That Was Needed ... or Wanted.” Tech & Telecom on Bloomberg Law, Bloomberg Law, 9 July 2018, [www.bna.com/insight-cracking-open-n73014477217/](http://www.bna.com/insight-cracking-open-n73014477217/).

While the decision will likely always be historically significant when assessing governmental access to digital evidence and an individual’s right to privacy, it could bear very little relevance to the technologies and laws that we actually live with.

Doesn’t Protect Majority Privacy of Location

*Howe, Amy. “Opinion Analysis: Court Holds That Police Will Generally Need a Warrant for Sustained Cellphone Location Information (Updated).” SCOTUSblog, 22 June 2018,* [*www.scotusblog.com/2018/06/opinion-analysis-court-holds-that-police-will-generally-need-a-warrant-for-cellphone-location-information/*](http://www.scotusblog.com/2018/06/opinion-analysis-court-holds-that-police-will-generally-need-a-warrant-for-cellphone-location-information/)*.*

Roberts emphasized that today’s ruling “is a narrow one” that applies only to historical cell-site location records. He took pains to point out that the ruling did not “express a view on” other privacy issues, such as obtaining cell-site location records in real time, or getting information about all of the phones that connected to a particular tower at a particular time. He acknowledged that law-enforcement officials might sometimes still be able to obtain cell-site location records without a warrant – for example, to deal with emergencies such as “bomb threats, active shootings, and child abductions.” And in a footnote, he also left open the possibility that law-enforcement officials might not need a warrant to obtain cell-site location records for a shorter period of time than the seven days at issue in Carpenter’s case – which might allow them to get information about where someone was on the day of a crime, for example.

Third-Party Doctrine Still Upheld

*Skorup, Brent, and Jennifer Huddleston Skees. “Bringing Constitutional Doctrine into the Digital Age.” The Washington Times, The Washington Times, 3 July 2018,* [*www.washingtontimes.com/news/2018/jul/3/carpenter-v-united-states-provides-necessary-updat/*](http://www.washingtontimes.com/news/2018/jul/3/carpenter-v-united-states-provides-necessary-updat/)*.*

It should be noted that the Carpenter decision does not eliminate the third-party doctrine. For the time being, police generally aren’t required to get a warrant for other third-party data like credit card transactions and documents and videos people transmit to the cloud.

Doesn’t Accurately Reflect the Present Reality of Technology

*Kerr, Orin. “First Thoughts on Carpenter v. United States.” Reason.com, Reason, 22 June 2018,* [*www.reason.com/volokh/2018/06/22/first-thoughts-on-carpenter-v-united-sta*](http://www.reason.com/volokh/2018/06/22/first-thoughts-on-carpenter-v-united-sta)*.*

This is one of the most interesting aspects of the opinion. Instead of focusing on the facts of this case, the Court seems more interested in where the technology is thought to be going. The record in this case indicates that the records only where (sic) precise to a range of 0.5 to 2 miles, and that records where only generated when a call was actually placed. It just reveals the neighborhood the phone was in when a call was made. But the Chief Justice's opinion presents the technology as vastly more invasive and detailed than the record indicates. It is absolute perfect surveillance, in the Court's vision, like a GPS device around a person's ankle. In response to the dissent's pointing out the record, the Chief Justice says we have to take into account where the technology is going. "The accuracy of CSLI is rapidly approaching GPS-level precision," the Chief Justice predicts, and the Court has to adopt a rule in light of what the technology will look like then. In effect, the technology isn't actually perfect and absolute surveillance now, but the Justices are confident that it is going to be that eventually.

Hamstrings Law Enforcement

*Lederman, Marty. “Carpenter's Curiosities (and Its Potential to Unsettle Longstanding Fourth Amendment Doctrine).” Balkinization: Clouds Over the Project of Liberal Constitutionalism? - I, 26 June 2018,* [*www.balkin.blogspot.com/2018/06/carpenter-s-curiosities-and-its.html*](http://www.balkin.blogspot.com/2018/06/carpenter-s-curiosities-and-its.html)*.*

Justice Alito laments that the Court's treatment of compulsory production as constitutionally equivalent to a "real search" is “revolutionary,” ignores "a century's worth of precedent," and will cause “upheaval.” In particular, he warns that the Court's “holding that subpoenas must meet the same standard as conventional searches will seriously damage, if not destroy, their utility.” Likewise, Justice Kennedy writes that "by invalidating the Government’s use of court-approved compulsory process in this case, the Court calls into question the subpoena practices of federal and state grand juries, legislatures, and other investigative bodies."

No Guarantee of Lasting Consensus on Decision

*Struyk, Ryan. “The Supreme Court Has Overturned More than 300 Rulings. Is Roe next?” CNN, Cable News Network, 6 Sept. 2018,* [*www.cnn.com/2018/09/05/app-politics-section/history-overruled-supreme-court-roe/index.html*](http://www.cnn.com/2018/09/05/app-politics-section/history-overruled-supreme-court-roe/index.html)*.*

A CNN analysis of data from the Congressional Research Service shows overruling Roe would be unusual but far from unprecedented: The Supreme Court has overruled more than 300 of its own cases throughout American history, including five dozen that lasted longer than the landmark abortion rights case to this point.

Impairs Investigative Juries

*Kennedy, Anthony. “16-402 Carpenter v. United States (Dissent).” SCOTUS, 22 June 2018.* [*https://www.supremecourt.gov/opinions/17pdf/16-402\_h315.pdf*](https://www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf)

State and federal law enforcement, for instance, often subpoena credit card statements to develop probable cause to prosecute crimes ranging from drug trafficking and distribution to healthcare fraud to tax evasion. See United States v. Phibbs, 999 F. 2d 1053 (CA6 1993) (drug distribution); McCune v. DOJ, 592 Fed. Appx. 287 (CA5 2014) (healthcare fraud); United States v. Green, 305 F. 3d 422 (CA6 2002) (drug trafficking and tax evasion); see also 12 U. S. C. §§3402(4), 3407 (allowing the Government to subpoena financial records if “there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry”). Subpoenas also may be used to obtain vehicle registration records, hotel records, employment records, and records of utility usage, to name just a few other examples. See 1 LaFave, supra, §2.7(c). And law enforcement officers are not alone in their reliance on subpoenas to obtain business records for legitimate investigations. Subpoenas also are used for investigatory purposes by state and federal grand juries, see United States v. Dionisio, 410 U. S. 1 (1973), state and federal administrative agencies, see Oklahoma Press, supra, and state and federal legislative bodies, see McPhaul v. United States, 364 U. S. 372 (1960).

1. “Summary: The Supreme Court Rules in Carpenter v. United States.” Lawfare, 27 June 2018, [www.lawfareblog.com/summary-supreme-court-rules-carpenter-v-united-states](http://www.lawfareblog.com/summary-supreme-court-rules-carpenter-v-united-states). [↑](#footnote-ref-1)