Negative: Third Party Doctrine

By Josiah Hemp

***Resolved: The United States federal government substantially reform the use of Artificial Intelligence technology***

Case Summary: The 4th Amendment to the US Constitution requires law enforcement to obtain search warrants before conducting any unreasonable search and seizure of our homes, papers and effects. Technological changes over the years have required the Supreme Court to make judgments about how and when to apply this constitutional privacy protection over varying circumstances never contemplated by the Founders in the 1790’s.

Warrantless telephone wiretapping, for example, was allowed by a Supreme Court case in the 1920’s. But it was overturned by a later Court decision in the 1960’s (the *Katz* decision) , where the Court ruled that a citizen’s expectation of privacy was a large factor in determining the need for a search warrant, and that warrants would be required for government eavesdropping on phone calls.

Another factor is the “Third Party Doctrine.” The Supreme Court has ruled that, in general (with some new exceptions recently made), any information you voluntarily disclose to a “third party” (not yourself and not the government) is fair game for the government to collect without a warrant. Examples include your bank account records, phone company records of numbers you have called – anything that, even though you might think it’s private, is already in someone else’s possession (the bank, the phone company).

Another example of “3rd party” records are recordings made by Google or Amazon of voice data collected by Siri, Alexa or other AI personal assistants in people’s homes. The Affirmative Plan removes recordings captured by smart devices from the Third-Party Doctrine. Post-plan, an individual’s consent to a third party (like Apple or Google or Amazon) will not be grounds for the government to search. Instead, the government must follow the 4th Amendment and obtain consent directly from the individual or else obtain a search warrant.

Negative Strategy:
There are few people arguing against this case in articles or papers. However, the Supreme Court, as well as lower courts, have routinely defended the Third-Party Doctrine since it was created. Thus, this brief heavily draws on the reasoning of the courts. Instead, we are talking about whether the plan is consistent with the Constitution and what impacts it would have on constitutional law, and resulting interpretations of the Constitution itself, which impacts our freedoms. This case could have unintended consequences that backfire and reduce freedom in the long run.

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Negative: Third Party Doctrine

BACKGROUND

Background of the Carpenter case

Note: Don’t read this card in round, this is background so you can understand the case since it significantly relates to this case.

"Carpenter v. United States." Oyez (a trusted site that summarizes Supreme Court cases), 22 June 2018 [www.oyez.org/cases/2017/16-402](http://www.oyez.org/cases/2017/16-402) (Accessed 23 Oct 2021.) (brackets in original)

Facts of the case

In April 2011, police arrested four men in connection with a series of armed robberies. One of the men confessed to the crimes and gave the FBI his cell phone number and the numbers of the other participants. The FBI used this information to apply for three orders from magistrate judges to obtain "transactional records" for each of the phone numbers, which the judges granted under the Stored Communications Act, 18 U.S.C. 2703(d). That Act provides that the government may require the disclosure of certain telecommunications records when "specific and articulable facts show[] 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." The transactional records obtained by the government include the date and time of calls, and the approximate location where calls began and ended based on their connections to cell towers—"cell site" location information (CSLI).

Based on the cell-site evidence, the government charged Timothy Carpenter with, among other offenses, aiding and abetting robbery that affected interstate commerce, in violation of the Hobbs Act, 18 U.S.C. 1951. Carpenter moved to suppress the government's cell-site evidence on Fourth Amendment grounds, arguing that the FBI needed a warrant based on probable cause to obtain the records. The district court denied the motion to suppress, and the Sixth Circuit affirmed.

Question

Does the warrantless search and seizure of cell phone records, which include the location and movements of cell phone users, violate the Fourth Amendment?

Conclusion

The government's warrantless acquisition of Carpenter's cell-site records violated his Fourth Amendment right against unreasonable searches and seizures. Chief Justice John Roberts authored the opinion for the 5-4 majority. The majority first acknowledged that the Fourth Amendment protects not only property interests, but also reasonable expectations of privacy. Expectations of privacy in this age of digital data do not fit neatly into existing precedents, but tracking person's movements and location through extensive cell-site records is far more intrusive than the precedents might have anticipated. The Court declined to extend the "third-party doctrine"—a doctrine where information disclosed to a third party carries no reasonable expectation of privacy—to cell-site location information, which implicates even greater privacy concerns than GPS tracking does. One consideration in the development of the third-party doctrine was the "nature of the particular documents sought," and the level of intrusiveness of extensive cell-site data weighs against application of the doctrine to this type of information. Additionally, the third-party doctrine applies to voluntary exposure, and while a user might be abstractly aware that his cell phone provider keeps logs, it happens without any affirmative act on the user's part. Thus, the Court held narrowly that the government generally will need a warrant to access cell-site location information.

Justice Anthony Kennedy filed a dissenting opinion, in which Justices Clarence Thomas and Samuel Alito joined. Justice Kennedy would find that cell-site records are no different from the many other kinds of business records the government has a lawful right to obtain by compulsory process. Justice Kennedy would continue to limit the Fourth Amendment to its property-based origins.

Justice Thomas filed a dissenting opinion, emphasizing the property-based approach to Fourth Amendment questions. In Justice Thomas's view, the case should not turn on whether a search occurred, but whose property was searched. By focusing on this latter question, Justice Thomas reasoned, the only logical conclusion would be that the information did not belong to Carpenter.

Justice Alito filed a dissenting opinion, in which Justice Thomas joined. Justice Alito distinguishes between an actual search and an order "merely requiring a party to look through its own records and produce specified documents"—with the former being far more intrusive than the latter. Justice Alito criticizes the majority for what he characterizes as "allow[ing] a defendant to object to the search of a third party's property," a departure from long-standing Fourth Amendment doctrine.

Justice Gorsuch filed a dissenting opinion in which he emphasizes the "original understanding" of the Fourth Amendment and laments the Court's departure from it.

DISCLOSURE ON NEGATIVE EVIDENCE

Some of our evidence contains quotes from Court decisions. These written opinions often have sentences that consist only of citations to other cases embedded in the text. Most other publications would have put these in footnotes, so they would never be read as part of the text, but courts do things differently. We want to disclose that when we read evidence from court opinions, we’re going to skip over these citations, but we otherwise will be reading all sentences in compliance with Stoa evidence rules. And we have not altered the text, so anyone can see the citations if they want to look at our evidence.

HARMS / SIGNIFICANCE

1. Privacy not violated #1: Consent eliminates claims of privacy

If you consent, you no longer have a right to privacy

Samuel D. Warren and Louis D. Brandeis, 1890 (widely considered the creators of the Right to Privacy as a legal concept. Both were attorneys, Brandeis would become a Supreme Court Justice) "The Right to Privacy." Harvard Law Review 4, no. 5 (1890): 193-220. doi:10.2307/1321160 <https://www.jstor.org/stable/1321160?seq=1#metadata_info_tab_contents> (Accessed October 19, 2021)

“4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent. This is but another application of the rule which has become familiar in the law of literary and artistic property. The cases there decided establish also what should be deemed a publication, - the important principle in this connection being that a private communication of circulation for a restricted purpose is not a publication within the meaning of the law.”

Consent is a well-recognized exception to the warrant requirement

Supreme Court of the United States, 1973, Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Accessed from the Library of Congress. <https://www.loc.gov/item/usrep412218/> (Accessed October 19, 2021) Ellipsis is in original. Legal Citations in this quote are not read.

“It is well settled under the Fourth and, Fourteenth Amendments that a search conducted, without a warrant issued upon probable cause is, "per se unreasonable . . . subject only to a few specifically established and well delineated exceptions; Katz v. United States, 389 U. S. 347, 357; Coolidge v. New Hampshire, -403 "U. S. 443, 454-455; Chambers v. Maroney, 399 U. S. 42, 51. It is equally well settled-that one of the specifically established exceptions to the requirements of -both a warrant and probable cause is a search that is conducted pursuant to consent. Davis v. United States, 328 U. S., 582, 593-594; Zap v. United States, 328 U. S. 624, 630. The constitutional question in the present case concerns the definition of "consent" in this Fourth and Fourteenth Amendment context.”

The Third-Party Exception is a consistently held Exception

Supreme Court of the United States, 1979, Smith v. Maryland, 442 U.S. 735 (1979). Accessed from the Library of Congress. <https://www.loc.gov/item/usrep412218/> (Accessed October 19, 2021) (Ellipsis is in original) Legal Citations in this quote are not read.

This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. E. g., United States v. Miller, 425 U. S., at 442-444; Couch v. United States, 409 U. S., at 335-336; United States v. White, 401 U. S., at 752 (plurality opinion); Hoffa v. United States, 385 U. S. 293, 302 (1966); Lopez v. United States, 373 U. S. 427 (1963). In Miller, for example, the Court held that a bank depositor has no "legitimate 'expectation of privacy'" in financial information "voluntarily conveyed to ... banks and exposed to their employees in the ordinary course of business." 425 U. S., at 442. The Court explained:

"The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. . . . This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." Id., at 443. Because the depositor "assumed the risk" of disclosure, the Court held that it would be unreasonable for him to expect his financial records to remain private.

2. Privacy not violated #2: Software providers disclose the risks and customers agree

Google’s Nest device privacy policy says recordings may be disclosed to the government

“Privacy Statement for Nest Products and Services” January 31, 2020. <https://nest.com/legal/privacy-statement-for-nest-products-and-services/> (accessed October 19, 2021)

“For legal reasons: We will share personal information with third parties if we have a good faith belief that access, use, preservation or disclosure of the information is reasonably necessary to (i) meet any applicable law, regulation, legal process or enforceable government request; (ii) enforce Nest policies or contracts, including investigation of potential violations; (iii) detect, prevent or otherwise address fraud, security or technical issues; (iv) protect against harm to the rights, property or safety of Nest, our users or the public as required or permitted by law.”

Subpoenas are legal requirements

Wex, (the legal dictionary of the Legal Information Institute “Subpoena,” no date. <https://www.law.cornell.edu/wex/subpoena> (accessed October 19, 2021)

“A subpoena is a written order to compel an individual to give testimony on a particular subject, often before a court, but sometimes in other proceedings (such as a Congressional inquiry). Failure to comply with such an order to appear may be punishable as contempt.”

Nest Devices connected to a Google Account also subject to Google’s privacy policy

“Privacy Statement for Nest Products and Services” January 31, 2020. <https://nest.com/legal/privacy-statement-for-nest-products-and-services/> (accessed October 19, 2021)

“Note: If you use your Nest devices and services with a Google Account, then your data will be handled as described in the Google Privacy Policy, and as explained in more detail in this Privacy FAQs Help Center page. Please also read Google’s commitment to privacy in the home.”

Google discloses to customers that they will share information to the government when it is requested by legal processes

“Google Privacy Policy” Effective July 1, 2021. <https://policies.google.com/privacy> (accessed October 19, 2021)

“We will share personal information outside of Google if we have a good-faith belief that access, use, preservation, or disclosure of the information is reasonably necessary to:

Meet any applicable law, regulation, legal process, or enforceable governmental request. We share information about the number and type of requests we receive from governments in our Transparency Report.”

Amazon discloses to customers that they share data to “comply with laws”

“Amazon.com Privacy Notice” February 12, 2021. <https://www.amazon.com/gp/help/customer/display.html?nodeId=GX7NJQ4ZB8MHFRNJ#GUID-8966E75F-9B92-4A2B-BFD5-967D57513A40__SECTION_3DF674DAB5B7439FB2A9B4465BC3E0AC> (accessed October 19, 2021)

“Protection of Amazon and Others: We release account and other personal information when we believe release is appropriate to comply with the law; enforce or apply our Conditions of Use and other agreements; or protect the rights, property, or safety of Amazon, our users, or others. This includes exchanging information with other companies and organizations for fraud protection and credit risk reduction.”

3. Free market solves: Choose Siri

Siri doesn’t save audio by default – only if customers choose to opt in

Statement from Apple corporation 2019 (maker of Siri) 28 Aug 2019 “Improving Siri’s privacy protections” <https://www.apple.com/newsroom/2019/08/improving-siris-privacy-protections/> (accessed 28 Oct 2021)

“First, by default, we will no longer retain audio recordings of Siri interactions. We will continue to use computer-generated transcripts to help Siri improve.  Second, users will be able to opt in to help Siri improve by learning from the audio samples of their requests. We hope that many people will choose to help Siri get better, knowing that Apple respects their data and has strong privacy controls in place. Those who choose to participate will be able to opt out at any time.  Third, when customers opt in, only Apple employees will be allowed to listen to audio samples of the Siri interactions. Our team will work to delete any recording which is determined to be an inadvertent trigger of Siri.

4. A/T “Katz test / we should get reasonable expectation of privacy”—Katz test is wrong

Katz v. U.S. was a 1967 Supreme Court case setting the “reasonable expectation of privacy” standard. But it was created out of thin air

Supreme Court Justice Clarence Thomas, 2018, in his dissenting opinion in Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919267> (Accessed October 23, 2021)

Justice Harlan did not cite anything for this “expectation of privacy” test, and the parties did not discuss it in their briefs. The test appears to have been presented for the first time at oral argument by one of the defendant’s lawyers. [**END QUOTE**] See Winn, Katz and the Origins of the “Reason- able Expectation of Privacy” Test, 40 McGeorge L. Rev. 1, 9–10 (2009). The lawyer, a recent law-school graduate, apparently had an “[e]piphany” while preparing for oral argument. Schneider, Katz v. United States: The Untold Story, 40 McGeorge L. Rev. 13, 18 (2009). [**HE GOES ON TO WRITE QUOTE**:] He conjectured that, like the “reasonable person” test from his Torts class, the Fourth Amendment should turn on “whether a reasonable person . . . could have expected his communication to be private.” Id., at 19. The lawyer presented his new theory to the Court at oral argument. See, e.g., Tr. of Oral Arg. in Katz v. United States, O. T. 1967, No. 35, p. 5 (proposing a test of “whether or not, objectively speaking, the communication was intended to be private”); id., at 11 (“We propose a test using a way that’s not too dissimilar from the tort ‘reasonable man’ test”). After some questioning from the Justices, the lawyer conceded that his test should also require individuals to subjectively expect privacy. See id., at 12. With that modification, Justice Harlan seemed to accept the lawyer’s test almost verbatim in his concurrence.

Katz has no basis in the 4th amendment and completely misconstrues its meaning

Supreme Court Justice Clarence Thomas, 2018, in his dissenting opinion in Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018 Accessed from Justia. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919267> (Accessed October 23, 2021) (brackets in original)

Under the Katz test, a “search” occurs whenever “government officers violate a person’s ‘reasonable expectation of privacy.’ ” Jones, supra, at 406. The most glaring problem with this test is that it has “no plausible foundation in the text of the Fourth Amendment.” Carter, 525 U. S., at 97 (opinion of Scalia, J.). The Fourth Amendment, as relevant here, protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches.” By defining “search” to mean “any violation of a reasonable expectation of privacy,” the Katz test misconstrues virtually every one of these words.

Katz has no basis in the history of the word “search”

Supreme Court Justice Clarence Thomas, 2018, in his dissenting opinion in Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919267> (Accessed October 23, 2021) (brackets in original)

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 examine by inspection; as, to search the house for a book; to search the wood for a thief.’ ” Kyllo v. United States, 533 U. S. 27, 32, n. 1 (2001) (quoting N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989)); accord, 2 S. Johnson, A Dictionary of the English Language (5th ed. 1773) (“Inquiry by looking into every suspected place”); N. Bailey, An Universal Etymological English Dictionary (22d ed. 1770) (“a seeking after, a looking for, &c.”); 2 J. Ash, The New and Complete Dictionary of the English Language (2d ed. 1795) (“An enquiry, an examination, the act of seeking, an enquiry by looking into every suspected place; a quest; a pursuit”); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) (similar). 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,[2] early congressional documents and debates,[3] collections of early American English texts,[4] or early American newspapers.

5. Subpoenas (the method used to obtain smart speaker recordings instead of warrants) aren’t a problem

Subpoenas do not bring about the harms the Fourth Amendment sought to prevent

Justice Samuel Alito, with whom Justice Thomas joins, dissenting, 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021) (brackets in original)

General warrants and writs of assistance were noxious not because they allowed the Government to acquire evidence in criminal investigations, but because of the means by which they permitted the Government to acquire that evidence. Then, as today, searches could be quite invasive. **[UNQUOTE]** Searches generally begin with officers “mak[ing] nonconsensual entries into areas not open to the public.” Donovan v. Lone Steer, Inc., 464 U. S. 408, 414 (1984). Once there, officers are necessarily in a position to observe private spaces generally shielded from the public and discernible only with the owner’s consent. Private area after private area becomes exposed to the officers’ eyes as they rummage through the owner’s property in their hunt for the object or objects of the search. If they are searching for documents, officers may additionally have to rifle through many other papers—potentially filled with the most intimate details of a person’s thoughts and life—before they find the specific information they are seeking. See Andresen v. Maryland, 427 U. S. 463, 482, n. 11 (1976). If anything sufficiently incriminating comes into view, officers seize it. Horton v. California, 496 U. S. 128, 136–137 (1990). Physical destruction always lurks as an underlying possibility; “officers executing search warrants on occasion must damage property in order to perform their duty.” Dalia v. United States, 441 U. S. 238, 258 (1979); see, e.g., United States v. Ramirez, 523 U. S. 65, 71–72 (1998) (breaking garage window); United States v. Ross, 456 U. S. 798, 817–818 (1982) (ripping open car upholstery); Brown v. Battle Creek Police Dept., 844 F. 3d 556, 572 (CA6 2016) (shooting and killing two pet dogs); Lawmaster v. Ward, 125 F. 3d 1341, 1350, n. 3 (CA10 1997) (breaking locks).

**[LATER IN THE WRITING HE CONTINUES, QUOTE]** Compliance with a subpoena duces tecumrequires none of that. A subpoena duces tecum permits a subpoenaed individual to conduct the search for the relevant documents himself, without law enforcement officers entering his home or rooting through his papers and effects. As a result, subpoenas avoid the many incidental invasions of privacy that necessarily accompany any actual search. And it was those invasions of privacy—which, although incidental, could often be extremely intrusive and damaging—that led to the adoption of the Fourth Amendment.

Subpoenas aren’t intrusive like a search warrant and allow the recipient to make objections before complying

Justice Kennedy, with whom Justice Thomas and Justice Alito join, dissenting. 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)

The second principle supporting Miller and Smith is the longstanding rule that the Government may use compulsory process to compel persons to disclose documents and other evidence within their possession and control. See United States v. Nixon, 418 U. S. 683, 709 (1974) (it is an “ancient proposition of law” that “the public has a right to every man’s evidence” (internal quotation marks and alterations omitted)). A subpoena is different from a warrant in its force and intrusive power. While a warrant allows the Government to enter and seize and make the examination itself, a subpoena simply requires the person to whom it is directed to make the disclosure. A subpoena, moreover, provides the recipient the “opportunity to present objections” before complying, which further mitigates the intrusion. Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186, 195 (1946).

It is legitimate to obtain even private information through subpoenas

Justice Kennedy, with whom Justice Thomas and Justice Alito join, dissenting. 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)

Based on Miller and Smith and the principles underlying those cases, it is well established that subpoenas may be used to obtain a wide variety of records held by businesses, even when the records contain private information. See 2 W. LaFave, Search and Seizure §4.13 (5th ed. 2012). Credit cards are a prime example. 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).

6. The Third-Party Doctrine Is Constitutionally Valid

The Supreme Court has not given privacy protection to information given to third parties

**[Note: This quote uses the word “damning” in its proper sense as “something that condemns,” which is not meant as a profanity when used properly. But be aware in case you don’t want to use it.]**

Justice Samuel Alito, with whom Justice Thomas joins, dissenting, 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)

Against centuries of precedent and practice, all that the Court can muster is the observation that “this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy.” Ante, at 19. Frankly, I cannot imagine a concession more damning to the Court’s argument than that. As the Court well knows, the reason that we have never seen such a case is because—until today—defendants categorically had no “reasonable expectation of privacy” and no property interest in records belonging to third parties. See Part II, infra. By implying otherwise, the Court tries the nice trick of seeking shelter under the cover of precedents that it simultaneously perforates.

There is no Fourth Amendment right in information given to third parties

Justice Samuel Alito, with whom Justice Thomas joins, dissenting, 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021) (brackets and ellipses in original)

It bears repeating that the Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects.” (Emphasis added.) The Fourth Amendment does not confer rights with respect to the persons, houses, papers, and effects of others. Its language makes clear that “ Fourth Amendment rights are personal,” Rakas v. Illinois, 439 U. S. 128, 140 (1978), and as a result, this Court has long insisted that they “may not be asserted vicariously,” id., at 133. It follows that a “person who is aggrieved . . . only through the introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights infringed.” Id., at 134.

Third Party Doctrine does apply to personal/sensitive information – no 4th Amendment violation

Justice Kennedy, with whom Justice Thomas and Justice Alito join, dissenting. 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)

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. United States v. Miller, 425 U. S. 435 (1976); Smith v. Maryland, 442 U. S. 735 (1979). 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 keep these records, the Government does not engage in a search of the business’s customers within the meaning of the Fourth Amendment.

Miller and Smith: no Fourth Amendment Right in Information Given to Third-Parties

Justice Kennedy, with whom Justice Thomas and Justice Alito join, dissenting. 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)

Miller and Smith hold that individuals lack any protected Fourth Amendment interests in records that are possessed, owned, and controlled only by a third party. In Miller federal law enforcement officers obtained four months of the defendant’s banking records. 425 U. S., at 437–438. And in Smith state police obtained records of the phone numbers dialed from the defendant’s home phone. 442 U. S., at 737. The Court held in both cases that the officers did not search anything belonging to the defendants within the meaning of the Fourth Amendment. The defendants could “assert neither ownership nor possession” of the records because the records were created, owned, and controlled by the companies. Miller, supra, at 440; see Smith, supra, at 741. And the defendants had no reasonable expectation of privacy in information they “voluntarily conveyed to the [companies] and exposed to their employees in the ordinary course of business.” Miller, supra, at 442; see Smith, 442 U. S., at 744. Rather, the defendants “assumed the risk that the information would be divulged to police.” Id., at 745.

SOLVENCY

1. Government spying continues unabated

The government already has a massive surveillance system set up with or without smart speakers

Rod Dreher, 2020 (senior editor at The American Conservative. A veteran of three decades of magazine and newspaper journalism) Live Not By Lies. Book. Published by Sentinel. Print. Pages 82-83.

“In 2013, Edward Snowden, the renegade National Security Agency analyst, revealed that the US federal government’s spying was vastly greater than previously known. In his 2019 memoir, *Permanent Record*, Snowden writes of learning that

The US government was developing the capacity of an eternal law-enforcement agency. At any time, the government could dig through the past communications of anyone it wanted to victimize in search of a crime (and everybody’s communications contain evidence of something). At any point, for all perpetuity, any new administration—any future rogue head of the NSA—could show up to work and, as easily as flicking a switch, instantly track everybody with a phone or computer, know who they were, where they were, what they were doing with whom, and what they had ever done in the past.

Snowden writes about a public speech that the Central Intelligence Agency’s chief technology officer, Gus Hunt, gave to a tech group in 2013 that caused barely a ripple. Only *The Huffington Post* covered it. In the speech, Hunt said, “It is really very nearly within our grasp to be able to compute on all human-generated information.” He added that after the CIA masters capturing that data, it intends to develop the capability of saving and analyzing it.”

Laws (like the AFF’s plan) are no defense against government surveillance

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“Understand what this means: your private digital life belongs to the State, and always will. For the time being, we have laws and practices that prevent the government from using that information against individuals, unless it suspects they are involved in terrorism, criminal activity, or espionage. But over and over, dissidents told me that the law is not a reliable refuge: if the government is determined to take you out, it will manufacture a crime from the data it has captured, or otherwise deploy it to destroy your reputation.

DISADVANTAGES

1. Constitutional tampering threatens freedom

3rd Party Doctrine carefully follows the Fourth Amendment on the question of “*whose* property was searched”

Supreme Court Justice Clarence Thomas, 2018, in his dissenting opinion in Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919267> (Accessed October 23, 2021) (ellipses in original)

This case should not turn on “whether” a search occurred. Ante, at 1. 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.” (Emphasis added.) In other words, “each person has the right to be secure against unreasonable searches . . . in his own person, house, papers, and effects.” Minnesota v. Carter, 525 U. S. 83, 92 (1998) (Scalia, J., concurring). 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.

Justice Alito: Objecting “to the search of a third party’s property” is a “revolutionary” new Court doctrine

Justice Samuel Alito, with whom Justice Thomas joins, dissenting, 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021) (brackets in original)

Second, the Court allows a defendant to object to the search of a third party’s property. This also is revolutionary. The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects” (emphasis added), not the persons, houses, papers, and effects of others. Until today, we have been careful to heed this fundamental feature of the Amendment’s text. This was true when the Fourth Amendment was tied to property law, and it remained true after Katz v. United States, 389 U. S. 347 (1967), broadened the Amendment’s reach.

4th Amendment was not intended to affect the government’s use of documents. It was to prohibit “common law trespass”

Justice Samuel Alito, with whom Justice Thomas joins, dissenting, 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)

The Fourth Amendment does not regulate all methods by which the Government obtains documents. Rather, it prohibits only those “searches and seizures” of “persons, houses, papers, and effects” that are “unreasonable.” Consistent with that language, “at least until the latter half of the 20th century” “our Fourth Amendment jurisprudence was tied to common-law trespass.” United States v. Jones, 565 U. S. 400, 405 (2012). So by its terms, the Fourth Amendment does not apply to the compulsory production of documents, a practice that involves neither any physical intrusion into private space nor any taking of property by agents of the state. Even Justice Brandeis—a stalwart proponent of construing the Fourth Amendment liberally—acknowledged that “under any ordinary construction of language,” “there is no ‘search’ or ‘seizure’ when a defendant is required to produce a document in the orderly process of a court’s procedure.” Olmstead v. United States, 277 U. S. 438, 476 (1928) (dissenting opinion).

A/T “Miller and Smith cases invented Third-Party Doctrine”—no, they simply reaffirmed the clear meaning of the 4th Amendment and past precedent

Justice Samuel Alito, with whom Justice Thomas joins, dissenting, 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)

By holding otherwise, the Court effectively allows Carpenter to object to the “search” of a third party’s property, not recognizing the revolutionary nature of this change. The Court seems to think that Miller and Smith invented a new “doctrine”—“the third-party doctrine”—and the Court refuses to “extend” this product of the 1970’s to a new age of digital communications. Ante, at 11, 17. But the Court fundamentally misunderstands the role of Miller and Smith. Those decisions did not forge a new doctrine; instead, they rejected an argument that would have disregarded the clear text of the Fourth Amendment and a formidable body of precedent.

Brink: Accepting privacy right over information given to third parties threatens to revolutionize a new 4th Amendment doctrine under current Court rulings

Justice Samuel Alito, with whom Justice Thomas joins, dissenting, 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)

Compounding its initial error, the Court also holds that a defendant has the right under the Fourth Amendment to object to the search of a third party’s property. This holding flouts the clear text of the Fourth Amendment, and it cannot be defended under either a property-based interpretation of that Amendment or our decisions applying the reasonable-expectations-of-privacy test adopted in Katz, 389 U. S. 347. By allowing Carpenter to object to the search of a third party’s property, the Court threatens to revolutionize a second and independent line of Fourth Amendment doctrine.

Impact: Constitutional freedoms threatened. If we cast aside the original meaning of the 4th Amendment to expand freedom, courts could just as easily cast it aside to REDUCE freedoms

Justice Antonin Scalia 1988 (associate Justice, US Supreme Court) “Originalism – The Lesser Evil” 16 Sept 1988 <https://docplayer.net/43972545-Originalism-the-lesser-evil-antonin-scalia.html> (accessed 28 Oct 2021) (ellipses in original)



Impact: Using the Court to change the constitution to adapt to modern times threatens the freedoms the Constitution was designed to permanently safeguard

**It’s not the role of the courts to make laws adapt to the times. Congressional elections do that. If we want the Constitution to change with the times, we should adopt a Constitutional amendment through a slow, deliberative process, rather than judicial fiat.**

Justice Antonin Scalia 1988 (associate Justice, US Supreme Court) “Originalism – The Lesser Evil” 16 Sept 1988 <https://docplayer.net/43972545-Originalism-the-lesser-evil-antonin-scalia.html> (accessed 28 Oct 2021)



Two Possible Impacts:

Impact 1: Policy Applied Across the Board: Result: Revolutionary and Unconstitutional Law applied across the board

Justice Samuel Alito, with whom Justice Thomas joins, dissenting, 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)

One possibility is that the broad principles that the Court seems to embrace will be applied across the board. All subpoenas duces tecum and all other orders compelling the production of documents will require a demonstration of probable cause, and individuals will be able to claim a protected Fourth Amendment interest in any sensitive personal information about them that is collected and owned by third parties. Those would be revolutionary developments indeed.

Impact 2: Applied in this one case, leading to terrible inconsistency in the law

Justice Samuel Alito, with whom Justice Thomas joins, dissenting, 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)

The other possibility is that this Court will face the embarrassment of explaining in case after case that the principles on which today’s decision rests are subject to all sorts of qualifications and limitations that have not yet been discovered. If we take this latter course, we will inevitably end up “mak[ing] a crazy quilt of the Fourth Amendment.” Smith, supra, at 745.

Backup Impact Card: Creating Exceptions from Third-Party Doctrine unhinges and ungrounds fourth amendment analysis

Justice Kennedy, with whom Justice Thomas and Justice Alito join, dissenting. 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)

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.

2. Hampers law enforcement

Preventing subpoenas of third parties without a warrant would stymie investigations of major crimes

Justice Samuel Alito, with whom Justice Thomas joins, dissenting, 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)

First, the Court ignores the basic distinction between an actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents. The former, which intrudes on personal privacy far more deeply, requires probable cause; the latter does not. Treating an order to produce like an actual search, as today’s decision does, is revolutionary. It violates both the original understanding of the Fourth Amendment and more than a century of Supreme Court precedent. Unless it is somehow restricted to the particular situation in the present case, the Court’s move will cause upheaval. Must every grand jury subpoena duces tecum be supported by probable cause? If so, investigations of terrorism, political corruption, white-collar crime, and many other offenses will be stymied. And what about subpoenas and other document-production orders issued by administrative agencies? See, e.g., 15 U. S. C. §57b–1(c) (Federal Trade Commission); §§77s(c), 78u(a)–(b) (Securities and Exchange Commission); 29 U. S. C. §657(b) (Occupational Safety and Health Administration); 29 CFR §1601.16(a)(2) (2017) (Equal Employment Opportunity Commission).

Subpoenas were well known to the founders

Justice Samuel Alito, with whom Justice Thomas joins, dissenting, 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 202(brackets in original)

The order in this case was the functional equivalent of a subpoena for documents, and there is no evidence that these writs were regarded as “searches” at the time of the founding. Subpoenas duces tecum and other forms of compulsory document production were well known to the founding generation. Blackstone dated the first writ of subpoena to the reign of King Richard II in the late 14th century, and by the end of the 15th century, the use of such writs had “become the daily practice of the [Chancery] court.” 3 W. Blackstone, Commentaries on the Laws of England 53 (G. Tucker ed. 1803) (Blackstone). Over the next 200 years, subpoenas would grow in prominence and power in tandem with the Court of Chancery, and by the end of Charles II’s reign in 1685, two important innovations had occurred.

The first session of Congress (the same session that created the fourth amendment) approved such use of subpoenas

Justice Samuel Alito, with whom Justice Thomas joins, dissenting, 2018. Carpenter v. United States, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)(ellipses in original)

In the United States, the First Congress established the federal court system in the Judiciary Act of 1789. As part of that Act, Congress authorized “all the said courts of the United States . . . in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.” §15, 1Stat. 82. From that point forward, federal courts in the United States could compel the production of documents regardless of whether those documents were held by parties to the case or by third parties.

Impact: Crime. Creating exceptions to the Third-Party Doctrine limits ability to prevent violent crime

Justice Anthony Kennedy dissenting in Carpenter v. United States 2018, 585 U.S. \_\_\_ 22 June 2018. <https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919268> (Accessed October 23, 2021)

The new rule the Court seems to formulate puts needed, reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases, often when law enforcement seeks to prevent the threat of violent crimes. And it places undue restrictions on the lawful and necessary enforcement powers exercised not only by the Federal Government, but also by law enforcement in every State and locality throughout the Nation. Adherence to this Court’s longstanding precedents and analytic framework would have been the proper and prudent way to resolve this case.