SCOTUS GOES DIGITAL

How the Third Party Doctrine Could Apply to Emerging Technology Under *Carpenter v. United States*

BY AMI IMBROGNO

How much information has your cell phone transferred to another party? In the past day alone, your phone has not only likely transferred text and email messages to other people, but has constantly been collecting data and passing it on to third parties. Companies like Facebook, Instagram, Fitbit and Garmin are likely collecting geographical data, and Google, through its myriad of services, is likely collecting data regarding an infinite number of topics, including whereabouts, web browsing preferences, and your contact network.

While this extensive data is collected by private, non-governmental companies, the Third-Party Doctrine could allow the government to obtain this information without a warrant. Therefore, while information within our own homes, hard drives, and backpacks generally cannot be obtained without a warrant absent an exception, once this information is in the hands of third parties, there is little we can do currently to protect from its disclosure.

The history of the Third-Party Doctrine begins with an examination of *Katz v. United States*, 389 US 347 (1967). In *Katz*, the Supreme Court held that the government violated the Fourth Amendment when it tapped into the petitioner's phone conversation, held in a private phone booth. Because the petitioner had a reasonable expectation of privacy in his phone conversation held within the closed phone booth, it was unconstitutional for the government to listen to the conversation (or conduct a "search") without first obtaining a warrant.

In *United States v. Miller*, 425 US 435 (1976), the Supreme Court held that the petitioner had no reasonable expectation of privacy in documents that he had provided to his bank, and therefore, no search occurred, and the government did not violate the Constitution when it obtained the bank records without first obtaining a warrant. Later, in *Smith v. Maryland*, 442 US 735 (1979), the Supreme Court held that no search occurred when a phone company recorded the numbers a suspect dialed, since phone users must inevitably know that they are conveying those numbers to the phone company.

Both *Katz* and *Miller* were decided before we entered a digital age, and the Supreme Court's reasoning made some sense during a time of simpler technology. However, the Court suggested in its opinion in *United States v. Jones*, 565 US ____ (2012) that the Third-Party Doctrine may need to be revisited based on changing technologies and standards of living. In *Jones*, law enforcement attached a GPS tracker to the petitioner's vehicle and tracked its position for a month without first obtaining a warrant. The majority opinion of the court, written by Justice Scalia and joined by Justices Roberts, Kennedy, Sotomayor, and Thomas, held in favor of the petitioner, because though the car was within public view, the government "physically occupied private property for the purpose of obtaining information," and violated the petitioner's property rights when it "trespassed" and installed the device on the car.

Justice Alito, joined by Justices Ginsburg and Breyer, crafted an important concurring opinion. He found in favor of the petitioner, but not because property rights had been violated; instead, he believed that the majority's decision was based on antiquated reasoning not suitable to the 21st century, and would have decided the case by "asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove." After criticizing the majority's analysis for several reasons, the concurrence recognized the rapidly evolving state of technology, citing specifically the smartphone's ability to collect GPS data, and stated that "The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements." Society's expectation prior to the digital age has been that law enforcement would not, and could not, track every movement of a person's car for a long period, and for this reason, the concurring justices would still rule in favor of the petitioner.

Throughout the digital age, courts have frequently struggled with applying the Fourth Amendment to obtainment of digital evidence, with little guidance from the Supreme Court. Hopefully this will soon change, as pending before the Court is *Carpenter v. United States*. In *Carpenter*, the petitioner was arrested based on information gathered from his cell phone provider (specifically, cell site location information, CSLI), which allowed law enforcement to connect him to certain robberies. Under the Stored Communications Act, enacted in 1986, law enforcement was able to obtain an order for disclosure of these records upon offering "specific and articulable facts showing that there are reasonable grounds to believe that the contents of…records or other information sought, *are relevant and material to an ongoing criminal investigation*" — a standard lower than the warrant standard requiring a showing of probable cause. 18 USC § 2703(d) (emphasis added).

In applying *Miller*, the Sixth Circuit upheld Timothy Carpenter's conviction, finding that law enforcement did not violate the Fourth Amendment when it gathered the CSLI without a warrant, because it was in possession of a third party — the cellular carrier, and therefore, no search had occurred. Mr. Carpenter has petitioned the Court to overturn the Sixth Circuit's decision, and asked that it find that a "totality of the circumstances" test should apply to the Third-Party Doctrine. In applying this test, Mr. Carpenter suggests that the Court should consider that people do not voluntarily provide CSLI to the cellular provider, and that CSLI is particularly sensitive information, as cell phones provide information about activity in places historically protected by the Fourth Amendment, like a home. He also asked the

Court to apply *Jones* and find that the collection of data over the course of 127 days was a period longer than that a person would reasonably expect law enforcement to gather such data.

In his brief, Mr. Carpenter cites the decision in *In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't*, 620 F.3d 304, 305 (3d Cir. 2010), in which the Third Circuit held that often, a person is making no affirmative act when data is transferred to a cell phone provider, particularly when data is transferred automatically. He also cited a district court opinion that recognized that often, cell phone users unknowingly wander into "roaming" territory in which a different service provider is collecting information, and certainly, those roaming users are not voluntarily sharing information with the provider of which they are unaware.

Based on Mr. Carpenter's brief, it is possible that the Supreme Court could take the view that a search occurs under the Fourth Amendment when the government seeks only information that the defendant has shared purposely, upon taking an affirmative, knowing, and physical action. Or, perhaps a search occurs when it is seeking data that originated from a place in which the defendant had a reasonable expectation of privacy, such as his or her home. The Court could, however, agree with the United States, which asked the Court to simply apply *Miller* and *Smith* to hold that no search occurs when records obtained were held by a third party, and also recognize that people voluntarily enter into contracts with their service providers, and therefore, they are voluntarily submitting the data to their cellular providers for collection.

The Court could also implement solutions forwarded in several *amicus* briefs that have been filed in the *Carpenter* matter. Some have argued that cell phones are a necessity for living in today's world, as most people rely on them for employment, and as such, cell phone users are not voluntarily sharing this data (the same analysis has been applied by some lower and state courts regarding banking records — today, it is nearly impossible to conduct business or life without a bank account and/or credit card, and as such, sharing information with a bank is involuntary).

Other *Amici* have suggested that the Court should hold that the Third-Party Doctrine does not apply when the defendant has expressly shared the information with the third party only for a limited purpose. Still, other *Amici* have urged the Court to reject the application of a "voluntariness" test, as there is no correlation between whether the provision of data is voluntary and whether a person has a reasonable expectation of privacy in that data. Some *Amici* suggest that the Court should apply a test regarding what the public perceives to be safe from "prying governmental eyes," while others suggest that the Court should scrap the reasonable expectation of privacy analysis and instead determine whether there has been a search or a seizure based on the nature of the activity, and then determine whether the search or seizure was reasonable.

Based on the concurring opinion in *Jones* and the questions the justices asked at oral argument,

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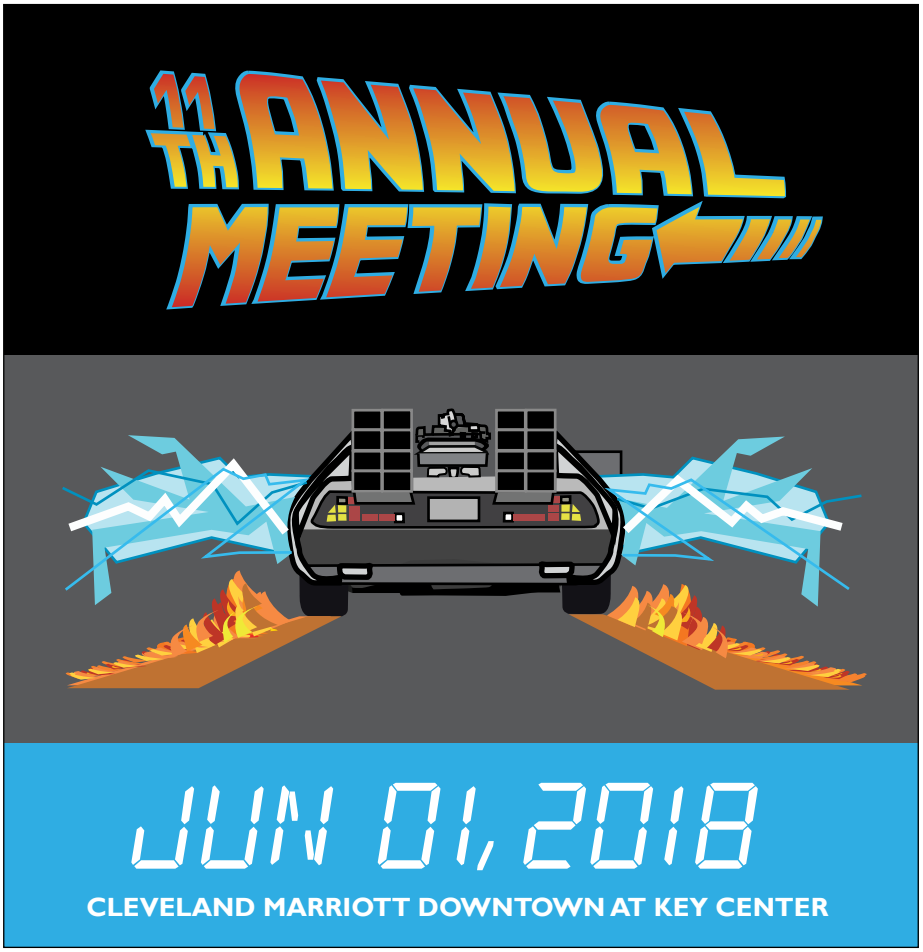

it seems that the justices are very interested in how the Fourth Amendment applies to advancing technology. It is unknown whether the Court will issue a broad, sweeping rule that affects all digital information, or whether it will just limit the rule to CSLI or to information gathered over a longer period of time, as in *Jones*. Should the Court issue a very limited rule, attorneys may still analogize the new rule to other types of digital evidence, like bank and credit card records, or any other type of digital evidence. Still, others could question how such a rule may apply outside the Fourth Amendment realm — for example, whether private companies can limit a customer's speech under the First Amendment, based on the premise that the company is so big, people in society cannot live without using its services.

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