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Supreme Court Protects Privacy of Cellphone Location Data

In an opinion released today, by the smallest possible margin the U.S. Supreme Court upheld the spirit and letter of the Fourth Amendment by holding that law enforcement agencies must get a warrant before collecting the location data from an individual's cellphone.

Writing for the majority in the case of *Carpenter v. United States*, Chief Justice John Roberts began the opinion by reciting what he called "Founding-era" history of the Fourth Amendment.

> The Founding generation crafted the Fourth Amendment as a "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." In fact, as John Adams recalled, the patriot James Otis's 1761 speech condemning writs of assistance was "the first act of opposition to the arbitrary claims of Great Britain" and helped spark the Revolution itself.

For the background on the case, we turn to the version included by Chief Justice Roberts in the opinion:

> In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and (ironically enough) T- Mobile stores in Detroit. One of the men confessed that, over the previous four months, the group (along with a rotating cast of getaway drivers and lookouts) had robbed nine different stores in Michigan and Ohio. The suspect identified 15 accomplices who had participated in the heists and gave the FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the robberies.
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> Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects. That statute, as amended in 1994, permits the Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U. S. C. §2703(d). Federal Magistrate Judges issued two orders directing Carpenter's wireless carriers—MetroPCS and Sprint—to disclose "cell/site sector [information] for [Carpenter's] telephone[ ] at call origination and at call termination for incoming and outgoing calls" during the four-month period when the string of robberies occurred. App. to Pet. for Cert. 60a, 72a. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter's phone was "roaming" in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day.

CSLI stands for "cell-site location information."

Based on the data collected by law enforcement via the cellphone companies, Carpenter was charged with six counts of robbery and six counts of carrying a firearm during the commission of a federal crime of violence.

Roberts — joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan — explained that the Court was being called on to decide how the Fourth Amendment would apply to the facts in this case, given that "cell phone location information is detailed, encyclopedic, and effortlessly compiled."

The takeaway from the majority opinion in the Carpenter case, the sentence that should please advocates of liberty and of the Constitution, is plain enough for all to understand, even federal agents.

"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," Roberts wrote.

"We hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI," the Chief Justice added.

The majority held that "A person does not surrender all Fourth Amendment protection by venturing into the public sphere." Then Roberts quoted the decision in the case of *Katz v. U.S.* from 1967, that held "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

Justice Neil Gorsuch wrote what was categorized as a dissenting opinion, but reads more like a concurring one. In his analysis, Gorsuch agreed with the end, but not the means.

"I would look to a more traditional Fourth Amendment approach," Gorsuch wrote. "The Fourth Amendment protects 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.' True to those words and their original understanding, the traditional approach asked if a house, paper or effect was yours under law. No more was needed to trigger 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," Gorsuch added.

This is unquestionably the more constitutionally consistent approach to the issue in *Carpenter*.

Why would a new judicial rule need to be created when the rule as ratified on December 15, 1791 does the job just fine?

There can be no doubt that the *Carpenter* decision is a victory for the Fourth Amendment and for the rights protected by it. In fact, there is an argument to be made that *Carpenter* may one day be regarded as the most historical decision handed down by the Supreme Court in the current term.

Be that as it may — and, yes, it is certainly a good day when one branch of the federal government refuses to let another branch plow through the constitutional barricades erected between the people and tyranny — Americans should not be so dependent for the perpetuation of our liberties on the caprice of five unelected, unaccountable, virtually untouchable judges.

To rely on such a flimsy fortress is, as Thomas Jefferson said, to reduce the Constitution to "a thing of wax."