Written by **Warren Mass** on June 6, 2017

Supreme Court to Hear Case About Warrantless Seizure of Cell Phone Records

The Supreme Court has agreed to rehear a case to determine whether the warrantless seizure and search of cellphone records is permitted by the Fourth Amendment. Of course, one does not need to obtain a law degree in order to determine the answer to this question. After all, the language in the Fourth Amendment is both clear and concise: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause…." But case law can be much more complicated and convoluted, particularly when activist judges make decisions not based on the language of the law itself and the intent of the lawgiver, but based instead on their own "interpretations" of the law.

So the question of how the Supreme Court *will* rule on this Fourth Amendment case is less clear than how the Supreme Court *should* rule.

On June 5, the Supreme Court announced on its website that it granted a petition for a writ of certiorari to a petitioner named Timothy Carpenter to rehear the case of *Timothy Ivory Carpenter v United States* to determine "whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment."

Carpenter was convicted in a series of armed robberies in Ohio and Michigan in 2010 and 2011 after a prosecutor obtained access to 127 days of cell phone location records revealing 12,898 points of location data for the defendant. He was convicted of six robberies after cellphone tower records revealed that he was in the vicinity at the time of the crimes.

A report in the *Washington Post* stated that law enforcement officials did not seek warrants for Carpenter's cellphone records based on probable cause but instead asked for the records under the Stored Communications Act, which has a lower standard. Carpenter's lawyers stated that such a request may be granted when the government has "reasonable grounds to believe that" the records sought "are relevant and material to an ongoing criminal investigation."

The *Post* reported that after Carpenter's lawyers appealed his conviction, a divided three-judge panel of the Sixth Circuit said that no warrants were needed for the records because Carpenter "had no reasonable expectation of privacy in cell phone location records held by his service provider."

The report noted that the Supreme Court ruled in the 1970s that a robbery suspect could not shield the numbers he dialed from his phone because he had turned the information over to a third party, namely the telephone company. However, continued the report, the High Court has more recently expressed concern about how technology affects privacy.

The *Post* article also cited an opinion of the Supreme Court delivered by Chief Justice John Roberts concluding that a warrant is required to search a mobile phone.

In that opinion, in the case of *Riley v. California*, the court unanimously held that the warrantless search and seizure of digital contents of a cellphone during an arrest is unconstitutional. Roberts wrote: "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought."

Last October 28, the libertarian Cato Institute filed an amicus brief urging the Supreme Court to take up the case of *Carpenter v United States*. In a message posted on Cato's website, it explained it reasons for filing the brief. It said that the institute was urging the Supreme Court to take up this case,

> … so it can revise Fourth Amendment practice to more closely adhere to the language of the Fourth Amendment. Consistent with precedents both longstanding and recent, the Court should find that communications and data are items that can be seized and searched. The Court should recognize that telecommunications customers can have property rights in such data, and that when the government seeks to seize and search such data, it generally requires a warrant. This will permit courts below to address seizures and searches of communications and data forthrightly, confidently assessing the reasonableness of government searches and seizures even when communications and data are involved.

While the above court cases pertain to the investigation of criminal suspects by local jurisdictions, the federal government has engaged in much more widespread surveillance activity since the terrorist attacks of September 11, 2001 — justifying such activity under the umbrella of the "war on terrorism."

An article posted in *The New American* on May 15 cited an April 27 report from the Office of the Director of National Intelligence revealing that during 2016 the National Security Agency (NSA) collected some 151 million phone records of Americans, despite passage of the USA Freedom Act of 2015. The article observed that while the Freedom Act supposedly ended the program enabling the NSA to collect the phone records of Americans in bulk, it nonetheless allowed the NSA to continue accessing records from phone numbers of "suspected terrorists" via court orders.

The NSA snooping began following the September 11 terrorist attacks in 2001, when President George W. Bush signed the Patriot Act, which empowered the agency to secretly gather massive amounts of communications data, including the far-reaching collection of the phone records of Americans. These activities were justified as part of the government's effort to stop terrorism.

The documents leaked in 2013 by NSA contractor Edward Snowden, which revealed the extent to which U.S. government agencies could access private records, helped influence public opinion and led to the passage of the 2015 Freedom Act. That act required federal agencies to obtain court orders on a case-by-case basis in order to access phone data.

The Freedom Act promised much more than it delivered, however. At the time of its passage in June 2015, *The New American* reported that the measure, which supposedly was intended to protect Americans from government surveillance. does nothing of the kind. The law "merely shifts the responsibility for collecting communications metadata from the NSA to companies such as AT&T, Sprint, and Verizon, which already keep customer records for as long as five years," we noted. "The NSA or the FBI would simply need to obtain permission from the secret FISA Court to access that data

— and the court nearly always grants it."

Whether at the federal or local level, Americans' right to privacy, which the Fourth Amendment describes as "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure," is not something that should be treated indifferently. That is why that amendment says that "no warrants shall issue, but upon probably cause."

Some conservatives have labeled those who stand up for this right as being "soft on crime," but we must remember that under our system, everyone is presumed innocent until proven guilty, so everyone is guaranteed the rights found in the Bill of Rights. It is dangerous to play into the hands of those who planned the terrorist attacks against America by falling into the trap that says: "We must bend the rules on the right to privacy in order to fight terrorists and criminals."

Osama bin Laden said in an interview with Al-Jazeera only weeks afterwards, "I tell you, freedom and human rights in America are doomed." He added, "The U.S. government will lead the American people in — and the West in general — into an unbearable hell and a choking life."

The ultimate goal of the terrorists is not merely to blow up buildings and kill people. That is only the means to an end. Their end is to destroy our freedom.

While past courts may have often gone too far in catering to criminals (as in the 1966 *Miranda v. Arizona* Supreme Court decision). it is important not to go too far in the opposite direction, as well.

It is encouraging that Chief Justice Roberts believes that modern electronic technology does not make the information carried in electronic devices "any less worthy of the protection for which the Founders fought." We will see if Roberts' thinking prevails when the High Court hears and decides *Carpenter v United States* during the court's next term, which starts in October.

Related articles:

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