



# Supreme Court: Warrant Usually Required For Cell Tower Records to Track a Person's Movements

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Published on [www.lorman.com](http://www.lorman.com) - November 2018

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# **Supreme Court: Warrant Usually Required For Cell Tower Records to Track a Person's Movements**

*WRITTEN JUNE 22, 2018 BY: PATRICK X. FOWLER*

On June 22, 2018, the United States Supreme Court ruled in a 5-4 decision that the government generally needs a search warrant to track a person's location through cell phone location records. The opinion, in Carpenter v. United States was written by Chief Justice John Roberts, who sided with the four most liberal justices on the high court. Four conservative justices (Kennedy, Thomas, Alito and Gorsuch) each wrote dissenting opinions, some of which were joined by others. This opinion reversed the Sixth Circuit's ruling that upheld the government's warrantless collection over more than 4 months' of historical cell phone location records that were used to convict Carpenter of six robberies.

The majority opinion is the latest in a trend at the court to address privacy rights in the digital era and to clarify prior court rulings dealing with data held by third parties. Tech companies, privacy advocates, journalists and others submitted briefs urging the court to reach this result.

## **Acquiring Cell Tower Records to Track Past Movements is a Fourth Amendment Search Requiring a Search Warrant**

The ruling is notable in several respects. It found that the government's acquisition of cell-site records that were used to track

the defendant's location over a period of time constituted a Fourth Amendment search, and thus required probable cause to obtain a search warrant.

### **Americans Have a Reasonable Expectation of Privacy Regarding Their Location and Movements**

The court noted that "the digital data at issue was at an intersection between two lines of cases." The first line of cases deals with a person's reasonable expectation of privacy as to their location and their movements (which was addressed in a 2012 Supreme Court decision, United States v. Jones, in which the court held that Fourth Amendment requirements on searches and seizures bar law enforcement from placing a GPS system on a vehicle to keep track of its location without a warrant.)

In Carpenter, the Chief Justice wrote, "[a]majority of the court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. Allowing government access to cell-site records — which 'hold for many Americans the 'privacies of life,' — contravenes that expectation."

### **No Expansion of the "Third-Party Doctrine" Limiting Privacy Expectations Regarding Information Voluntarily Shared**

The other line of cases, decided decades ago, deals with a person's diminished expectation of privacy regarding information they voluntarily share with third parties, such as financial records held by a bank, or dialed telephone numbers conveyed to phone companies. Years ago the Supreme Court ruled that such records can be obtained without a search warrant; this concept, called the "third party doctrine", has been used limit privacy expectations regarding

certain kinds of information that a person voluntarily gives to a third party.

### **Limited Application of this Narrow Decision**

Notably, the opinion expressly states that it is limited to the facts of this case. It “does not call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information; and does not consider other collection techniques involving foreign affairs or national security.”

Moreover, the court noted that there are the usual exceptions to the need for a warrant, including pursuing suspects or protecting people threatened with imminent harm. This opinion focuses on the collection of historical cell-site records to re-create a person’s location over a period of time in the past.

### **The syllabus of the opinion:**

*Cell phones perform their wide and growing variety of functions by continuously connecting to a set of radio antennas called “cell sites.” Each time a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). Wireless carriers collect and store this information for their own business purposes. Here, after the FBI identified the cell phone numbers of several robbery suspects, prosecutors were granted court orders to obtain the suspects’ cell phone records under the Stored Communications Act. Wireless carriers produced CSLI for petitioner Timothy Carpenter’s phone, and the Government was able to obtain 12,898 location points cataloging Carpenter’s movements over 127 days—an average of 101 data points per day. Carpenter moved to*

*suppress the data, arguing that the Government's seizure of the records without obtaining a warrant supported by probable cause violated the Fourth Amendment. The District Court denied the motion, and prosecutors used the records at trial to show that Carpenter's phone was near four of the robbery locations at the time those robberies occurred. Carpenter was convicted. The Sixth Circuit affirmed, holding that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers.*

*Held:*

*1. The Government's acquisition of Carpenter's cell-site records was a Fourth Amendment search.*

*(a) The Fourth Amendment protects not only property interests but certain expectations of privacy as well. Katz v. United States, 389 U. S. 347, 351. Thus, when an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. Smith v. Maryland, 442 U. S. 735, 740 (internal quotation marks and alterations omitted). The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." Carroll v. United States, 267 U. S. 132, 149. These Founding-era understandings continue to inform this Court when applying the Fourth Amendment to innovations in surveillance tools. See, e.g., Kyllo v. United States, 533 U. S. 27.*

*(b) The digital data at issue—personal location information maintained by a third party—does not fit neatly under existing precedents but lies at the intersection of two lines of cases. One set addresses a person’s expectation of privacy in his physical location and movements. See, e.g., United States v. Jones, 565 U. S. 400 (five Justices concluding that privacy concerns would be raised by GPS tracking). The other addresses a person’s expectation of privacy in information voluntarily turned over to third parties. See United States v. Miller, 425 U. S. 435 (no expectation of privacy in financial records held by a bank), and Smith, 442 U. S. 735 (no expectation of privacy in records of dialed telephone numbers conveyed to telephone company).*

*(c) Tracking a person’s past movements through CSLI partakes of many of the qualities of GPS monitoring considered in Jones—it is detailed, encyclopedic, and effortlessly compiled. At the same time, however, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of Smith and Miller. Given the unique nature of cell-site records, this Court declines to extend Smith and Miller to cover them.*

*(1) A majority of the Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. Allowing government access to cell-site records—which “hold for many Americans the ‘privacies of life,’ ” Riley v. California, 573 U. S. \_\_\_, \_\_\_—contravenes that expectation. In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring considered in Jones: They give the Government near perfect surveillance and allow it to travel back in time to retrace a person’s whereabouts, subject only to the five-year retention policies of most wireless carriers. The Government contends that CSLI data is*

*less precise than GPS information, but it thought the data accurate enough here to highlight it during closing argument in Carpenter's trial. At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development," Kylo, 533 U. S., at 36, and the accuracy of CSLI is rapidly approaching GPS-level precision.*

*(2) The Government contends that the third-party doctrine governs this case, because cell-site records, like the records in Smith and Miller, are "business records," created and maintained by wireless carriers. But there is a world of difference between the limited types of personal information addressed in Smith and Miller and the exhaustive chronicle of location information casually collected by wireless carriers. The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. Smith and Miller, however, did not rely solely on the act of sharing. They also considered "the nature of the particular documents sought" and limitations on any "legitimate expectation of privacy" concerning their contents." Miller, 425 U. S., at 442. In mechanically applying the third-party doctrine to this case the Government fails to appreciate the lack of comparable limitations on the revealing nature of CSLI. Nor does the second rationale for the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as the term is normally understood. First, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. Riley, 573 U. S., at \_\_\_\_\_. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up.*

*(d) This decision is narrow. It does not express a view on matters not before the Court; does not disturb the application of Smith and Miller or call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information; and does not consider other collection techniques involving foreign affairs or national security.*

*2. The Government did not obtain a warrant supported by probable cause before acquiring Carpenter's cell-site records. It acquired those records pursuant to a court order under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U. S. C. §2703(d). That showing falls well short of the probable cause required for a warrant. Consequently, an order issued under §2703(d) is not a permissible mechanism for accessing historical cell-site records. Not all orders compelling the production of documents will require a showing of probable cause. A warrant is required only in the rare case where the suspect has a legitimate privacy interest in records held by a third party. And even though the Government will generally need a warrant to access CSLI, case-specific exceptions—e.g., exigent circumstances—may support a warrantless search.*

Stay tuned for further developments in this interesting area of the law and technology.

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