

Location, Location, Location

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

If you're like most Americans, during the Thanksgiving holidays you made cellphone calls to relatives and friends, sent lots of email good wishes, and accessed websites for Cyber Monday online shopping. So here's a question: While doing that did you think that, by voluntarily disclosing your location, telephone numbers, email addresses and personal financial information to telephone companies, internet-service providers, and merchants, you were giving up your right to keep that information private from the prying eyes of governmental officials?

This question is at the heart of a high-profile case the Supreme Court heard oral argument on in late November.

Carpenter v. U.S. examines whether the Constitution's Fourth Amendment (which prohibits unreasonable searches and seizures) protects the site-location data that our cellphones automatically transmit to service providers as we roam from one geographic location (and one cell-tower jurisdiction) to another. Seeking to establish that Timothy Carpenter masterminded a theft ring plaguing a variety of stores – ironically, including cellphone retailers! – federal officials acquired 121 days of detailed location data generated by Carpenter's phone. Carpenter was convicted of 11 federal-law violations and sentenced to 116 years in prison.

Key to the controversy is that law-enforcement officials did not get a search warrant. This is the default practice in Fourth Amendment cases, and would have required a showing of “probable cause” to suspect Carpenter. Instead, officials invoked a federal law authorizing the subpoenaing of data directly from Carpenter's cellphone service providers under a substantially more forgiving relevance/materiality standard. A divided circuit-court panel ruled that the more protective Fourth Amendment standard was not applicable to cellphone-location data.

One way in which *Carpenter* illustrates a basic dynamic of constitutional controversies is by showing how deciding which side wins often comes down to choosing which of two lines of precedent to follow.

Supreme Court Fourth Amendment case law provides relatively robust protection to the *contents* of telephonic communications. Holding that telephone users reasonably expect that the information they reveal in conversations (or store on their increasingly smart phones) will remain private, the Court has required warrants and showings of probable cause to obtain telephone-call contents. With a unity that transcends ideology and has pleasantly surprised privacy advocates, the justices have rejected more general law-enforcement fishing expeditions when telephonic content is involved.

By contrast, a second line of cases, followed by the circuit judges in *Carpenter*, goes in a completely different direction. In the 1979 decision in *Smith v. Maryland*, the Court held that the Fourth Amendment warrant requirement does not apply when law-enforcement officials only seek telephone-company records showing the *telephone numbers dialed* by users. Over substantial dissent, six justices reasoned that customers have no expectation of privacy from law enforcement once they “voluntarily” disclose called telephone numbers to another third party (their phone-service provider) as part of making telephone calls.

In deciding which of these precedential paths to follow, the *Carpenter* Court will illustrate a second basic dynamic about constitutional litigation: the ongoing challenge of keeping legal precedents in tune with the times – especially when rapid technological change is involved. As Supreme Court Justice Sonia Sotomayor argued in a 2012 decision involving extended GPS tracking of a suspect, the notion that “information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection” is “ill suited to the digital age.” As Sotomayor noted, “people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks,” such as making cellphone calls, emailing and online shopping.

How the Court decides in *Carpenter v. U.S.* to bring core privacy rights into the digital age will be as revealing as it is important.