Supreme Court narrowly protects privacy of cellphone location data

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In a 5-4 ruling, the Supreme Court of the United States issued an opinion Friday holding that a criminal defendant's cellular phone location data, obtained without a warrant, cannot be used as evidence against him.

Chief Justice John Roberts wrote the majority opinion, emphasizing the ubiquity of cellular phones in modern life, as well as the intimate nature of the location data held by carriers. If reviewed without a warrant, such data would allow the government to conduct "near perfect surveillance, as if it had attached an ankle monitor to the phone's user"—not only prospectively, but for a period of up to five years prior.

Roberts joined the so-called liberal bloc of justices Elena Kagan, Sonya Sotomayor, Ruth Bader Ginsburg and Steven Breyer, providing a majority with an unusual line-up. It is often Anthony Kennedy who serves as a "swing" vote between the liberal and reactionary blocs. It is only the second time Roberts has written a 5-4 opinion while joining the liberal bloc. This occurred in the highly political decision on Obamacare (the Affordable Care Act) in *NFIB v. Sibelius*.

Friday's decision concerned Timothy Carpenter, convicted of a spree of robberies across Michigan and northern Ohio. The FBI had used cellphone location data, generated when a phone connects to a nearby radio tower and uses its service, to follow Carpenter's movements for 127 days. The government collected a total of 12,898 location points in Carpenter's records, or an average of 101 each day.

The FBI became aware of Carpenter in 2011 when some of his accomplices were arrested and gave up his name and phone number. Instead of applying for a warrant, which would have been granted upon a showing of probable cause that he had committed a crime, the government obtained Carpenter's cellphone records from Metro PCS and Sprint through a provision of the federal Stored Communications Act, which has a lower legal threshold than the probable cause standard for a warrant application.

At trial, Carpenter's accomplices testified that he was the leader of a crime ring. A cellular communications expert testified as well, correlating Carpenter's wireless location data to the site of the robberies in question. He was convicted of six counts of robbery and five firearms charges, receiving a sentence of over 100 years in prison.

The US Court of Appeals for the Sixth Circuit rejected Carpenter's claim that the cell data should not have been admitted as evidence because it was obtained without a warrant and therefore violated the Fourth Amendment of the US Constitution, which bars unwarranted searches and seizures.

The majority opinion focuses on the universal integration of cellular phones into social life and the immense amount of information they contain of a highly personal character, in particular, what is known as "cell-site location information," or CSLI.

"Whether the Government employs its own surveillance technology as in *Jones* [a case involving the FBI's use of GPS tracking of a vehicle] or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search," the opinion states.

The decision openly departs from an aspect of Fourth Amendment jurisprudence known as the third-party rule, which holds that a person generally cannot claim a privacy interest in documents or data given to a third person. Precedents existed that say banking and phone records can be obtained without a warrant. The reasoning was always weak: one supposedly cannot expect privacy from the government's eyes if one shares things with this third party.

Carpenter undercuts this notion, finding that because carrying a cellphone "is indispensable to participation in modern society" the data held by wireless providers isn't something that users have voluntarily "shared" with them. At the same time, the sheer volume of data in provider databases, including location, browser history and personal contacts, exceeds anything contemplated in prior Supreme Court cases concerning phone and banking records in the

mid and late 1970s (*US v. Smith* and *Maryland v. Miller*).

Apart from this, the *Carpenter* decision simply affirms other precedents in Fourth Amendment law, including warrant requirements for GPS surveillance of a vehicle, for the use of an infrared camera to search for marijuana-growing operations, and for the contents of a cellphone during a traffic stop.

The opinion boasts of its own narrow character, i.e., it is not intended to set any precedent regarding any type of data save cellphone location data. A footnote explains that the government might not need a warrant to obtain cell-site location records for a shorter period of time than what was at issue in Carpenter's case.

"Further, our opinion does not consider other collection techniques involving foreign affairs or national security," it clarifies.

In other words, the decision leaves intact the vast domestic spying apparatus and the whole legal framework of American imperialism. But, where the government could literally know the location of nearly every person in the country, and going back five years—this prompts the need for a check on police powers in the form of a warrant, the court is essentially saying.

Justice Anthony Kennedy wrote a dissenting opinion, joined in part by the right-wing Justices Clarence Thomas and Samuel Alito. The thrust of the argument here is that the cellphone location data belong to a third party, not to the defendant, who thus has no right to argue about how his data is used, shared or followed by the state. By this logic the government should be able to obtain anyone's location data as long as the carrier is willing to provide it, or if it meets the lower standard of the Stored Communications Act.

Thomas, as he is often inclined, took occasion in his own separate dissent to propose a radical drawing down of established Constitutional jurisprudence, this time aimed at the "reasonable expectation of privacy" standard from the 1967 case *Katz v. United States*. Without delving into the details at greater length, Thomas wishes to overturn the so-called Warren Court-era and "restore" the law to the plain text of the Constitution.

The banality of his reasoning needs to appreciated in the original. Thomas writes:

"The word 'privacy' does not appear in the Fourth Amendment (or anywhere else in the Constitution for that matter). Instead, the Fourth Amendment references '[t]he right of the people to be secure.' It then qualifies that right by limiting it to 'persons' and three specific types of property: 'houses, papers, and effects' … The Court today, for example, does not ask whether cell-site location records are 'persons, houses, papers, [or] effects' within the meaning of the Fourth Amendment."

Trump appointee Justice Neil Gorsuch wrote his own dissent along the same doctrinal lines as Thomas, namely, that the 1960s should be erased and the "original intent of the Framers" be restored.

For both Thomas and Gorsuch, acolytes of the great "originalist" Antonin Scalia, nothing that does not appear in the text of the Constitution can have constitutional weight, a posture that would seem to severely undermine the justices' understanding of, for example, drivers' licenses, the Air Force, online income tax filings, or the entire modern world.

All these reactionary justices give property the decisive role in the question of privacy. According to this line of reasoning, the owner of a telecommunications company literally has a greater right to privacy than does any one of his customers. The records, theirs and his, are all his property. He can share some with the state and require a warrant to be produced for others, all as he sees fit.

For all their pages and pages of vitriol, none of these "originalist" jurists seriously considers the obvious question: could the FBI not have applied for and obtained a search warrant in this case, with the testimony of accomplices satisfying all the legal requirements of probable cause? Where is the magistrate who would have refused a warrant application supported with this evidence? Even this minimal limitation on governmental authority sends them into a self-righteous fit of apoplexy.

It is important to view the *Carpenter* case in its historical context. While the decision favors democratic rights, it represents more of a momentary slowing down of the decades-long decay of bourgeois legal norms than it does a grand counteroffensive. While the opinion does uphold a right to privacy in one's cellphone location data, it does so by a single vote. Even the usual swing vote of Kennedy is placed on the side of the police state.

The carefully written and "narrow" opinion, joined solidly by the entire liberal bloc—there are no concurrences that represent divergent views that still join the majority—suggests a deep political concern that simply handing over all CSLI to the government exceeds what a restive populace might tolerate.