Technology and the Fourth Amendment

An Inquiry Pack to Accompany LegalTimelines.org

Inquiry Question: How have advances in technology changed the way the search and seizure clause of the Fourth Amendment has been interpreted?

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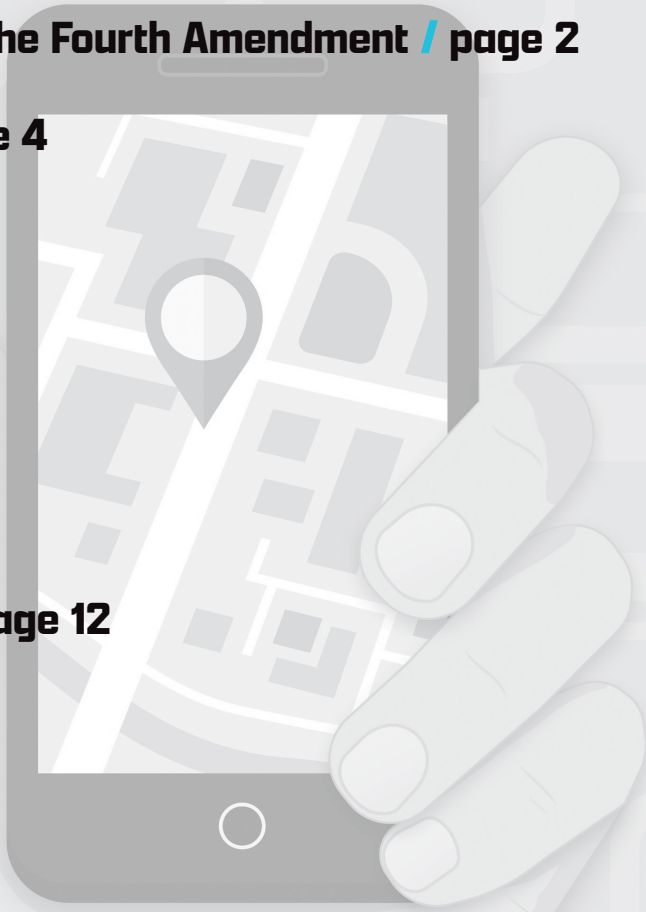

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Introduction: Technology and the Fourth Amendment

The Fourth Amendment is part of the U.S. Constitution's Bill of Rights. In general, the Bill of Rights limits the power of government and declares specific rights to people. This is part of what the Fourth Amendment says: "[T]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated…"

So the Fourth Amendment prohibits searches and seizures that are unreasonable. A search occurs when the government looks through someone's property or belongings, as long as the person had a reasonable expectation of privacy. A "reasonable expectation of privacy" is a legal term. It means that the person whose belongings are being searched expected those belongings to be private and society recognizes that expectation as reasonable. "Government" can mean any agent or officer of the federal, state, or local government.

The Fourth Amendment also deals with search warrants: "…no Warrants should issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." A warrant is a legal document issued by a judge that authorizes a search. Probable cause is established when the government—usually a police officer—demonstrates to the judge a reasonable belief that a crime has been committed and that people or items connected to that crime are likely to be found in a certain place.

A search is considered reasonable under the Fourth Amendment only when the officer has first obtained a warrant. But there are several exceptions to the warrant requirement—such as when an emergency requires the officer to search right away to protect a life or stop the destruction of evidence, rather than waiting for a warrant.

When the Constitution came into force in 1789, information was transmitted much differently than today. Books, newspapers, and pamphlets were the norm back then. If people wanted to talk to one another, they had to meet in person. Telephones and the internet were a thing of the distant, unforeseeable future. The technology of the day informed the development of the rights found in the Bill of Rights. When writing the Fourth Amendment, the Constitution's Framers could not have envisioned a future with crimes committed using cell phones or computers, nor could they envision the government using technology to investigate crimes. Courts have had to interpret the Constitution to apply it to today's technology and challenges.

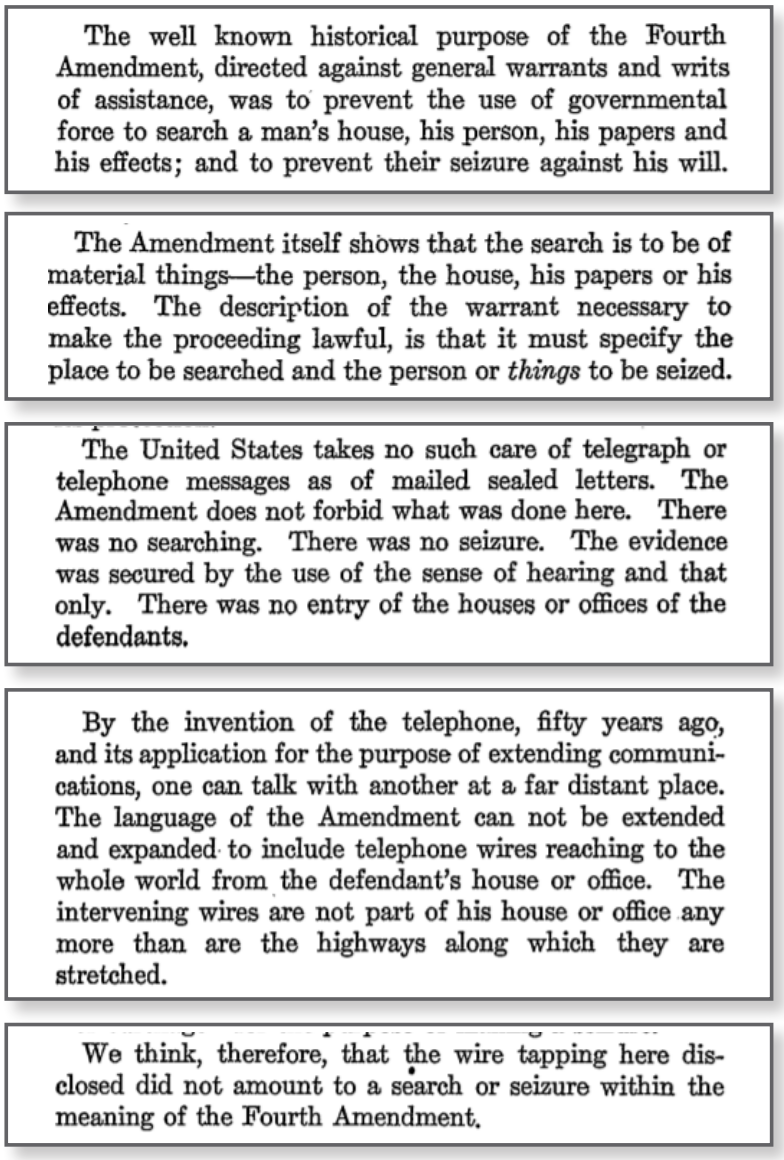
The Supreme Court's approach to the Fourth Amendment and technology has evolved over time. For example, in the case of *Olmstead v. United States* (1928), the Supreme Court ruled that the Fourth Amendment did not protect against the use at trial of evidence found through a warrantless wiretap of a phone conversation. The reasoning in *Olmstead* was that the government had not physically entered the defendant's house or taken some property belonging to him. It had simply listened to a conversation. But not all the justices agreed with this outcome; several of them wrote opinions explaining their disagreement—called dissents—in which they argued that listening in on someone's phone calls should be considered a search because it invades a person's privacy in the same way that rummaging through someone's house does.

Nearly 40 years later in *Katz v. United States* (1967), the Court reexamined its stance on Fourth Amendment protections and determined that "people not places" were protected. The Court used the "reasonable expectation of privacy" test and found that the government could not legally wiretap a call from a phone booth without first getting a valid search warrant. People have an expectation of privacy in the contents of their phone conversations, and society regards this expectation as reasonable.

This test has since been applied many times, including in cases with relatively new technologies. Over time the Court has had to decide whether Fourth Amendment protections apply to searches and seizures involving motor vehicles, cell phones, Global Positioning System (GPS) data, computer and internet data, and more.

Wiretapping Telephones

Source A: Opinion in *Olmstead v. United States* (1928)[1]



The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects; and to prevent their seizure against his will.

The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.

The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

By the invention of the telephone, fifty years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.

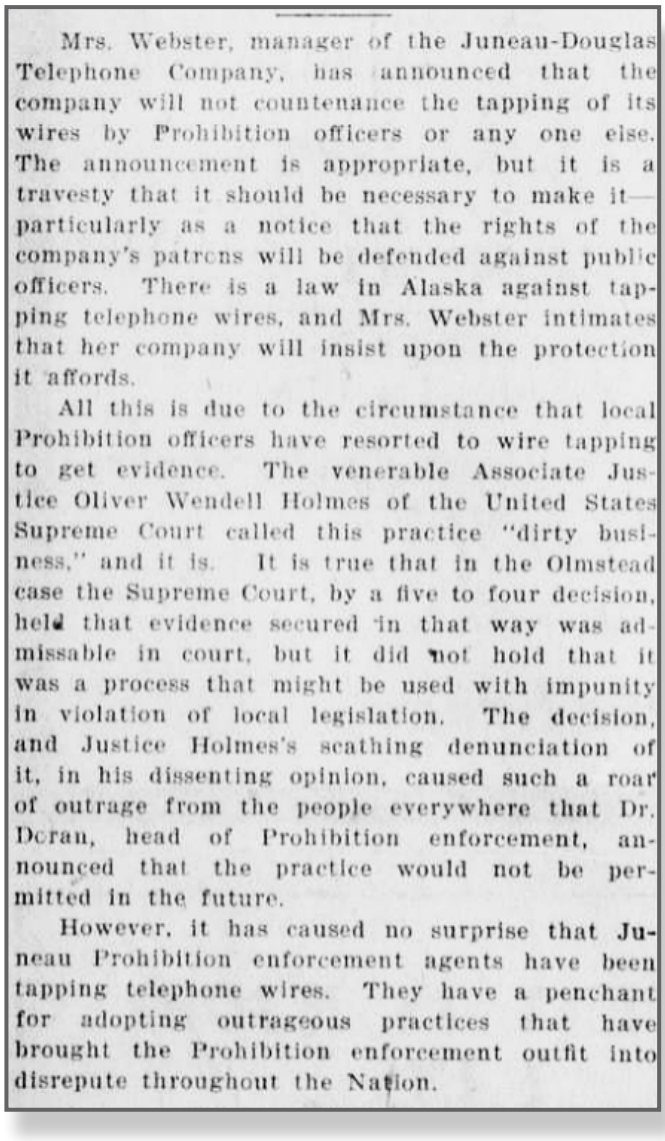
We think, therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

Source A Information: From 1920 to 1933, the 18th Amendment to the Constitution banned the production, transport, and sale of alcoholic beverages, known as Prohibition. Despite this ban, illegal production, transport, and sale were widespread. In its attempt to stop bootleggers (or people who make and sell things illegally), federal government enforcers made use of a variety of tactics. One tactic was to wiretap phones, or listen in to peoples' phone conversations. The telephone was a relatively new invention by the time of this Supreme Court case. It was invented in the late 1880s and by 1910, there were almost six million telephones in use in the United States. The *Olmstead* case dealt with whether federal law enforcement could wiretap phones without receiving a warrant first.

Glossary of key terms from the source:

- *Writs of assistance:* general search warrant

Source B: "Wire Tapping" article from *The Daily Alaska Empire* (1928)[2]



Mrs. Webster, manager of the Juneau-Douglas Telephone Company, has announced that the company will not countenance the tapping of its wires by Prohibition officers or any one else. The announcement is appropriate, but it is a travesty that it should be necessary to make it—particularly as a notice that the rights of the company's patrons will be defended against public officers. There is a law in Alaska against tapping telephone wires, and Mrs. Webster intimates that her company will insist upon the protection it affords.

All this is due to the circumstance that local Prohibition officers have resorted to wire tapping to get evidence. The venerable Associate Justice Oliver Wendell Holmes of the United States Supreme Court called this practice "dirty business," and it is. It is true that in the Olmstead case the Supreme Court, by a five to four decision, held that evidence secured in that way was admissable in court, but it did not hold that it was a process that might be used with impunity in violation of local legislation. The decision, and Justice Holmes's scathing denunciation of it, in his dissenting opinion, caused such a roar of outrage from the people everywhere that Dr. Doran, head of Prohibition enforcement, announced that the practice would not be permitted in the future.

However, it has caused no surprise that Juneau Prohibition enforcement agents have been tapping telephone wires. They have a penchant for adopting outrageous practices that have brought the Prohibition enforcement outfit into disrepute throughout the Nation.

Source B Transcription:

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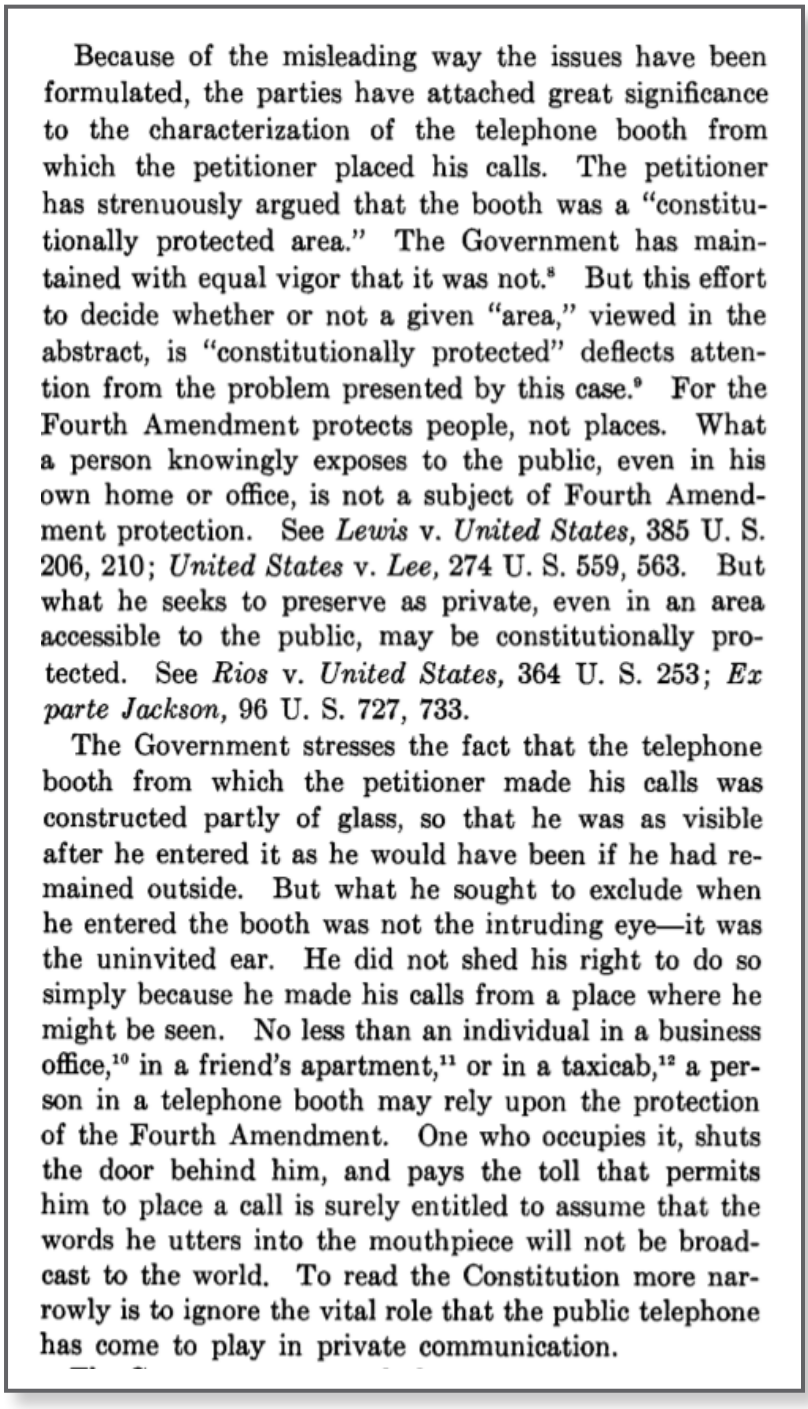
Source B Information: Many people were unhappy with the Supreme Court's 5-4 *Olmstead* decision. In Alaska, according to scholar Dr. Mary F. Ehrlander, "many if not most Alaskans continued to view producing and consuming alcohol as relatively harmless activities. Corruption among public officials likely reinforced Alaskans' tendency to perceive authority (especially federal authority) as illegitimate."[3] This 1928 article from a major Alaskan newspaper shares some reactions to the Court's *Olmstead* decision.

Questions to Consider for Sources A and B:

1. **Observe:** What do you notice first about the information in these sources?
2. **Reflect:** What can Source B tell you about some people's reactions to the Supreme Court's opinion in Source A? Why do you think people might have had this reaction? What might this reaction tell us about the value people place on their ability to act without interference from the government?
3. **Question:** What questions do you have about these sources?

Telephone Booths

Source C: Opinion in *Katz v. United States* (1967)[4]



Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not.[8] But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case.[9] For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis* v. *United States*, 385 U. S. 206, 210; *United States* v. *Lee*, 274 U. S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See *Rios* v. *United States*, 364 U. S. 253; *Ex parte Jackson*, 96 U. S. 727, 733.

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office,[10] in a friend's apartment,[11] or in a taxicab,[12] a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

Source C Information: In 1965, Charles Katz used a public telephone booth in Los Angeles to conduct illegal sports betting activities. The FBI recorded Katz's phone calls without a search warrant and eventually arrested him. The case ultimately made it to the Supreme Court, where Katz's lawyers argued that the FBI needed a search warrant and, thus, the recordings violated Katz's Fourth Amendment rights. The Supreme Court agreed in a 7-1 decision.

Questions to Consider for Source C:

1. **Observe:** What stands out to you about this source?
2. **Reflect:** The Court writes, "The Fourth Amendment protects people, not places." What is the significance of this phrase to this case and to future interpretation of the Fourth Amendment?
3. **Question:** What questions do you have about this source?

Enforcement

Source D: "Investigative Uses of Technology, Devices, Tools, and Techniques" (2007)[5]

Legal considerations

- Installing a GPS device where there is no reasonable expectation of privacy does not implicate the Fourth Amendment. Some State statutes, however, require legal process.
- Installing a GPS device where there is a reasonable expectation of privacy (such as entering the curtilage of a residence, entering a private automobile, or opening a package) implicates the Fourth Amendment, and legal authority is usually required.
- Tracking the GPS device in an area where there is no reasonable expectation of privacy does not implicate the Fourth Amendment, but some States and Federal circuit courts have statutes or decisions that require legal authority to accomplish such tracking.
- Tracking the GPS device when the device moves to a location where there is a reasonable expectation of privacy implicates the Fourth Amendment, and legal authority is required.
- These considerations vary among jurisdictions and may be subject to more stringent regulations than listed. Consult legal counsel for direction.

Scenarios

1. A salesman in California is suspected of murdering his wife. A covertly installed GPS device reveals that he has since parked his vehicle within 1 mile of the remote location at which his wife's body is ultimately discovered.
2. A suspect is believed to have murdered his daughter and buried her. A GPS device is installed in his vehicle and determines that he visits one location in the woods for 45 minutes, another location for about 15 minutes, then returns to the first location for about 10 minutes. Going to these two locations, officers find the victim buried in one location and trace evidence that she had previously been buried in the other location. Officers are able to demonstrate the offender went to the first location to dig a grave, the second to exhume and remove the hastily buried victim, and returned to the predug grave to rebury the child.

Source D Information: This guidance document was written by the U.S. Department of Justice to aid law enforcement agencies in navigating technology-related crimes and technological tools that can be used to investigate crimes. Each section of the document also provides legal guidance for specific technology and scenarios in which the technology might be applied.

Glossary of terms from the source:

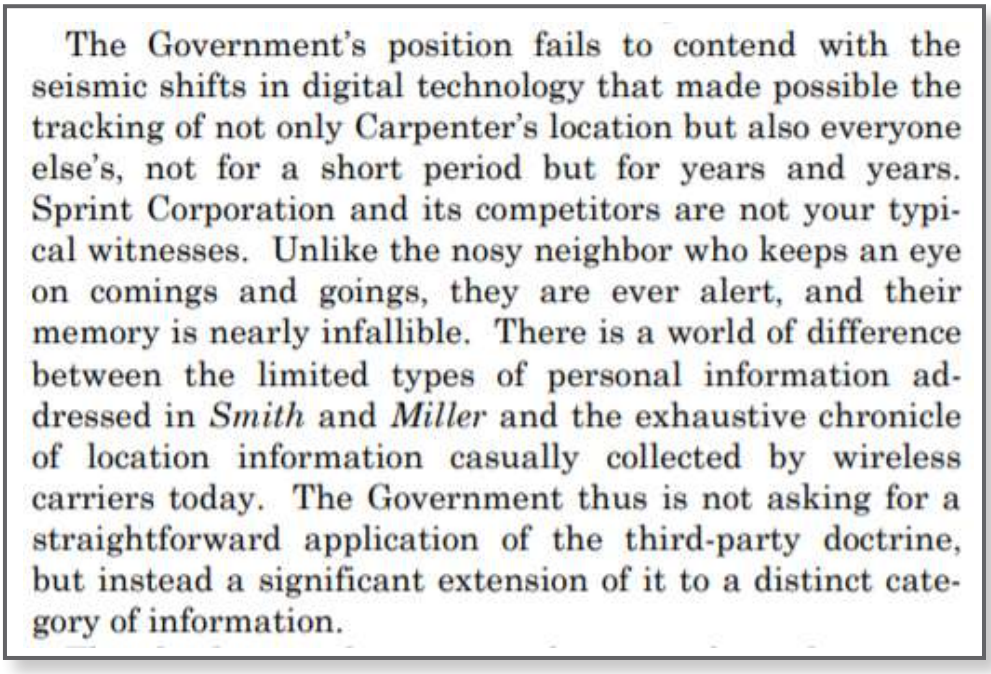
- *GPS (Global Positioning System) Device:* a highly accurate satellite-based navigation system that can provide location and time information anywhere on Earth where there is a strong enough signal

Questions to Consider for Source D:

1. **Observe:** What do you notice first about this source?
2. **Reflect:** Why might law enforcement agencies value this source? How do changes in technology impact the way that law enforcement agencies do their jobs?
3. **Question:** What questions do you have about this source?

Cell Phones

Source E: Opinion in *Carpenter v. United States* (2018)[6]



The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible. 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 today. The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information.

Source E Information: This 2018 Supreme Court case was about whether law enforcement needed a search warrant to collect data from a wireless service provider, like Sprint (now T-Mobile) or Verizon. These companies have technology that allows them to use GPS systems and cell phone towers to determine the location of peoples' cell phones. In its opinion, the Court points out that this cell phone tower data can be preserved for many years. It also compares this case to the cases of *Smith v. Maryland* (1979) and United *States v. Miller* (1976), both cases where it was determined that the government did not need warrants to access a person's data from a third-party company.

Questions to Consider for Source E:

1. **Observe:** What do you notice first about this source?
2. **Reflect:** Why does the Court compare the Sprint Corporation (a third-party wireless company) to a nosy neighbor? How does this comparison help the Court interpret the Fourth Amendment?
3. **Question:** What questions do you have about this source?

Inquiry Question

How have advances in technology changed the way the search and seizure clause of the Fourth Amendment has been interpreted?

Use the sources above and the timeline to support your answer.

Extension Inquiry Question

Aerial surveillance drones and facial recognition software are two of the more recent technologies that law enforcement agencies have used to investigate crimes.

Research one of these technologies, then use the sources above and the timeline to interpret how the technology must be used in order not to violate the Fourth Amendment rights of the people.

Notes

[1] *Olmstead v. United States,* 277 U.S. 438 (1928). Library of Congress U.S. Reports, https://tile.loc.gov/storage-services/service/ll/usrep/usrep277/usrep277438/usrep277438.pdf.

[2] "Wire Tapping," *The Daily Alaska Empire,* October 27, 1928. Library of Congress Chronicling America, https://chroniclingamerica.loc.gov/data/batches/ak_halibut_ver01/data/sn83045499/00414185770/1928102701/0386.pdf.

[3] Mary F. Ehrlander, "The Paradox of Alaska's 1916 Alcohol Referendum: A Dry Vote within a Frontier Alcohol Culture." *The Pacific Northwest Quarterly* 102, no. 1 (2010): 29–42. http://www.jstor.org/stable/23059493.

[4] *Katz v. United States,* 389 U.S. 347 (1967). Library of Congress U.S. Reports, https://tile.loc.gov/storage-services/service/ll/usrep/usrep389/usrep389347/usrep389347.pdf

[5] "Investigative Uses of Technology: Devices, Tools, and Techniques," National Institute of Justice, October 2007, https://babel.hathitrust.org/cgi/pt?id=mdp.39015075632771&view=1up&seq=110.

[6] *Carpenter v. United States,* 585 U.S. ___ (2018), https://www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf.