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Carpenter privacy case vexes justices, while tech giant Microsoft battles Government in second U.S. Supreme Court privacy case with international implications

By Richard J. Peltz-Steele

Last quarter's committee news reported the first of two major privacy cases with international implications to reach the U.S. Supreme Court this term, *Carpenter v. United States*.¹ Now a second such case pits the Government against Big Tech in *United States v. Microsoft*.²

Carpenter v. United States. *Carpenter* is a criminal case involving federal seizure of cell phone location data from service providers. Arising under the "reasonable grounds" provision of the Stored Communications Act (SCA),³ the case accentuates Americans' lack of constitutional protection for personal data in third-party hands, in contrast with emerging global privacy norms.

In oral argument in November, the Government positioned itself squarely within the third-party doctrine. Justice Kagan pushed back, finding analogy in *United States v. Jones*.⁴ In *Jones* in 2012, the Court held unanimously that law enforcement violated the Fourth Amendment by surreptitiously attaching a GPS tracker to a suspect's car. The Government sought to distinguish *Jones* as involving (literally) hands-on intrusion.

Just as she expressed misgivings about the third-party doctrine in her *Jones* concurrence, Sotomayor raised the alarm about waning informational privacy in the digital age. She suggested that the Court might carve out an exception to the doctrine, as it has for medical records. Justice Breyer seemed receptive to the comparison; Justice Alito did not. Chief Justice Roberts seemed to search for a middle ground, wanting to connect the dots from cell phone *content*—which requires a search warrant—to location data.

In sum the Court majority seemed ill disposed to discard the third-party doctrine and invigorate privacy in constitutional law. The takeaway from *Carpenter* is likely to be that Congress still holds the key to bringing U.S. search and seizure into accord with European data protection.

United States v. Microsoft. The second major privacy case headed for Supreme Court decision in 2018 also arises under the SCA, involves criminal investigation and new technology, and implicates collision between the third-party doctrine and European privacy law. In *United States v. Microsoft*, however, the implications for international law loom larger.

In *Microsoft*, federal law enforcement officers in a narcotics investigation obtained a probable-cause warrant for the *content* of a Microsoft user's email. The user's identity, residence, and nationality are not in the public record. What is known is that the user's email resides in Ireland. Microsoft maintains only one virtual "copy" of a user's email (with some immaterial exceptions), usually geographically near the user or where the user purports to be.

Carpenter and *Microsoft* implicate different subdivisions of SCA § 2703. *Carpenter* involves a court order predicated only upon reasonableness, ostensibly meant to compel production of information *about* a user. *Microsoft* involves a court-sanctioned warrant predicated upon probable cause to compel production of information *of* a user. When the Government wants to look *inside* email messages, the SCA ups the stakes, more or less analogizing to a postal package.

Microsoft surrendered metadata stored on servers in the United States, but moved to quash the warrant for email contents stored on servers in Dublin. Microsoft asserted that the SCA does not authorize compelled production outside the United States. The Government retorted that production is not extra-territorial if data can be summoned from a terminal in Redmond, Washington, without anyone in Dublin lifting a finger. The Second Circuit ruled for Microsoft, citing the canon of presumption against extraterritoriality, and an equally divided bench denied rehearing en banc with dissents.

The Court heard oral argument in February. According to analysis by Amy Howe for SCOTUSblog, the court was divided. Chief Justice Roberts and Justice Alito were skeptical that

Microsoft's choice to place data overseas should control the government's reach. Justices Ginsburg, Gorsuch, and Sotomayor seemed more sensitive to the impact of overseas reach on international comity. Justice Breyer seemed in search of a case-by-case middle ground, of which Microsoft counsel wanted no part.

In a lucid concurring opinion in the Second Circuit, below, Judge Lynch posited that the case perhaps should turn on a fact we do not have: the user's nationality. It matters, he reasoned, whether the case is about an American warrant for an Irish national's email, located in Ireland, held by an American company selling services to Irish users, or about an American warrant for an American's email located in Ireland only because the American misrepresented residence.

Nevertheless, Judge Lynch concluded that the key to resolving conflict between international law enforcement and comity rests, again, with Congress.

¹ 819 F.3d 880 (6th Cir. 2016), *cert. granted*, No. 16-402 (U.S. June 5, 2017).

² 829 F.3d 197 (2d Cir. 2016), *cert. granted*, No. 17-2 (U.S. Oct. 16, 2017).

³ 18 U.S.C. § 2703

⁴ 565 U.S. 400 (2012).