The Third-Party Doctrine and the Fourth Amendment: Best Friends for Life

I. Introduction

“All telephone users realize that they must ‘convey’ phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed.”¹ This assertion comes from Justice Blackmun’s majority opinion in the 1979 landmark decision of *Smith v. Maryland*, and it has been enshrined in Fourth Amendment jurisprudence ever since.² While Justice Blackmun’s remark seems like a fairly simple and logical principle, its legal implications reach far and wide for what has been dubbed “third-party doctrine” – the notion that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”³ As applied in *Smith*, this meant that police installation and use of a pen register in order to obtain phone numbers dialed off of Smith’s phone was not a “search” within the meaning of the Fourth Amendment, and therefore, did not require a warrant or probable cause.⁴ Post-*Smith*, every phone call is essentially an assumption of the risk that the numerical information conveyed by the caller to the phone company may be turned over to law enforcement.⁵ But does the same principal apply to a cellphone user’s location information?⁶ Apparently it does – at least according to the U.S. Court of Appeals for the Eleventh Circuit as evinced by its recent holding in *United States v. Davis*.⁷

Long gone are the days in which Fourth Amendment search and seizure analysis relied solely on the presence or absence of a physical trespass.⁸ In addition to the common law trespass test, modern-day Fourth Amendment jurisprudence largely revolves around the reasonable-expectation-of-privacy test first pronounced in *Katz v. United States*.⁹ To satisfy Katz’s test, an individual must establish both a subjective and an objective expectation of privacy.¹⁰ The question presented in *Davis* was “whether [a] court order authorized by the Stored
Communications Act . . . compelling the production of a third-party telephone company's business records containing historical cell tower location information, violated Davis's Fourth Amendment rights and was thus unconstitutional.\textsuperscript{11} The Court held that it did not. Therefore, Davis’s Fourth Amendment rights were not implicated by the government’s actions.\textsuperscript{12}

This casenote will analyze the \textit{Davis} holding through \textit{Katz}’s reasonable-expectation-of-privacy test by comparing and contrasting elements of Davis’s case to the relevant body of Fourth Amendment caselaw that has emerged since 1967, when \textit{Katz} came to the forefront. Part II will identify and discuss a trend in third-party doctrine jurisprudence, questioning its viability in a modern era dominated by technological innovation. Part III will describe critical details of the \textit{Davis} case with an emphasis on its fact pattern as viewed by both the majority and the dissent. Part IV will elaborate on \textit{Davis}’s place in Fourth Amendment jurisprudence, its relationship to its predecessors with a particular focus on the disputed statute, and what the \textit{Davis} holding means for the future.

\textbf{II. Third-Party Doctrine: The Way Back When vs. The Here and Now}

Third-party doctrine gained momentum in the 1970s with major cases involving subpoenaed business records.\textsuperscript{13} Opinions commonly contained language describing constitutionally protected “zone[s] of privacy,”\textsuperscript{14} which excluded bank records of defendants’ accounts or other types of business records detailing transactions to which a business itself was a party.\textsuperscript{15} For example, in \textit{United States v. Miller}, where the government subpoenaed all records of Miller’s bank accounts, the Court specified that “[a]ll of the documents obtained, including financial statements and deposit slips, contain[ed] only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.”\textsuperscript{16} Therefore, by revealing his affairs to a third party bank, Miller assumed the risk that the information he
conveyed would be relayed to the government.17 While Miller is a flagship third-party doctrine case, Justice Brennan’s dissent identified a hole in its logic directly applicable to Davis and the debate surrounding historical cell tower location information:

For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography.18

Justice Brennan’s dissent in Miller represents the early stages of a continuing trend in the relevant caselaw: Courts are increasingly demonstrating discomfort with the third-party doctrine and its application to modern society.19

Three years after Miller, Justice Marshall offered a similar critique in his dissenting opinion in Smith v. Maryland. In that case, the Court concluded that Smith likely had “no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not ‘legitimate.’”20 Justice Marshall pressed against the majority by suggesting that the notion that using a phone is a “choice” in Western society is a fallacy: “[U]nless a person is prepared to forego use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance.”21 Unwillingness to accept such a risk leaves a person without any realistic way of participating in the modern economy.

In United States v. Jones, the Court confronted the issue of “whether the attachment of a Global-Position-System (GPS) tracking device to an individual’s vehicle, and subsequent use of that device to monitor the vehicle’s movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment.”22 Ultimately, the Court found that the government’s actions did in fact violate Jones’s Fourth Amendment rights.23 However, the Court reached its conclusion by relying on a traditional trespass test, avoiding a reasonable-
expectation-of-privacy analysis. While the case was easily decided based upon the government’s physical occupation of Jones’s private property, Justice Sotomayor’s concurrence recognized that the ruling provided little guidance to courts in cases involving novel surveillance methods that do not require physical intrusion. Accordingly, Justice Sotomayor suggested that the third-party doctrine “is ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.” Given the current split between the Eleventh Circuit and the Fifth and Third Circuits with respect to the standard for obtaining cell site location information, it appears that Justice Sotomayor’s concern was well-founded.

III. United States v. Davis

A. Procedural Posture

Between August and October of 2010, Quartavius Davis, along with several accomplices, took part in seven armed robberies of an array of South Florida businesses. A federal grand jury for the Southern District of Florida subsequently issued a seventeen-count indictment in relation to the crimes, sixteen of which named Davis. The government’s case against him included both accomplice and eyewitness testimony, video surveillance, DNA, 67 days of telephone records from MetroPCS spanning the time period between the first and last robbery, the MetroPCS cell tower glossary, and maps portraying six of the robbery sites in relation to certain cell towers. Davis objected to the introduction of the toll records and the MetroPCS glossary; however, those objections were denied, and Davis was subsequently convicted. On appeal, a panel of the Eleventh Circuit found that the government violated Davis’s Fourth Amendment rights by obtaining the MetroPCS telephone records. Nevertheless, the Court upheld the convictions based on the good-faith exception to the exclusionary rule.
government successfully petitioned for a rehearing en banc,\textsuperscript{35} where the Court again affirmed Davis’s convictions, this time finding that no violation of his Fourth Amendment rights had occurred.\textsuperscript{36}

B. The Majority Opinion

In finding for the government, the Court relied heavily on classic third-party doctrinal reasoning.\textsuperscript{37} To start, the majority emphasized that the government did not obtain or attempt to obtain any information containing actual content.\textsuperscript{38} To the contrary, the disputed records only “allowed the government to determine the precise physical location of the cell towers that connected calls made by and to Davis’s cell phone . . . but not the precise location of that cell phone or of Davis.”\textsuperscript{39} The majority built upon this point by comparing historical cell location information to the location data used in \textit{Smith}.\textsuperscript{40} Whereas historical cell location information does not pinpoint a cell phone user’s exact location,\textsuperscript{41} the pen register used in \textit{Smith} exposed numerical data of landlines corresponding to actual physical addresses.\textsuperscript{42} Additionally, like the bank records in \textit{Miller}, the MetroPCS records in this case were the property of the business – not of Davis – and were created for “legitimate business purposes.”\textsuperscript{43}

The Court further strengthened its position by looking to persuasive precedent from the Fifth Circuit,\textsuperscript{44} which held two years earlier that court orders authorized by the Stored Communications Act to compel cell phone service providers to produce the historical cell site information of their subscribers are not per se unconstitutional.\textsuperscript{45} Specifically, the majority agreed with the Fifth Circuit “that cell users know that they must transmit signals to cell towers within range . . , that users when making or receiving calls are necessarily conveying or exposing to their service provider their general location within that cell tower’s range, and that cell phone companies make records of cell-tower usage.”\textsuperscript{46} Therefore, even if Davis harbored a subjective
expectation of privacy in the cell-tower data, it was not an objectively reasonable one. In any event, the Court further negated Davis’s claim to any subjective expectation of privacy in the data by pointing to the fact that Davis had registered his cell phone number under the fictitious alias, “Lil Wayne,” demonstrating awareness that the information generated could be used to incriminate him.

The majority went on to distinguish Davis’s case from Jones, where the police violated Jones’s Fourth Amendment rights by placing a GPS tracking device on his car. While no physical intrusion occurred in Davis, the opinion suggests that Davis and the dissent misapplied Justice Alito’s Jones concurrence. In that case, “[o]nly the government did the tracking and its tracking was not authorized or regulated by a federal statute.” Additionally, the majority contrasted the “precise, real-time, and long-term” information generated by the GPS in Jones with the historical cell site location data used in Davis, which did not locate the cell phone user with pinpoint precision. Accordingly, the majority found that the third-party doctrine, as applied in Supreme Court precedent in Miller and Smith, ultimately governed the outcome of Davis’s case. The § 2703(d) order permitting government access to MetroPCS’s records comported with applicable Fourth Amendment principles and, therefore, was not, unconstitutional.

C. The Dissenting Opinion

The dissent expressed grave concern over the greater implications of the Court’s holding, particularly with regard to the government’s ability to use the third-party doctrine as a tool for gaining access to other records that businesses routinely create which detail every-day activities. In addition, the dissent questioned how the quantity of information generated by the historical cell location information in Davis’s case does not amount to more than a minimal
invasion of privacy. Over the course of 67 days, the government obtained information pertaining to 5,803 phone calls, translating to 11,606 cell site location data points, which amounts to an average of about one location data point every five and one half minutes. From this information, the government would be more or less able to ascertain many aspects of Davis’s private life:

A person who knows all of another’s travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups – and not just one such fact about a person, but all such facts.

Moreover, the government’s claim that the data collected does not equate to the precise information generated by GPS tracking contradicted its very use of that information to pin Davis at the robbery sites.

The dissent goes on to question the premise that a cell phone user voluntarily conveys their location information. Whereas a telephone user, as in Smith, affirmatively enters phone numbers, he does not affirmatively enter his location information each time he places a call. In fact, historic cell location information also includes data generated when a cell phone user receives a call. The dissent bolsters this point by citing the Third Circuit: “[W]hen a cell phone user receives a call, he hasn’t voluntarily exposed anything at all.” The cell phone is a “basic necessity of twenty-first century life,” and “it is the person who is not carrying [one] . . . who is the exception.” Moreover, cell sites are rapidly increasing and the typical cell phone user “has no idea how precise cell site location data is at any given location.” Therefore, government compulsion of historic cell location information from third-party carriers should require a warrant.
IV. Where is the Legislative Solution?

Third-party doctrine caselaw is littered with calls for legislative solutions to the complex issues that applying the precedent necessitates. Even when the doctrine was fairly new, judges recognized its inadequacy in confronting technological changes in society.⁶⁹ Today, the government’s nearly unfettered ability to obtain historic cell site location information poses one such example, as evinced by the federal circuit split in adjudicating the issue.⁷⁰ The Eleventh Circuit’s ruling in Davis would seem to suggest that the Stored Communications Act provides an answer, but the Third Circuit’s ruling in In re United States suggests otherwise.

A. The Stored Communications Act: A Statutory Nightmare

The government was able to obtain Davis’s cell site location information by issuing a court order pursuant to 18 U.S.C. § 2703(d) – the Stored Communications Act (SCA).⁷¹ § 2703(d) of the SCA provides in part:

A court order for disclosure . . . may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.⁷²

However, § 2703(c)(1)(A) provides warrant procedures for obtaining the same type of non-content information.⁷³ If a § 2703(d) order is always available to the government, and the standard to obtain such an order is less than the probable cause standard required for a warrant, why would the government ever elect to pursue a warrant? The SCA is problematic in this regard because it contains ambiguous language, leaving Courts without direction in its application and leaving the statute itself open to constitutional challenge. The dissent in In re Application confronted these statutory flaws head on.⁷⁴
The issues in both *Davis* and *In re Application* pose substantial constitutional questions. When such questions arise, precedent mandates that courts “first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.”\(^7\) Looking to the “plain meaning” of the statute, nowhere does the language of § 2703(d) *require* courts to issue such orders when the governments meets the statutory standard.\(^8\) To the contrary, the words “only if” present a *necessary*, but not a *sufficient* condition. Moreover, “it is a settled ruled that a statute must, if possible, be construed in such a fashion that every word has some operative effect.”\(^7\) Nevertheless, if, as the government contended in *In re Application*, the statute were interpreted to require the court to issue a § 2703(d) order *whenever* the statutory standard was met, the § 2703(c)(1)(A) warrant provisions would be rendered “insignificant if not entirely superfluous.”\(^8\) Accordingly, “[s]ubsection 2703(c)(1)(A) strongly indicates that Congress intended warrant procedures to play a meaningful role in its legislative effort to balance ‘protection of privacy interests’ with ‘legitimate law enforcement needs.’”\(^7\) Because of the difficulty that arises in interpreting its ambiguous language, it is clear that the SCA is not the legislative solution to the third-party doctrine as it applies to the debate surrounding government access to historical cell site location information.

**B. Orwellian America**

In *Davis*, the majority adopted the Fifth Circuit’s reasoning that all cell phone users must know that they convey their general location information to their service provider when making or receiving a call.\(^8\) But whether or not this is true does not end the Fourth Amendment inquiry because the cell phone of today is nothing like the landline of yesterday. Justice Blackmun’s similar reasoning in *Smith* with regard to landline users knowing that they must convey numerical information to the phone company in placing calls\(^8\) is wholly inapplicable to *Davis*
because of the difference in the functionality of landlines and the cell phones. Cell phones, unlike landlines, travel with the user wherever he goes. Moreover, as long as the device is powered on, it constantly interacts with cell towers in order to update without any affirmative action on behalf of the user. If a person is asleep inside their home and their cell phone receives a call, has that person voluntarily exposed any information at all to the public?

The *Davis* majority advised that “Davis ha[d] no reasonable expectation of privacy in the type of non-content data collected;” therefore, the quantity of historical cell site location information was immaterial to the judgment. If that is truly the case, nothing is to stop the government from collecting years of the same data simply because it is categorized as “non-content” information. The Court distinguished historic cell location information from GPS-generated information, stating that historic cell information is not as precise. However, “[e]ach call or text message to or from a cell phone generates a location record, and at least some, if not all, of those records will reveal information precise enough to know or infer where a person is at a number of points during the day.” Moreover, as the number of cell sites rapidly increases, so too does the ability to track a person’s precise whereabouts. Historic cell site location information may be unworthy of the same treatment as GPS-generate information for Fourth Amendment purposes now, but if the aforementioned trend continues, Courts will increasingly be forced to revisit that premise.

**V. Conclusion**

In holding for the government in *Davis*, the Court reaffirmed the third-party doctrine and its place in Fourth Amendment jurisprudence. The majority held on to an antiquated, bright-line rule that oversimplifies a complex set of problems posed by technology and the realities of modern life. In her *Jones* concurrence, Justice Sotomayor warned that “GPS monitoring – by
making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track – may ‘alter the relationship between citizen and government in a way that is inimical to democratic society.’

While GPS monitoring and historic cell site location information are two different technologies, both are capable of exposing intimate details of a person’s life. For now, only one implicates the Fourth Amendment; therefore, a true legislative solution, free of ambiguity, is needed to clarify what is private and what is not when it comes to cell phone use.
1 Smith v. Maryland, 442 U.S. 735, 742 (1979) (emphasis added).

2 Id.

3 Id. at 743-44 (citing United States v. Miller, 425 U.S. 435, 442-44 (1976)).

4 Id. at 745-46.

5 Id. at 744.

6 United States v. Davis, 785 F.3d 498, 500 (11th Cir. 2015).

7 See id. at 518.

8 Id. at 507 (citing Katz v. United States, 389 U.S. 347, 353 (1967)).

9 Id. (citing see Smith v. Maryland, 442 U.S. 735, 739-40 (1979)).

10 Id. (citing United States v. Robinson, 62 F.3d 1325, 1328 (11th Cir. 1995).

11 Id. at 500.

12 United States v. Davis, 785 F.3d 498, 500 (11th Cir. 2015).


15 See id. at 440-41 (quoting California Bankers Assn. v. Shultz, 416 U.S. 21, 48-49 (1974)).

16 Id. at 442.

17 Id. at 443 (citing United States v. White, 401 U.S. 745, 751-52 (1971)).

18 Id. at 451 (Brennan, M., dissenting) (emphasis added).


Id. at 749 (Marshall, J., dissenting) (citing Lopez v. United States, 373 U.S. 427, 465-66 (1963)).


Id. at 949.

See id.

See id.

Id. at 955.

Id. at 957.


United States v. Davis, 785 F.3d 498, 500 (11th Cir. 2015).

Id.

Id. at 501.

Id. at 504.

Id. at 505.

Id.

United States v. Davis, 785 F.3d 498, 505 (11th Cir. 2015).
36 Id. at 518.

37 See id. at 512 (“The longstanding third-party doctrine plainly controls the disposition of this case.”).

38 See id. at 503 (emphasis added).

39 Id. at 504.

40 Id. at 511.

41 United States v. Davis, 785 F.3d 498, 515 (11th Cir. 2015).

42 Id. at 512.

43 Id. at 511.

44 Id.

45 In re Application of the U.S. for Historical Cell Site Data, 724 F.3d 600, 602 (5th Cir. 2013).

46 United States v. Davis, 785 F.3d 498, 511 (11th Cir. 2015).

47 Id.

48 Id.

49 See id. at 514

50 Id.

51 Id. (citing United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring)).

52 United States v. Davis, 785 F.3d 498, 515 (11th Cir. 2015).

53 Id. at 514 (“Justice Alito’s concurrence further underscores why this Court is bound by Supreme Court precedent in Smith and Miller.”).

54 Id. at 518.

55 See id. at 533.

56 See id. at 540.
57 Id.

58 United States v. Davis, 785 F.3d 498, 541 (11th Cir. 2015) (citing see also United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010)).

59 See id. at 515.

60 See id. at 541.

61 See id. at 534.

62 Id.

63 Id.

64 United States v. Davis, 785 F.3d 498, 534 (11th Cir. 2015) (citing In re Application of U.S. for an Order Directing a Provider of Elec. Commc’n Serv. to Disclose Records to the Gov’t, 620 F.3d 304, 317-18 (3rd Cir. 2010)).

65 Id. at 539.

66 Id. (citing Riley v. California, 134 S.Ct. 2473, 2490 (2014).

67 Id. at 542.

68 Id. at 544.


71 United States v. Davis, 785 F.3d 498, 501 (11th Cir. 2015).

72 18 U.S.C. § 2703(d) (emphasis added).

74 See In re Application of the U.S. for Historical Cell Site Data, 724 F.3d 600, 616-22 (5th Cir. 2013).

75 Id. at 617 (citing United States v. Sec. Indus. Bank, 459 U.S. 70, 78 (1982)).

76 See id. at 619.

77 Id. at 620 (citing Carver v. Lehman, 558 F.3d 869, 876 n. 12 (9th Cir. 2009)).

78 Id. at 625.

79 In re Application of the U.S. for Historical Cell Site Data, 724 F.3d 600, 628 (5th Cir. 2013).

80 See United States v. Davis, 785 F.3d 498, 511 (11th Cir. 2015).


83 See id.

84 United States v. Davis, 785 F.3d 498, 515 (11th Cir. 2015).

85 See id.


87 See id. at 10-11.


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