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Public Safety versus Privacy in light of Coronavirus: When Contact Tracing can become a Search under the 4th Amendment

BY ERIC DELGADO/ ON APRIL 26, 2020

There are many concerns regarding the current Coronavirus pandemic. We're concerned with our health and the health of our friends, family, and neighbors. We're concerned with the current state of the economy and the future economic outlook given the pandemic. The virus has flipped our lives upside-down. However, we are now beginning to envision ways to put our lives back in place by controlling the virus. Experts believe the best way to do this is via more testing and tracking/tracing those who have tested positive.[1] However, a strategy involving tracing of individuals may be considered a search or seizure under the 4th Amendment.

First, we need to explain a bit more about what contact tracing involves. Recently, Google and Apple announced a partnership to create an app that would alert users who have come into contact with someone who has tested positive for coronavirus.[2] The app would use Bluetooth technology to continuously emit codes to other phones in the area.[3] The codes

change every 10 to 15 minutes to protect peoples' privacy.[4] When someone tests positive for the virus, their phone sends the codes to a server, which would then notify every phone which has come into contact with that code within a given period of time.[5] For example, if X downloads the app, and 3 days ago comes into contact with Y, Y will have received a code from X's phone. If X then tests positive for COVID-19, Y will receive a notification that she has been in contact with someone who has tested positive for the virus.[6]

If a user who tests positive for COVID-19 simply opts in to providing the government with location tracking data, it would likely not run the risk of a 4th Amendment violation. However, it also may not be entirely effective. Many people would not opt in, and the virus would continue to spread through these individuals. Further, many individuals may allow Apple or Google to track the data, but not share the data with the government. One way to alleviate these concerns would be to centralize the process by government intervention. In other words, the government would mandate use of an app (using the same technology of Google or Apple) and posting of positive COVID-19 tests.[7] Additionally, the government may compel Google or Apple to disclose location information on COVID-19 positive individuals. This would allow the government to track the movements of these individuals and prevent spreading of the virus. Both of these strategies, however, can run into major 4th Amendment concerns.

The 4th Amendment protects people against "unreasonable searches and seizures."[8] Therefore, for something to violate the 4th Amendment, it must constitute a search or seizure. For something to be considered a search, it must either infringe on one's reasonable expectation of privacy[9], or constitute a trespass by the government.[10] Additionally, the search or seizure must be "unreasonable."[11]

In the case of a mandated app download, it would likely be considered a search under the *Jones* test. This is because in that scenario the government would be controlling what is on one's physical device, their phone. As such, it is a violation of their property interests, which becomes a 4th Amendment violation, per *Jones*.

The more difficult question is what happens if the government forces Apple or Google to turn over location data on individuals who have already voluntarily downloaded the app and have tested positive for COVID-19? This would not be a violation under the *Jones* test because here there has been no government trespass. However, under *Katz*, if something infringes on one's reasonable expectation of privacy, it is a search. However, one is not considered to have a reasonable expectation of privacy for information that the government obtains which he had voluntarily handed over to a 3rd party.[12] In *Carpenter v. United States*, the Supreme court held that the 3rd party doctrine did not apply to cellphone information that was "detailed, encyclopedic, and effortlessly compiled."[13] The Court opined that "the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities [while risking] Government encroachment."[14] In effect, an individual retains his reasonable

expectation of privacy over certain sensitive information (such as tracking data) even though it has been handed over to a 3rd party. *Carpenter* did not provide much detail about how its holding applies to other fact patterns, and, in fact, its holding was a "narrow one."[15] What it did do is allow courts to make independent decisions on whether previously unprotected information is now protected due to the way it was tracked or the sensitivity of the information.

Ultimately, I believe a contact tracing method utilized by the government is going to be considered a search under the 4th Amendment. The government's best bet in avoiding any constitutional concerns would be to let users opt in to any policy. However, giving such leeway to individuals may not prove effective in controlling the virus and re-opening the country safely. A challenge will likely come down to a court's analysis of the special needs doctrine. The situation lends an interesting analysis to the personal balance we all have with our privacy concerns and public safety

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[1] *See e.g.*, Denise Chow, *Escaping the coronavirus lockdown with testing and tracing*, NBC News (April 13, 2020), https://www.nbcnews.com/science/science-news/test-trace-how-u-s-could-emerge-coronavirus-lockdowns-n1182626.

[2] Mark Gurman, *Apple, Google Announce COVID-19 Smartphone Contact Tracing in Rare Partnership*, Time (April 10, 2020), https://time.com/5819235/apple-google-smartphone-tracking-coronavirus/.

[3] *See* Andy Greenberg, *Does Covid-19 Contact Tracing Pose a Privacy Risk? Your Questions, Answered*, Wired (April 17, 2020), https://www.wired.com/story/apple-google-contact-tracing-strengths-weaknesses/.

[4] *Id.*

[5] *Id.* The standards for distance and time period are governed by knowledge of the virus. *Id.* For example, as of now it is believed the virus has a possible 2-week intubation period and the infection area is around 6-feet. If these standards were to change, so would the standards for notification for the app.

[6] For a discussion of the privacy protections Google and Apple are putting in place with regard to the app, *see* Greenberg, *supra*, note 3.

[7] This also would help to eliminate false positives by forcing and allowing only positive patients to report their results.

[8] U.S. Const. Amend. IV.

[9] *Katz v. United States*, 339 U.S. 347 (1967).

[10] *United States v. Jones*, 132 S. Ct. 945 (2012). Jones re-established the "trespass" standard to 4th Amendment privacy concerns as an addition to *Katz*'s "reasonable expectation of privacy" standard.

[11] Note that this blog post only covers the search analysis of contact tracing. For a search to be a violation of the 4th Amendment, it must also be unreasonable. Normally, a search is unreasonable without a warrant. However, this analysis is subject to multiple exceptions, including one that may be relevant here – the special needs doctrine. The special needs doctrine is largely unsettled and case-specific. For a discussion of the special needs doctrine, *see* 68 Am. Jr. 2d Searches and Seizures §115.

[12] *See United States v. Miller*, 425 U.S. 435 (1976); *see also Smith v. Maryland*, 442 U.S. 735 (1979).

[13] 138 S. Ct. 2206, 2216, 201 L. d. 2d 507 (2018).

[14] *Id.* at 2223.

[15] *Id.* at 2220.