

Good afternoon Chairman Rubin and Members of the House Committee on Corrections and Juvenile Justice. Thank you for the opportunity to provide written testimony on behalf of the American Civil Liberties Union of Kansas and Western Missouri, the more than 10,000 local members, countless additional advocates and supporters.

The ACLU supports passage of HB 2034, requiring law enforcement agents to secure a warrant based upon probable cause before obtaining geolocational information through tracking devices. HB 2034 would allow legitimate investigations to proceed, while ensuring that innocent Kansans are protected from intrusions into their privacy. Passing this bill would fulfill the Legislature's duty to ensure that the safeguards provided by the Fourth Amendment to the Constitution are respected, and it would allow Kansans to preserve the privacy they have traditionally experienced, even as technology advances.

Introduction

GPS technology provide law enforcement agents with powerful and inexpensive methods of tracking individuals over an extensive period of time and an unlimited expanse of space as they traverse public and private areas. Today, individuals' movements can be subject to remote monitoring and permanent recording without any judicial oversight. As Justice Sonya Sotomayor recently wrote, "The net result is 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."¹

Current Technologies Allow for Detailed Tracking of Americans' Movements Beyond Tracking Devices

Recent technological developments make it possible to obtain geolocational information about the vast majority of Americans with great precision, in both real time and historically, regardless of whether they are tracked through their cell phones or their vehicles, or whether the police obtain GPS or cell site data.

HB 2034 seems to only apply to a tracking device that law enforcement attaches to someone's property. The definition of tracking device, found in Section 1(e)(4), includes "a device that allows for the real-time monitoring of movement" which could also include a cell phone. We would encourage this Committee to explicitly extend the protections in the bill to cell phone location data and data from location-based services.

Over the past decade, cell phones have gone from a luxury good to an essential communications device. As of December 2011, there were more than 311.6 million wireless subscriber accounts in the United States—a number greater than the total U.S. population.² While cell phones are best known as devices used to make voice calls and send text messages, they are also capable of being used as tracking devices. As a result, cell phone technology has given law enforcement an unprecedented new surveillance tool. With compelled assistance from mobile phone carriers, the government now has the technical capability to covertly track any one of the nation's hundreds of millions of cell phone owners, for 24 hours a day, for as long as it likes.

Cell phones yield several types of information about their users' past and present location and movements: cell site location data, triangulation data, and Global Positioning System (GPS) data. The most basic type of cell phone location information is "cell site" data or "cell site location information," which refer to the identity of the cell tower from which the phone is receiving the strongest signal and the sector of the tower facing the phone. This data is generated because whenever individuals have their cell phones on, the phones automatically scan for nearby cell towers that provide the best reception; approximately every seven seconds, the phones register their location information with the network.³

¹ *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J concurring).

² CTIA, Wireless Quick Facts, available at <http://www.ctia.org/advocacy/research/index.cfm/aid/10323>.

³ *In re the Application of the United States for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't*, 534 F. Supp. 2d 585, 589-90 (W.D. Pa. 2008) (Lenihan, M.J.), *rev'd on other grounds*, 620 F.3d 304 (3d Cir. 2010).

In addition to cell site information, law enforcement agents can obtain location data at a high level of accuracy by requesting cell phone providers to engage in “triangulation,” which entails collecting and analyzing data of the precise time and angle at which the cell phone’s signal arrives at multiple cell towers. Current technology can pinpoint the location of the cell phone to an accuracy of within 50 meters or less anytime the phone is on, and the accuracy will improve with newer technology.⁴

Finally, a cell phone that has GPS receiver hardware built into it can determine its precise location by receiving signals from global positioning satellites. An increasing number of phones, particularly smartphones, contain such GPS chips, and over half of mobile subscribers are now smartphone users.⁵ Current GPS technology can pinpoint location when it is outdoors, typically achieving accuracy of within 10 meters.⁶ With “assisted GPS” technology, which combines GPS and triangulation, it is possible to obtain such accurate location information even when the cell phone is inside a home or a building.

The Need For Action

In January 2012, the Supreme Court ruled in *U.S. v Jones* that the government violated the Fourth Amendment when it used a GPS device to track a suspect’s location for 28 days without a valid warrant.⁷ The actual majority ruling rests on relatively narrow grounds, but a majority of the justices (in two concurrences) recognize that the long term monitoring of each and every single movement made by a person, no matter what technology is used, impinges on an individual’s reasonable expectation of privacy. In a concurrence endorsed by four justices, Justice Alito, in fact, urges legislators to properly address location privacy issues, saying:

In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. ... A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way. ... To date, however, Congress and most States have not enacted statutes...

The Court has clearly indicated that the Fourth Amendment is implicated in location tracking and that there are countless technical and legal questions related to location tracking that lawmakers need to answer. The *Jones* decision creates an excellent opportunity for location tracking legislation, like HB 2034. We encourage this Committee to seize this opportunity and to go further and address both GPS and other types of cell phone location tracking. It is only a matter of time until the Supreme Court rules on cell phone tracking and HB 2034 is an opportunity for Kansas to lead by addressing other methods of location tracking in addition to tracking devices.

Conclusion

The need for HB 2034 is real and immediate. The ACLU agrees with Justice Alito that, in this time of rapid technological change, it is especially appropriate to regulate the use of surveillance technology by government. The warrant and probable cause requirements strike the appropriate balance, ensuring that legitimate investigations can go forward without eroding the privacy rights of innocent Kansans. We urge the Committee to support HB 2034 and report it favorably for passage.

⁴ *Hearing on Electronic Communications Privacy Act Reform and the Revolution in Location Based Technologies and Services Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. On Judiciary*, 111th Cong. (2010) (statement of Professor Matt Blaze at 5), available at <http://judiciary.house.gov/hearings/pdf/Blaze100624.pdf>; Thomas Farely & Ken Schmidt, *Cellular Telephone Basics: Basic Theory and Operation* (2006), http://www.privateline.com/mt_cellbasics/iv_basic_theory_and_operation/

⁵ Keith Flagstaff, *Nielson: Majority of Mobile Subscribers Now Smartphone Owners*, Time Techland (May 7, 2012), <http://techland.time.com/2012/05/07/nielsen-majority-of-mobile-subscribers-now-smartphone-owners/>.

⁶ Statement of Professor Matt Blaze, *supra* n.5, at 5.

⁷ Crump, Catherine. “Supreme Court GPS Ruling: Bringing the 4th Amendment into the 21st Century.” *Blog of Rights*. January 26, 2012. <http://www.aclu.org/blog/technology-and-liberty/supreme-court-gps-ruling-bringing-4th-amendment-21st-century>. (Ruling: <http://www.supremecourt.gov/opinions/11pdf/10-1259.pdf>)