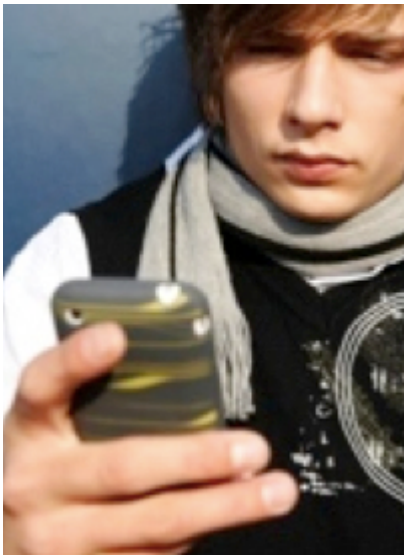
Written by **Bob Adelmann** on February 16, 2010

Cellphones, Big Brother, & Fourth Amendment



The Obama Justice Department is appealing a lower court decision that requires it to provide "probable cause" before it can track cellphone users. The DOJ wants instead to operate under a lower standard for tracking cellphone users, based on a reasonable belief that such information is "relevant to a . . . criminal investigation."

Magistrate Judge Lisa Pupo Lenihan wrote: "Where there is a reasonable expectation of privacy, intrusion on that right by the Government for investigatory purposes requires that the Government obtain a warrant by demonstrating to the Court that it has probable cause, i.e., that it make a showing of a fair probability of evidence of criminal activity."

Police have been tapping into the locations of cellphones thousands of times a year. The major cellphone providers for the nearly 277 million cellphones currently in use in the United States — e.g. Verizon Wireless, Sprint Nextel, AT&T, and T-Mobile — each has the capability of tracking the exact location of cellphones, both historically and real-time, through the use of either embedded GPS chips or network-based technology.

In 1998, a movie starring Gene Hackman and Wil Smith, *Enemy of the State*, built an eerie story line around the government's ability to track cellphone users. Hackman warned in the movie that the National Security Agency has "been in bed with the entire telecommunications industry since the '40's — they've infected everything."

Whether that is true or not, the DOJ continues to push for obtaining such information, all in the name of national security and "fighting terrorism." Warrantless tracking is permitted, according to the Justice Department, because American citizens enjoy no "reasonable expectation of privacy" in the use of their cellphones. Lawyers from the DOJ claim that "a customer's Fourth Amendment rights are not violated when the phone company reveals to the government its [the company's] own records," which show where a cellphone was when calls were being made or received.

Claims of criminal activity are often used to "justify" pushing further into the privacy of citizens. For instance, the perpetrators of a dozen bank robberies in Dallas were finally brought to justice when it was discovered that cellphone calls were made around the time that each robbery was taking place. Convictions were obtained of two cellphone owners, who were sentenced to long jail terms.

John Yoo, a former official in the Department of Justice under President George Bush, wrote a brief article for the American Enterprise Institute defending the Justice Department's lower standards to obtain this cellphone location information. He uses the "terror" smokescreen as justification. He claimed that probable cause warrants are "old-fashioned" and delay the investigations of terror suspects. He argued: "Such methods did not prevent 9/11, and stopping terrorists, who may have no

criminal record, requires something more."

But would the denial of probable cause warrants, in violation of an apparently old-fashioned Fourth Amendment, have prevented 9/11? Is Yoo actually arguing that terrorism can only be prevented by surrendering basic rights? While a Justice Department lawyer, Yoo defended the Bush Administration's war on terrorism including the use of torture (despite the Eighth Amendment protection against "cruel and unusual punishments") and the warrantless wiretapping (despite the Fourth Amendment protection against "unreasonable searches and seizures").

A number of privacy and civil-liberties groups that obviously disagree with Yoo are weighing in on the cellphone case being appealed to the U.S. Third Court of Appeals in Philadelphia. Kevin Bankston, attorney for the Electronic Frontier Foundation (EFF), was quoted by CNET saying: "This is a critical question of privacy in the 21st century. If the courts [overrule Lenihan and] side with the government, that means that everywhere we go, in the real world and online, will be an open book to the government [and we will be] unprotected by the Fourth Amendment." Bankston also stated:

> The biggest issue at stake is whether or not courts are going to accept the government's minimal view of what is protected by the Fourth Amendment. The government is arguing that based on precedents from the 1970s, any record held by a third party about us, no matter how invasively collected, is not protected by the Fourth Amendment.

Writing on this for the Cato Institute, Jim Harper warned his readers:

> Cellular telephone networks pinpoint customers' locations throughout the day through the movement of their phones. Internet service providers maintain copies of huge swaths of the information that crosses their networks, tied to customer identifiers. Search engines maintain logs of searches that can be correlated to specific computers and usually the individuals that use them.…
>
> The totality of these records are very, very revealing of people's lives. They are a window onto each individual's spiritual nature, feelings, and intellect. They reflect each American's beliefs, thoughts, emotions, and sensations. They ought to be protected, as they are the modern iteration of our "papers and effects."

Magistrate Lenihan, in her "Opinion and Memorandum Order" that is being challenged in Philadelphia, made clear exactly what is at stake: "The Government's *ex parte* applications for cellular telephone ('cell phone') subscriber information from which it may identify an individual's past or present physical/geographic movements/location [is] not on a showing of probable cause … as [required] under the Fourth Amendment, but rather on an articulable, reasonable belief that such information is 'relevant to a…criminal investigation.'" She noted further that the "location information [that is] so broadly sought [by the government] is extraordinarily personal and potentially sensitive," and could "render these requests particularly vulnerable to abuse."

Therefore, she concludes:

> Because … the government does not have a statutory entitlement to an electronic communication service provider's covert disclosure of cell-phone-derived movement/location information, the Government's application(s) for such information, absent a showing of probable cause, must be denied.

Her conclusion is in accord with the Fourth Amendment to the Constitution: "The right of the people to

be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."