Written by **Joe Wolverton, II, J.D.** on June 15, 2014

# Federal Appeals Court Strikes Down Warrantless Cellphone Tracking

A federal court ruled for the first time that cell phone location data enjoys the same reasonable expectation of privacy under the Fourth Amendment as other information already included under that provision of the Bill of Rights.

On June 11 the 11th Circuit Court of Appeals held in the case of *U.S. v. Davis* that although the defendant, Quartavious Davis, will still be subject to nearly the entire 162-year sentence imposed by a lower court, the evidence against him that was obtained from a warrantless search of his cellphone location data was invalid as it violated the rights guaranteed by the Fourth Amendment.

"In short, we hold that cell site location information is within the subscriber's reasonable expectation of privacy. The obtaining of that data without a warrant is a Fourth Amendment violation," the decision reads.

The information obtained by law enforcement from the cellular service provider includes a record of the calls made by the customer, the location of the cell tower that carried the call to or from the customer, and the direction of the customer's location from the nearest cell tower.



Unlike decisions handed down in similar cases of warrantless cellphone tracking, the judges in this case reasoned that as "Davis has not voluntarily disclosed his cell site location information to the provider" that information was shielded from unwarranted seizure by the Fourth Amendment.

"Voluntary" is a key word in the 11th Circuit's decision. In the case of *Smith v. Maryland*, the Supreme Court held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."

The high court in that case ruled that if someone is talking to another person by way of a medium provided by a third-party (in the Smith case it was a telephone company), both parties must expect that the "intermediary" will have access to the content of the communication.

Regarding the telephone company, the court explained that when a person uses a telephone, he "voluntarily convey[s] numerical information to the telephone company and 'expose[s]' that information to its equipment in the ordinary course of business."

The 11th Circuit did not agree. Quoting a prior ruling by the Third Circuit, the court in Davis held:

> "When a cell phone user makes a call, the only information that is voluntarily and knowingly conveyed to the phone company is the number that is dialed, and there is no indication to the user

> that making that call will also locate the caller." Even more persuasively, "when a cell phone user receives a call, he hasn't voluntarily exposed anything at all."

Furthermore, the 11th Circuit's ruling pointed out that the data seized by law enforcement — particularly the location data — was very personal in nature and thus protected by the Fourth Amendment. Not only could this information reveal whether the defendant was near the location of a crime, but it could also reveal other, obviously protected location data, including whether the defendant is "near the home of a lover, or a dispensary of medication, or a place of worship, or a house of ill repute."

The circuit court held that numerous earlier decisions established the rule that "it is a 'basic principle of Fourth Amendment law' that searches and seizures without a warrant 'are presumptively unreasonable.'"

In Davis' case, the information obtained from the telecommunications provider was not covered in a warrant, which would have required the police demonstrate "probable cause," but in a court order that requires the much lower "reasonable grounds to believe" standard. The court found this end run around the Fourth Amendment to be unconstitutional.

Putting a fine point on the issue, the court held that "it cannot be denied that the Fourth Amendment protection against unreasonable searches and seizures shields the people from the warrantless interception of electronic data or sound waves carrying communications."

Apart from its effect on the actions of law enforcement, the Davis case impacts the National Security Agency's (NSA) collection of so-called cellphone "metadata," as well.

In an article covering the Davis decision, *Wired* reports, "The Davis decision, in effect, suggests that the U.S. government's collection of all kinds of business records and transactional data — commonly called 'metadata' — for law enforcement and national security purposes may also be unconstitutional."

By now everyone knows that the tracking of such data by the government is rampant. Based on reports of the number of domestic phone calls being recorded by the NSA, the Obama administration must have probable cause to suspect millions of us of threatening national security.

As *The New American* reported last year, documents obtained by former NSA contractor-turned-whistleblower Edward Snowden reveal that, in a 30-day period in 2013, the NSA recorded data on 124.8 billion phone calls, about three billion of which originated within the United States.

The program, first reported by *The Guardian*, is appropriately code-named "Boundless Informant," and it involves the monitoring and recording of phone calls and Internet communication. *The Guardian* revealed that Boundless Informant "allows users to select a country on a map and view the meta data volume and select details about the collections against that country."

While it is unlikely that the actual conversations themselves were recorded by the NSA, the fact that any information on a phone call was recorded without conforming to the Constitution is alarming. Regardless of the volume of recordings or the amount or type of data stored, a single act of warrantless surveillance violates the Constitution, and everyone who ordered or participated in the program should be held accountable.

Among the most disturbing disclosures found within the reams of Edward Snowden's revelations was the surrender by major telecommunications companies of the otherwise private phone records of millions of Americans — none of whom was, as required by the Constitution, suspected of committing

any sort of crime.

According to a court order labeled "TOP SECRET," federal judge Roger Vinson ordered Verizon to turn over the phone records of millions of its U.S. customers to the NSA.

The order, issued in April 2013 by the U.S. Foreign Intelligence Surveillance Court and leaked on the Internet by *The Guardian*, compels Verizon to provide these records on an "ongoing daily basis" and to hand over to the domestic spy agency "an electronic copy" of "all call detail records created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls."

This information includes the phone numbers involved, the electronic identity of the device, the calling card numbers (if any) used in making the calls, and the time and duration of the call.

Last December, the *Washington Post* reported that the NSA is "gathering nearly 5 billion records a day on the whereabouts of cellphones around the world." The article also reveals that "data are often collected from the tens of millions of Americans who travel abroad with their cellphones every year."

In other words, millions of innocent Americans have had their cellphone call records shared with a federal spy agency in open and hostile defiance of the Fourth Amendment's guarantee of the right of the people to be free from such unreasonable searches and seizures.

Even if the reasonableness threshold is crossed, though, there must be a warrant and suspicion of commission of or intent to commit a crime. Neither the NSA nor Verizon has asserted that even one of the millions whose phone records were seized fits that description.

While the 11th Circuit's decision in the Davis case does not directly cover the NSA's wholesale, dragnet collection of metadata, it could be a huge victory for the Bill of Rights if an appellate level federal court finds its reasoning persuasive when a case directly dealing with the NSA's seizure of records comes before it.

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