Important New Opinion on Cell Phone Tracking

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On Tuesday, the Eleventh Circuit ruled, en banc, that law enforcement may obtain historical cell site location information without a search warrant, using a court order based on less than probable cause. There's a controversy over what legal standard should govern law enforcement access to location information, and the Eleventh Circuit's ruling is likely to be influential in the debate. This post explains the issue and puts the new decision in context.

The traditional analysis. The traditional view of cell site location information has been (1) that the subscriber has no privacy interest in it, because it is voluntarily shared with the service provider in the course of using cell phone service; (2) that law enforcement access to such information is therefore regulated principally by the Stored Communications Act, 18 U.S.C. 2701 et seq., rather than the Fourth Amendment; and (3) that because location data are non-content records, they are available under the SCA through a court order based on a showing of specific and articulable facts providing reasonable grounds to believe that the data are relevant and material to a criminal investigation. *See* 18 U.S.C. § 2703(c)-(d).

The argument for Fourth Amendment protection. Defendants have sometimes argued that location information is inherently private in a way that other business records are not, and so should be protected by the Fourth Amendment. This view gained some momentum after the Supreme Court's ruling in *United States v. Jones*, 565 U.S. __, 132 S. Ct. 945 (2012), regarding GPS tracking. Although the holding in *Jones* focused on the trespassory installation of tracking devices, several Justices suggested that at least long-term GPS tracking itself would constitute an intrusion on a reasonable expectation of privacy and so would implicate the Fourth Amendment. Defendants have sometimes contended that if there is a right of locational privacy as suggested in *Jones*, whether that right is compromised through GPS tracking or through cell site location information is immaterial, and a search warrant based on probable cause is necessary to do either one.

The split of authority. Starting on page 104 of my book about digital evidence, I summarize some of the leading cases in this area. They don't all agree. A majority of courts have accepted the traditional business records analysis, but a few have ruled that the Fourth Amendment applies to cell site location information.

The *Davis* panel opinion. Among the most important of the decisions comprising the minority view was *United States v. Davis*, 754 F.3d 1205 (11th Cir. 2014). In that case, the government obtained the defendant's cell site location information pursuant to a "reasonable grounds to believe" court order, then used the data to tie him to seven armed robberies. On appeal, the defendant contended that the government's failure to use a search warrant violated the Fourth Amendment. A divided panel of the Eleventh Circuit, relying heavily on *Jones*, agreed. It ruled that "the government's warrantless gathering of [the defendant's] cell site location information violated his reasonable expectation of privacy," and rejected the idea that a cell phone subscriber knowingly discloses his or her location to the service provider by obtaining and carrying a cell phone. However, the court ruled that the officers acted in good faith in obtaining the defendant's cell site location information, and so declined to suppress the evidence.

The *Davis* en banc opinion. The government sought rehearing en banc, and the entire Eleventh Circuit reversed the panel on this issue. Framing the case as one about "government access to the existing and legitimate business

records already created and maintained by a third-party telephone company," the majority viewed the case as a straightforward application of the third-party doctrine of *Smith v. Maryland*, 442 U.S. 735 (1979) (finding no expectation of privacy in the numbers dialed on a telephone, as those numbers are voluntarily conveyed to the phone company). The court specifically opined that "cell users know that they must transmit signals to cell towers . . . [and so] 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."

An emerging consensus? The Fifth Circuit has ruled in the same way. *See, e.g., United States v. Guerrero*, 768 F.3d 351 (5th Cir. 2014). The Sixth Circuit has ruled that real-time tracking using GPS data from a suspect's cell phone does not implicate the Fourth Amendment, at least where the tracking lasts only a few days. *United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012). And the Third Circuit has issued a somewhat confusing opinion concluding that historical location information generally may be obtained without a search warrant but that a court could require a warrant under some circumstances. *In re Application of the United States*, 620 F.3d 304 (2010). No federal court of appeals, other than the *Davis* panel, has ruled that cell site location information is generally protected by the Fourth Amendment.

Advice to officers. My advice to officers has been to use a search warrant to obtain cell site location information, because it is better to err on the side of caution. That continues to be my advice, even after *Davis.* Although the federal courts may be moving towards a consensus, they aren't there yet, and some state courts have reached contrary conclusions. Furthermore, even when the lower courts generally agree on an issue, the Supreme Court is free to upset the apple cart, as it did, for example, in *Arizona v. Gant*, 556 U.S. 332 (2009) (ruling that a vehicle may not automatically be searched incident to the arrest of a recent occupant, despite nearly uniform lower court precedent to the contrary). It's clear that the defendant in *Davis* will petition the Supreme Court for review, and there are other cases raising this issue on the Court's doorstep as well. Bottom line, this is still an issue on which reasonable minds can differ, so I continue to believe that the safest course is to use a search warrant.

Further reading. Orin Kerr has thoughts on *Davis* here. The en banc opinion itself is here.