Warrantless Cellphone Tracking Is Upheld

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In a significant victory for law enforcement, a federal appeals court on Tuesday said that government authorities could extract historical location data directly from telecommunications carriers without a search warrant.

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The ruling is the first that squarely addresses the constitutionality of warrantless searches of the historical location data stored by cellphone service providers.

The closely watched case, in the United States Court of Appeals for the Fifth Circuit, is the first ruling that squarely addresses the constitutionality of warrantless searches of historical location data stored by cellphone service providers. Ruling 2 to 1, the court said a warrantless search was "not per se unconstitutional" because location data was "clearly a business record" and therefore not protected by the Fourth Amendment.

DOCUMENT: Appeals Court Ruling on Using Historic Cell Data

The ruling is likely to intensify legislative efforts, already bubbling in Congress and in the states, to consider measures to require warrants based on probable cause to obtain cellphone location data.

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The appeals court ruling sharply contrasts with a New Jersey State Supreme Court opinion in mid-July that said the police required a warrant to track a suspect's whereabouts in real time. That decision relied on the New Jersey Constitution, whereas the ruling Tuesday in the Fifth Circuit was made on the basis of the federal Constitution.

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The Supreme Court has yet to weigh in on whether cellphone location data is protected by the Constitution. The case, which was initially brought in Texas, is nc expected to go to the Supreme Court because it is "e parte," or filed by only one party — in this case, the government.

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But the case could renew calls for the highest court to look at the issue, if another federal court rules differently on the same question. And two other federal cases involving this issue are pending.

"The opinion is clear that the government can access cell site records without Fourth Amendment oversight," said Orin Kerr, a constitutional law scholar at George Washington University Law School who filed an amicus brief in the case.

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For now, the ruling sets an important precedent: It allows law enforcement officials in the Fifth Circuit to chronicle the whereabouts of an American with a court order that falls short of a search warrant based on probable cause.

“This decision is a big deal,” said Catherine Crump, a lawyer with the American Civil Liberties Union. “It’s a big deal and a big blow to Americans’ privacy rights.”

The group reviewed records from more than 200 local police departments last year, concluding that the demand for cellphone location data had led some cellphone companies to develop “surveillance fees” to enable police to track suspects.

In reaching its decision on Tuesday, the federal appeals court went on to agree with the government’s contention that consumers knowingly give up their location information to the telecommunications carrier every time they make a call or send a text message on their cellphones.

“That means it is not protected by Fourth Amendment when the government goes to a third-party service provider and issues something that is not a warrant to demand production of those records,” said Mark Eckenwiler, a former Justice Department lawyer who worked on the case and is now with the Washington law firm Perkins Coie. “On this kind of historical cell site information, this is the first one to address the core constitutional question.”

Historical location data is crucial to law enforcement officials. Mr. Eckenwiler offered the example of drug investigations: A cellphone carrier can establish where a suspect met his supplier and how often he returned to a particular location. Likewise, location data can be vital in establishing people’s habits and preferences, including whether they worship at a church or mosque or whether they are present at a political protest, which is why, civil liberties advocates say, it should be accorded the highest privileges of privacy protection.

The decision could also bear implications for other government efforts to collect vast amounts of so-called metadata, under the argument that it constitutes “business records,” as in the National Security Agency’s collection of Verizon phone records for millions of Americans.

“It provides support for the government’s view that that procedure is constitutional, obtaining Verizon call records, because it holds that records are business records,” said Mr. Kerr, of George Washington University. “It doesn’t make it a slam dunk but it makes a good case for the government to argue that position.”

An important element in Tuesday’s ruling is the court’s presumption of what consumers should know about the way cellphone technology works. “A cell service subscriber, like a telephone user, understands that his cellphone must send a signal to a nearby cell tower in order to wirelessly connect his call,” the court ruled, going on to note that “contractual terms of service and providers’ privacy policies expressly state that a provider uses a subscriber’s location information to route his cellphone calls.”

In any event, the court added, the use of cellphones “is entirely voluntary.”

The ruling also gave a nod to the way in which fast-moving technological advances have challenged age-old laws on privacy. Consumers today may want privacy over location records, the court acknowledged: “But the recourse for these desires is in the market or the political process: in demanding that service providers do away with such records (or anonymize them) or in lobbying elected representatives to enact statutory protections.”

Cellphone privacy measures have been proposed in the Senate and House that would require law enforcement agents to obtain search warrants before prying open location records. Montana recently became the first state to require a warrant for location data. Maine soon followed. California passed a similar measure last year but Gov. Jerry Brown, a Democrat, vetoed it, saying it did not strike what he called the right balance between the demands of civil libertarians and the police.

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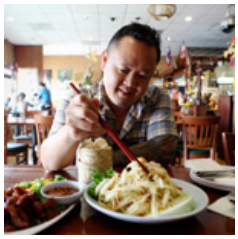

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