Montana Tells Police: No Location Tracking Without a Warrant

by Ross Slutsky
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Throughout the country, elected officials are working to update 4th Amendment protections to reflect the technological demands of the twenty first century.

Montana recently became the first state to enact a comprehensive law [1] requiring law enforcement officials to obtain a search warrant before obtaining location information generated by the operation of electronic devices such as cellular telephones. The bill requires a warrant regardless of whether the location information is generated by GPS or by proximity to one or more cellular towers. It appears to require warrants for such location information no matter how it is obtained. Thus, the bill would require a warrant for, among other things: (i) prospective location tracking; (ii) disclosure from storage of cell site location information by a provider of cellular phone service; (iii) disclosure of location information stored on a mobile device itself (i.e., no warrantless search of a cell phone for location information, including in any search incident to arrest); (iv) location tracking through the use of a cell site simulator such as Triggerfish [2]; and (v) social networking check-in information. Montana Governor Steve Bullock signed the law, which passed in the legislature by a resoundingly wide margin.

Montana should be commended for its proactive efforts to protect the privacy of its citizens. Location data can reveal a significant amount of information that individuals are not consciously choosing to make known to others. As Justice Sotomayor acknowledged in her concurrence in the GPS tracking case *United States v. Jones* [3], location information sometimes includes indisputably private information such as “trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.” Cell phone location information significantly decreases the costs of location tracking for law enforcement, but these new capacities in no way lessen the privacy rights of people in the U.S.

Hopefully other states will follow Montana’s lead. The Maine legislature recently passed a similar measure [4] that would require government entities to obtain a warrant for location information but the bill is making a return trip through the legislature due to issues pertaining to appropriations.

These state level measures are a good start, but much work remains to be done at the federal level. A number of bills have been introduced in Congress to require warrants for location tracking. In the House, Reps. Zoe Lofgren (D-CA), Ted Poe (R-TX), and Suzan DelBene (D-WA) introduced the Online Communications and Geolocation Protection Act [5], which would require the government to obtain a warrant to intercept or force service providers to disclose geolocation data.

In the House and Senate, Representative Jason Chaffetz (R-UT) and Senators Ron Wyden (D-OR) and Mark Kirk (R-IL) have introduced companion legislation known as the Geolocation Privacy and Surveillance Act [6]. This bill similarly aims to extend warrant protection to geolocation information, and would also require consumer consent for commercial use of location information generated by the operation of a mobile computing device.

Both bills enjoy bipartisan support and either would be a welcome improvement over the current legal framework, which does not afford geolocation data with clear protections.

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