



**Testimony for the House Judiciary Committee
February 26, 2013**

HB 887– Criminal Procedure – Search Warrants – Location Privacy

SUPPORT

AMERICAN CIVIL
LIBERTIES UNION
OF MARYLAND

MAIN OFFICE
& MAILING ADDRESS
3600 CLIPPER MILL ROAD
SUITE 350
BALTIMORE, MD 21211
T/410-889-8555
or 240-274-5295
F/410-366-7838

FIELD OFFICE
6930 CARROLL AVENUE
SUITE 610
TAKOMA PARK, MD 20912
T/240-274-5295

WWW.ACLU-MD.ORG

OFFICERS AND
DIRECTORS
ALLI HARPER
PRESIDENT

SUSAN GOERING
EXECUTIVE DIRECTOR

C. CHRISTOPHER BROWN
GENERAL COUNSEL

The American Civil Liberties Union of Maryland supports HB 887. This bill would enable law enforcement to obtain cell phone tracking information upon obtaining a search warrant based upon probable cause. It balances individuals' privacy in the vast amount of personal information that is contained in location tracking information with enabling law enforcement to obtain this information in criminal investigations or emergency situations.

Privacy Implications

A cell phone that is on gives off a signal several times a minute (“pinging”). That signal reaches the closest cell towers, from which the phone receives its cellular capability. In urban areas there are many cell towers, or cell sites. Because people carry their cell phone with them at all times, and because that cell phone is constantly transmitting its location information, cell phone location information gives a very detailed picture of a person's behavior. It can show whether you are in the hospital, in a bedroom, what stores or coffee shops you are visiting. As DC Circuit Judge Ginsburg wrote, one's location might reveal

“whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups – and not just one such fact about a person, but all such facts.”¹

Without the proper standard, the implications for privacy and opportunities for abuse are significant. This is an issue that brings together diverse coalitions, as is evidenced by the attached information from Digital Due Process, an organization that supports the warrant standard and has members such as the ACLU, ALEC, Apple, AOL, AT&T, Ebay, Google and IBM, to name a few.

Legal Standards

The legal standard for when law enforcement may obtain cell phone tracking information is not settled. A recent Supreme Court case, *United States v. Jones*, 132 S.Ct. 945 (2012), indicates the Court, when presented with the question, likely would require a warrant to obtain cell phone location tracking. In *Jones*, the Court held that the government conducts a search under the Fourth Amendment, and thus must obtain a warrant first, when it attaches a GPS device

¹ *U.S. v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010)

to a car and tracks its movements. Though the case was decided on relatively narrow grounds, a majority of justices, in two concurrences, recognized that the long term monitoring of each and every single movement made by a person, no matter what technology is used, impinges on an individual's reasonable expectation of privacy.²

Unlike a GPS tracker on a car, which tracks the driver only when he/she drives, pinging tracks the cell phone wherever it goes, regardless of whether the holder is using it. Thus it would seem that after *Jones* courts would require a search warrant based upon probable cause before the government can obtain someone's cell phone tracking information. However, this is not the case. Lower courts have addressed (and continue to address³) cell phone pinging and are coming to different conclusions. Some have held that this is a Fourth Amendment search subject to a warrant⁴; others have held that under the Federal Electronic Communications Privacy Act (written in 1986 prior to the explosion of cell phone use and technology) the standard is lower.⁵ In fact, many of the courts have explicitly called on legislatures to clarify this issue. It is up to the state legislatures to lead the way and protect privacy while balancing the needs of law enforcement.

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What HB 887 does

HB 877 would require law enforcement to obtain a search warrant based upon probable cause prior to obtaining someone's cell phone location tracking information.⁶ Furthermore, it provides an exception to the warrant requirement in several circumstances: in order to respond to the user's call for emergency services; with the express consent of the owner or user of the electronic communication device; or if the agent believes that an emergency involving immediate danger of death or serious physical injury requires obtaining the location information without delay. In addition, HB 887 allows law enforcement to postpone notice to the 'searchee' – one of the concerns they raised at the hearing on February 5, 2013 for HB 377.

Law Enforcement Should Get A Warrant – And Many Do

² Earlier Supreme Court cases also lend credence to the view that a search warrant based upon probable cause would be required for cell phone tracking. *See Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)(Court held that "the Fourth Amendment protects people, not places," and found a violation in attachment of an eavesdropping device to a public telephone booth); *see, also* *See, e.g., Bond v. United States*, 529 U.S. 334, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000); *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

³ Cases are pending before the Court of Appeals for the Fifth Circuit and the New Jersey Supreme Court.

⁴ *See e.g., United States v. Maynard*, 615 F.S3d 544 (D.C. Cir. 2010); *In re 2012 Tex. Application*, 2102 WL 4717778 (S.D. Tex. 2012); *In re 2010 S.D. Tex. Application*, 747 F. Supp.2d 827 (S.D. Tex. 2010); *In re 2010 E.D.N.Y Application*, 736 F.Supp.2d 578 (E.D.N.Y. 2010).

⁵ *See e.g., United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012); *In re: MD Application*, 402 F.Supp.2d 597 (D.Md. 2005).

⁶ Under Maryland law, law enforcement may obtain a search warrant upon a showing that there is probable cause to believe that a criminal offense is being committed by the person or at the place for which the warrant is sought. Md. Crim. Pro. § 1-203.

A number of enforcement agencies across the country, in states as diverse as California, Colorado, Hawaii, Kansas, Kentucky, Nevada, New Jersey, North Carolina, and Wisconsin, obtain probable cause warrants in order to access cell phone location information. These law enforcement agencies are able to protect public safety and privacy by meeting the warrant and probable cause requirement, and so can Maryland.

For these reasons, we support HB 887.

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