

US senator proposes mobile-privacy legislation

By Declan McCullagh, CNET News on January 27, 2011 (4 days 8 minutes ago)

U.S. federal law needs to be updated to halt the common police practice of tracking the whereabouts of Americans' mobile devices without a search warrant, a Democratic senator said Wednesday.

Ron Wyden, an Oregon Democrat, said it was time for Congress to put an end to this privacy-intrusive practice, which the U.S. Justice Department under the Barack Obama administration has sought to defend in court.

In a luncheon speech at the libertarian Cato Institute in Washington, D.C., Wyden said his staff was drafting legislation to restore "the balance necessary to protect individual rights" by requiring police to obtain a search warrant signed by a judge before obtaining location information.

Even though police are tapping into the locations of mobile phones thousands of times a year, the legal ground rules remain hazy, and courts have been divided on the constitutionality and legality of the controversial practice. In September, the first federal appeals court to rule on the legality indicated that no search warrant was needed, but sent the case back to a district judge for further proceedings.

Because the two-way radios in mobile phones are constantly in contact with cellular towers, service providers like AT&T and Verizon know--and can provide to police if required--at least the rough location of each device that connects to their mobile wireless network. If the phone is talking to multiple towers, triangulation yields a rough location fix. And, of course, the location of GPS-enabled phones can be determined with near-pinpoint accuracy.

Wyden said this kind of eerily accurate remote surveillance is akin to searching a person's home, which requires probable cause and a search warrant signed by a judge. "You just can't argue logically to me...that secretly tracking a person's movements 24/7 is not a significant intrusion into their privacy," he said.

The forthcoming legislation, he said, is being drafted with Rep. Jason Chaffetz (R-Utah), and will apply to "all acquisitions of geolocation information," including GPS tracking devices that police are generally allowed to place on cars without warrants under current law.

It will address both law enforcement and intelligence investigations, including saying that Americans who are overseas continue to enjoy the same location-privacy rights, a nod to the debate a few years ago over rewriting federal wiretapping law. It will also extend the same privacy protections to both "real-time monitoring and acquisition of past movements."

Not long ago, the concept of tracking cell phones would have been the stuff of spy movies. In 1998's "Enemy of the State," Gene Hackman warned that the National Security Agency has "been in bed with the entire telecommunications industry since the '40s--they've infected everything". After a decade of appearances in "24" and "Live Free or Die Hard", location-tracking has become such a trope that it was satirized in a scene with Seth Rogen from "Pineapple Express" (2008).

In 2005, CNET disclosed that police were engaging in warrantless tracking of cell phones. In a subsequent Arizona case, agents from the Drug Enforcement Administration tracked a tractor trailer with a drug shipment through a GPS-equipped Nextel phone owned by the suspect. Texas DEA agents have used cell site information in real time to locate a Chrysler 300M driving from Rio Grande City to a ranch about 50 miles away. Verizon Wireless and T-Mobile logs showing the location of mobile phones at the time of calls became evidence in a Los Angeles murder trial.

Verizon Wireless, for instance, keeps phone records including cell site location for 12 months, a company official said at a federal task force meeting in Washington, D.C., last year. Phone bills without cell site location are kept for seven years, and SMS text messages are stored for only a very brief time. (A representative of the International Association of Chiefs of Police said yesterday that Verizon keeps incoming SMS messages for "only three to five days".)

Wyden's push to advance Fourth Amendment-like privacy protections through legislation is likely to be met with applause among technology firms. Last March, as CNET was the first to report, a group called the Digital Due Process coalition including Facebook, Google, Microsoft, Loopt, and AT&T as members endorsed the principle of location privacy. (Loopt says it already requires a search warrant before divulging location information.)

One of the coalition's principles says: "A governmental entity may access, or may require a covered entity to provide, prospectively or retrospectively, location information regarding a mobile communications device only with a warrant issued based on a showing of probable cause."

The Obama Justice Department, on the other hand, has argued that warrantless tracking is permitted because Americans enjoy no "reasonable expectation of privacy" in their--or at least their cell phones'--whereabouts. U.S. Department of Justice lawyers have argued in court documents that "a customer's Fourth Amendment rights are not violated when the phone company reveals to the government its own records" that show where a mobile device placed and received calls.