Federal court OKs warrantless collection of cellphone data

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The US 5th Circuit Court of Appeals ruled 2-1 Tuesday that law enforcement agencies may collect "historical location data" from telecommunications companies without acquiring a warrant. Historical location data enables law enforcement to track a cellphone user's movements across the map, in real time if necessary.

The ruling included broad authorization of warrantless government spying on data collected by telecommunications providers. It effectively overturned a 2011 ruling by US District Judge Lynn Hughes that cellphone records were protected under the Fourth Amendment.

The 5th Circuit Court of Appeals ruled that data taken by cellphone providers was "clearly a business record," and therefore not protected by the Fourth Amendment. The ruling argued that the data is not protected under the Constitution because it is held by private telecommunications companies, and only later taken by the government. The government can issue an order based on "specific and articulable facts" to gain access to these massive data pools stored by the companies, without requiring a warrant.

The cellphone companies can store the location data because they are private companies, the ruling argued: "The cell service provider collects and stores historical cell site data for its own business purposes, perhaps to monitor or optimize service on its network or to accurately bill its customers for the segments of its network that they use. The Government does not require service providers to record this information or store it. The providers control what they record and how long these records are retained."

Following this logic, any data created by users and companies in the course of business is eligible for warrantless snooping, and is not covered by Fourth Amendment protections. As the court wrote:

"Because a cellphone user makes a choice to get a phone, to select a particular service provider, and to make a call, and because he knows that the call conveys cell site information, the provider retains this information, and the provider will turn it over to the police if they have a court order, he voluntarily conveys his cell site data each time he makes a call."

The ruling further argued that carrying a cellphone is "entirely voluntary," and that users understand they are transmitting information, hence they have no right to expect that information to remain private: "the government does not require a member of the public to own or carry a phone… 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."

Agreeing with the government, the court held that by making a call or sending a text message, consumers are consciously giving up their location. Effectively, the ruling holds that by choosing to use a cellphone, or any other data producing service for that matter, one forfeits any right to privacy.

Acknowledging the existence of concerns over privacy, the court stated that "the recourse for these desires is in the market or the political process: in demanding the service providers do away with such records (or anonymize them) or in lobbying elected representatives to enact statutory protections."

In other words, to safeguard their cellphone data Americans have no recourse but to appeal to the telecommunications companies or to Congress. This is a blind alley if there ever was one, since both the corporations and congressional leaders work closely with the intelligence apparatus. By deferring to "the market" and "the political process" the court is

effectively sanctioning the warrantless surveillance.

Legal experts are pointing to the reactionary character of the ruling, which deals a heavy blow to Fourth Amendment protections.

"The government should not be able to access this personal, sensitive information without getting a warrant based on probable cause. Unfortunately, the Fifth Circuit's decision allows exactly that," said Catherine Crump, a staff attorney with the American Civil Liberties Union.

"This decision is a big deal," said Crump. "It's a big deal and a big blow to Americans' privacy rights."

"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.

The 5th Circuit ruling comes in opposition to developments in other states. Maine enacted a law this week requiring law enforcement to get a warrant to collect location data. A ruling protecting cellphone data from government surveillance was made earlier this month by the New Jersey Supreme Court. Chief Justice Stuart Rabner wrote in a unanimous decision of the New Jersey Supreme Court, "People buy cellphones to communicate with others, to use the internet, and for a growing number of other reasons," adding, "But no one buys a cellphone to share detailed information about their whereabouts with the police."