1851 CENTER FOR CONSTITUTIONAL LAW
Interest Party Testimony on Senate Bill 5

June 18, 2013

Ohio House of Representatives
Transportation Public Safety and Homeland Security Committee

Mr. Chairman and Members of the Committee:

Given the purpose, spirit, and black letter of the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution, alongside the profound national debate currently underway regarding the rights of citizens to be free from intrusive government surveillance (not to mention due process concerns and contract rights), it would be a mistake to enact Senate Bill 5 as currently drafted: The Bill (1) incentivizes cell phone carriers to break their contracts with their customers, in violation of the Ohio Constitution; (2) strips Ohioans of their legal rights to remedy this; and (3) subtly and quietly vests low-level local police with unlimited discretion to engage in warrantless searches of all Ohioans' cell phone communications and activity.

The Impermissible Defects of Senate Bill 5

Senate Bill 5 is defective in two key respects. First, the Bill proposes to enact R.C. 2921.231(B), which states "On request, a wireless service provider shall provide device location information to a law enforcement officer or agency concerning a user of a wireless service device in the following circumstances: 1. in an emergency situation * * *."

Further, and more disturbingly, R.C. 2921.231(C) and (D) provide "a wireless service provider may establish protocols for the voluntary disclosure of device location information," and where it does so, "no cause of action shall arise in any court of this state against a wireless service provider * * * for providing any information * * * to a law enforcement officer." This is where the Bill's more subtle, yet greatest, defect lies: the Bill authorizes wireless service providers to break their voluntarily-agreed-to contracts with Ohio customers, and strips Ohioans of their contractual rights. While this enhances carrier's profit margins, it also authorizes dangerous warrantless surveillance on Ohioans in *non-emergency* situations.

Proposed R.C. 2921.231(C) and (D) violate the Ohio Constitution's Contracts Clause.

Ohio's Contracts Clause is directly applicable, and *more* protective of contractual rights and obligations than that of the federal constitution.

Section 28, Article II of the Ohio Constitution states, in pertinent part, as follows: "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts * * *."

The prohibition against laws that "impair the obligations of contracts" is deeply rooted in Ohio history, extending all of the way back to the Northwest Ordinance.[1] Since at least 1875, the Ohio Supreme Court has stressed that, pursuant to this clause, "any change in the law which impairs the rights of either party, or amounts to a denial or obstruction of the rights accruing by contract, is repugnant to the Constitution."[2]

In particular, Ohio Courts have always held that "Section 28, Article II, of the Ohio Constitution prohibits laws impairing *existing* contractual obligations."[3] In the 1998 case of *Ross v. Farmer's Insurance Group*, the Ohio Supreme Court outlined the strict limitations on the legislature's capacity to pass legislation that alters existing contracts.[4] And in *Kiser v. Coleman*, the Court concluded that "*the retroactive application of R.C. 5313.07 and 5313.08 to land installment contracts which were in existence at the time of the enactment of these statutes is violative of Section 28, Article II of the Ohio Constitution* which prohibits the enactment of retroactive laws or laws impairing the obligation of contracts."[5]

Consequently, any retroactive application of this Bill to existing contracts between cell phone carriers and customers, where there is a privacy term currently in force (and many Ohio customers have such contracts) will violate Ohio's Contract Clause: it will permit law enforcement to acquire personal and private cell phone records that the carrier is otherwise required to protect.

Proposed Divisions (C) and (D) violate Due Process under the Ohio Constitution.

Next, the blanket immunity provision for cell phone carriers who voluntarily supply law enforcement with Ohioans' private information violates Ohioans "right to a remedy." The Ohio Supreme Court vindicated "the right to a remedy guaranteed by Section 16, Article I of the Ohio Constitution," in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*,[6] finding certain tort reforms unconstitutional. Here, this Bill strips an Ohioan of the right to go to court with a breach of contract claim, even after his cell phone provider sells his information in violation of the contract.

Law Enforcement must not purchase Ohioans' Cell Phone Activity without a warrant.

Finally, Ohio law enforcement violates the spirit and letter of the Fourth Amendment when it, pursuant to a criminal search and without a warrant or other judicial oversight, purchases Ohioans' cell phone records and activity from cell phone carriers.

Shockingly, the proposed R.C. 2921.231(C) and (D) place **no limits** on local law enforcement's authority to acquire cell phone records of *any* Ohioan for *any* reason.

However, the United States Supreme Court makes it clear that searches of cell phone activity are "searches" under the Fourth Amendment that require a warrant, unless an exception applies: in *U.S. v. Jones* the Supreme Court unanimously held that, "The Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment." Cell phone tracking, much less wire-tapping or retrieval of conversations, is self-evidently no less of a search.

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1 Steinglass and Scarselli, *The Ohio State Constitution, a Reference Guide*, p. 148.

2 *Goodale v. Fennell* (1875), 27 Ohio St. 426.

3 See, e.g., *State ex rel. Youngstown v. Jones* (1939), 136 Ohio St. 130, 136, 16 O.O. 73, 24 N.E.2d 442.

4 *Ross v. Farmer's Insurance* (1998) 82 Ohio St.3d 281, 695 N.E.2d 732, 1998 -Ohio- 381. See also *Aetna Life Ins. Co.v. Schilling* (1993), 67 Ohio St.3d 164, 616 N.E.2d 893, syllabus (a statutory provision applied to contracts that were entered into before the effective date of the statute would impair the obligation of contracts in violation of Section 28, Article II of the Ohio Constitution). See also *Burtner-Morgan-Stephens Co. v. Wilson* (1992), 63 Ohio St.3d 257, 586 N.E.2d 1062 (holding that, pursuant to Section 28, Article II of the Ohio Constitution, a statute could not be retroactively applied to determine the distribution of royalties that were provided for in an agreement entered into prior to the enactment of the statute); and *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 28 OBR 337, 503 N.E.2d 753 (holding that the retroactive application of statutory provisions to land installment contracts that were in existence at the time of the enactment of the statutes violated Section 28, Article II of the Ohio Constitution by impairing an obligation of contract).

5 Id.

6 86 Ohio St.3d 451, 715 N.E.2d 1062

This level of intrusion by police, without judicial oversight, violates the very purpose of the Fourth Amendment.

The Fourth Amendment states that "[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Before a *search* occurs, "a warrant must *generally* be secured."[7]

As the Supreme Court has explained, "the fundamental purpose of the Fourth Amendment's warrant clause is "to protect against all general searches."[8] The Fourth Amendment was adopted specifically in response to the Crown's practice of using general warrants and writs of assistance to search "suspected places" for evidence of smuggling, libel, or other crimes.[9] Early patriots railed against these practices as "the worst instrument of arbitrary power" and John Adams later claimed that "the child Independence was born" from colonists' opposition to their use.[10] Further, *unsupervised police control* over criminal searches was replaced with judicial oversight.

Thus, if one takes these constitutional principles into account, police must not be permitted to conduct searches of Ohioans private effects, such as cell phone records and activities, without a warrant. Divisions (C) and (D) of this Bill currently do not account for this. Instead, they appear to permit retrieval of any type of cell phone record - - without a warrant, and upon purchase.

This Bill is More Intrusive than the Much-Criticized NSA Program

This Bill, as currently drafted, authorizes searches that are more intrusive and over more petty conduct than even the scandal-ridden National Security Administration Program now under public scrutiny. There, at least, the federal government seeks to search conversations with foreign citizens with terrorist ties to prevent terrorist activities. And at least there is *some* judicial oversight.

Here, there is no such noble justification *or* limited scope. Cell phone carriers could sell Ohioans cell phone usage information and conversations (conversations and activity taking place solely *within* Ohio) to law enforcement to facilitate the investigation of cell phone, parking, other driving infractions, and similar low-level crime. And there will be tremendous economic and political pressure on carriers to eventually do *just that*, with cell phone carriers earning as much as $2,200 per sale to police.[11]

This Bill is either redundant of federal intrusions, or instead targeted at prying into Ohioans private lives to investigate *de minimus* "crime" while enriching cell phone carriers who break their contracts with Ohioans.

The "Nothing to Hide" Defense

Even if breaking voluntarily-agreed -upon cell phone contracts between Ohioans and carriers were not enough, the further moral and constitutional consequences of this Bill are breathtaking. As Judge Douglas Ginsburg pointed out in a recent Court opinion addressing tracking:

> ''[a] person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical

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7 *Kentucky v. King*, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011).

8 *Go–Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S.Ct. 153, 75 L.Ed. 374 (1931).

9 *Boyd v. United States*, 116 U.S. 616, 625–626, 6 S.Ct. 524, 29 L.Ed. 746 (1886).

10 *Id.*, at 625, 6 S.Ct. 524 (internal quotation marks omitted).

11 See New York Times, *Police Are Using Phone Tracking as a Routine Tool, March 31, 2013*, available at http://www.nytimes.com/2012/04/01/us/police-tracking-of-cellphones-raises-privacyfears.html?pagewanted=all&_r=0 ("Cell carriers, staffed with special law enforcement liaison teams, charge police departments from a few hundred dollars for locating a phone to more than $2,200 for a full-scale wiretap of a suspect, records show.")

> treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts."[12]

Hitting closer to home, each of the State Senators who voted for this Bill, upon allegations that they were bribed by the promise of political contributions from cell phone carriers for their "yes" votes, could be tracked ton lunch and dinner meetings with those lobbyists. And others. As could the lobbyists. Indeed, this Bill, as currently written, could result in the tracking of every person in this room.

Solution

There are solutions to this bills defects.

First, Ohioans should have the freedom to choose: they should have the right to contract with a cell phone carrier that will not sell their private activity and conversations to their local law enforcement. And where they make this choice, those contracts should be honored, not shredded. This Bill pulls the rug out from under Ohioans who contracted for that privacy, and whose contracts are *currently* in force. This Bill would also nullify the enforceability of any future contractual privacy term by immunizing cell phone carriers who violate it, even if they have contractually-promised it.

Proposed divisions (C) and (D) of this Bill cannot be enacted as currently written. They permit law enforcement to acquire **ANY** cell phone information from carriers without a warrant, even when no exception to the warrant requirement is justified. *At minimum*, these proposed divisions must include (1) a warrant requirement; or (2) the limitations articulated in Division (B) (release of information for *bona fide* emergencies only).[13]

Conclusion

In conclusion, it is difficult not to be cynical here: cell phone carriers charge law enforcement up to $2,200 per cell phone record, and apparently have an interest in further opening this new market.[14] Hence, perhaps, the current drafting of Divisions (C) and (D). However, this Committee should not enrich these carriers at the expense of Ohioans' constitutional rights - - this is the opposite of what you were elected to do. The changes recommended herein protect these rights, while permitting law enforcement to address genuine emergency situations. These changes should be implemented before this legislation is -- if at all -- enacted.

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[12] *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010) (emphasis added), aff'd. *United States v. Jones*, 132 S.Ct. 945 (2012).

[13] This could be accomplished through inserting the words "upon presentation of a valid search warrant" after the word "protocols" in Division (C). This would also cure the otherwise significant defect in Division (D).

[14] See New York Times, *Police Are Using Phone Tracking as a Routine Tool, March 31, 2013*, available at http://www.nytimes.com/2012/04/01/us/police-tracking-of-cellphones-raises-privacyfears.html?pagewanted=all&_r=0 ("Cell carriers, staffed with special law enforcement liaison teams, charge police departments from a few hundred dollars for locating a phone to more than $2,200 for a full-scale wiretap of a suspect, records show.")