



### **E49 Where Have You Been? Where Are You Now, and Who Have You Been Talking to? Historical Cell Site Analysis and Expectations of Privacy**

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After attending this presentation, participants will learn: (1) how customers' cell phone billing records are being used for surveillance purposes by the government; (2) some of the technique's limitations; and, (3) the basic privacy concerns created by this new technology.

This presentation will impact the forensic science community by addressing the concerns of using the findings of this surveillance technique in court without demanding adequate safeguards of reliability, reproducibility, and error rates of its stated conclusions.

We all recognize that our concerns about the security of those we care about prompt us to check out where they are. We recognize that the same concerns prompt us to keep tabs on the locations of suspicious people and seemingly dangerous events. Parents ask their children where they will be and why, who will they be with and when. But children grow up. Eventually, they resist answering such questions. They develop a sense of autonomy and privacy, even when those asking do so out of love and concern. When our government asks where we have been and when, who we were with and to whom we were talking, it raises those same concerns about privacy and autonomy, but at a heightened level. We sense our autonomy as free citizens and privacy as individuals is being violated.

Today, the government no longer needs to ask these questions, because most can be answered by reading your cellular telephone provider's Call Detail Records (CDRs). As a rule, you are where your cell phone is, and your personal and professional associations are captured by your cell phone. It is as if a detective could follow you everywhere for years, note who you talk to, and who that person talks to, and record the date, time, and place of every conversation.

Government, from the NSA to any local police department, can now obtain CDRs to answer these questions, and their justification is to attempt to protect us, preserve order, and find out about dangerous situations. We are told that this is not surveillance, because in an Orwellian twist of language, no conversations are overheard or recorded. Yet, on the other hand, is it not surveillance if a detective could follow you everywhere for years, note who you talk to, and who that person talks to, and record the date, time, and place of every conversation?

While we may be more secure from some threats in such a world, we expose ourselves to other hazards. Historical and international precedent has shown such efforts have sometimes been used to control people and to limit their freedom. The government's massive use of such technology, absent from public scrutiny until recently, calls to mind James Madison's warning, "Since the general civilization of mankind, I believe there are more instances of the abridgment of the freedom of the people, by gradual and silent encroachments of those in power, than by violent and sudden usurpations."<sup>1</sup> American jurisprudence has recognized the importance of keeping our associations private. In *NAACP vs. Alabama*, Justice Harlan wrote, the "Court has recognized the vital relationship between freedom to associate and *privacy* in one's associations."<sup>2</sup> Indeed, the inviolability of *privacy* in group association may be indispensable to preserve the First Amendment's freedom of association, particularly where a group espouses dissident beliefs.

In the criminal justice system, lawyers now use CDRs to present evidence in court supposedly showing very precisely where someone is when they make a call. They do this to achieve their persuasive goals. The evidence is made to look accurate and precise, while, in fact, it is not. In fact, a recent federal court limited such evidence for lacking scientific scrutiny.<sup>3</sup> After attending this presentation, attendees will learn how cell phone surveillance is being used, some of its limitations, and the basis for concerns about privacy created by this new technology.

#### **References:**

1. James Madison, speech in the Virginia Convention, Richmond, Virginia, June 6, 1788, *The Papers of James Madison*, ed. Robert A. Rutland and Charles F. Hobson, vol. 11, p. 79 (1977) (emphasis added).
2. *NAACP v. Alabama*, 357 U.S. 449 (1958).
3. *United States v. Antonio Evans*, Case No. 10 CR 747-3, Northern District of Illinois – Eastern Division, Opinion and Order filed 08/29/12).



## Jurisprudence Section - 2014

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### **Cell Phone, Surveillance, Privacy**