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Written Testimony of

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Hearing on H.R. 2168, the "Geolocation Privacy and Surveillance Act"

House Judiciary Committee
Subcommittee on Crime, Terrorism, and Homeland Security
United States House of Representatives

May 17, 2012

Chairman Sensenbrenner, Ranking Member Scott, members of the Subcommittee, thank you for inviting me to testify today on behalf of the National District Attorneys Association (NDAA), the oldest and largest organization representing over 39,000 district attorneys, State's attorneys, attorneys general and county and city prosecutors with responsibility for prosecuting 95% of criminal violations in every state and territory of the United States.

As an Army Ranger who served in Viet Nam and a State's Attorney for over thirty-three years I have pledged my honor and life to defending the Constitution and the rights of my fellow citizens.

The Founders of our Country in adopting the Fourth Amendment wanted to protect its citizens from unreasonable searches. Obtaining geolocation information from a third party has been determined not to be a search; although the U. S. Supreme Court may weigh in on that decision. Even if it is a search obtaining a warrant is not required for a lawful search when the circumstances of getting the warrant would be unreasonable or frustrate the lawful purposes of the government; ie. Search incident to arrest, search resulting from exigent circumstances or “hot pursuit”, search of a vehicle, among other recognized exceptions to the warrant requirement.

NDAA has serious concerns with the potential impact that H.R. 2168, the Geolocational Privacy and Surveillance Act (GPS Act), would have on State or local law enforcement’s ability to most effectively and efficiently protect the citizens we serve. The GPS Act, as currently written, has been drafted so broadly that the bill would require a search warrant to gather many forms of information that can currently be obtained by subpoena. The new standards set through the GPS Act would hamper law enforcement’s ability to quickly obtain important information that could be used to save lives. NDAA feels that any legal reforms to the current system should be implemented to *shorten* the investigative timeline instead of lengthening it, which we feel would be an unintentional consequence of the GPS Act. NDAA believes that any bill that hinders law enforcement from doing its job most effectively would lead to serious consequences for crime victims and public safety. Because so many cases are time sensitive in nature - including child abductions, other forms of kidnapping and organized criminal and/or terrorist activities - law enforcement must be able to work these cases without unnecessary administrative delay.

NDAA believes it is imperative to distinguish between historical data compiled from cell tower hits, referred to as cell-site information and real time GPS ping information. The overwhelming majority of the requests for geolocation data in my jurisdiction are for the historical data. These requests are often made to confirm or rebut information which does not meet the probable cause standard. For example, in a gang shooting in my jurisdiction an anonymous caller who states they fear gang retaliation if their identity is known gives the police the identity of two gang members who committed the murder. The police receive cell phone information regarding these individuals from prior arrest reports. The cell-site historical information for the time of the killing shows that those two cell phones were hitting off the same tower at the same time in the area of the murder. Even with this information, the police do not have probable cause to arrest but to require probable cause to access historical records would have deprived the officers of this vital information. Gang crimes are domestic terrorism which rules with fear, silences witnesses and deprives whole communities of life and liberty. Denying law enforcement the ability to use this critical tool is to decide to refuse to allow America's communities to protect themselves from the scourge of gangs.

In section 2602 (d) "Exception for Consent" allows for a parent or guardian to consent to a child's device location but it is silent as to whether such consent is available for those with mental handicaps, developmental disabilities, dementia or who may be on medication. Also, what if a child is reported missing by their peers but parents or guardians cannot be located? Do the police waste precious seconds hunting for the parents or use those seconds to hunt for the child?

Evidence of the confusion this bill will cause is obvious from the fact that section 2602 (f) “Exception for Emergency Information” sets a different standard for a law enforcement officer to access geolocation information than does section 2604(a)(1)(A) “Emergency Situation Exception”, including the fact that one section does not require a subsequent order while the other does. While NDAA does appreciate the “Emergency Situation Exception” contained in section 2604(a) of the GPS Act, we also feel the bill as currently written leaves too much of a grey area on what geolocational information can be legally obtained by law enforcement in such emergency situations. For example, the exception allows for interception of geolocation information when “such officer reasonably determines that an emergency situation exists that --- involves—immediate danger of death or serious physical injury to any person;” It is unclear, however, whether this exception would permit interception of geolocation information relating to others – such as the perpetrator of a crime - or only information relating to the person whose life or safety is threatened. Take a kidnapping case, for example; it is currently unclear whether law enforcement could use this exception to track the kidnapper’s phone or only the victim’s phone or other electronic devices belonging to the victim. It is also important to point out that the ability to gather GPS information lasts only so long as the battery continues to power the device. Stopping to investigate to gather information or draft a warrant or find a judge may exhaust the battery and frustrate the effort to use geolocation.

It may not be clear at first whether a missing person is in danger or just out of touch and yet frantic relatives often demand that law enforcement use every opportunity to locate that person. Given that the proposed law subjects electronic communication service providers’ employees to possible criminal and civil liability if they cooperate with an officer, as well as loss of their job if

the employer wishes to separate itself from an employee's decision, the employee might challenge the officer's determination that an exception to the warrant requirement exists.

If Congress chooses to elevate the standard for location evidence to probable cause, law enforcement will be forced to adapt to these changes and such changes would extend the investigative timeline and decrease the number of leads law enforcement can pursue in a given time period. Additionally, with deep cuts in federal spending to important State and local law enforcement programs over the past several years – including to COPS, Byrne-JAG, Byrne Competitive and cuts to information sharing programs like the Regional Information Sharing System (RISS) - law enforcement has been forced to do more with less; the GPS Act would seem to present yet another burdensome obstacle for State and local law enforcement to overcome in order to effectively protect and serve.

State statutes and court rules impose additional burdens on the use of warrants. For example in Maryland, law enforcement officers are required to deliver a copy of the warrant to the person being searched at the execution of the warrant. Is the person being searched the person carrying the phone? This means that the target of the investigation would be alerted to the investigation and afforded an opportunity to intimidate witnesses, destroy evidence, turn off the wireless communication device and flee. In addition Maryland law enforcement is required to deliver the statement of probable to the person searched at least sixty days after the warrant is executed; therefore, warrants in Maryland generally come at the conclusion of the investigation, but most law enforcement needs geolocation information at the beginning of the investigation. Additionally, on weekends, holidays and evenings law enforcement may use hours trying to

locate a judge and another hour driving to their location with the warrant. These are just some examples from one of fifty states and several territories of how the Federal requirement of a warrant translated to the States will result in uncounted obstacles and frustrate or destroy law enforcement efforts.

Whatever level of investigative process is deemed appropriate by the Congress, NDAA urges the Committee to take steps to guarantee that law enforcement is able to access the required communications records – including location information – once that process is implemented. The emergency exceptions outlined in section 2602(f) of the GPS Act may provide the necessary recourse but if there is no statutory mandate for a service provider to turn over the records, and no time frame for compliance, law enforcement may effectively be denied the information we need despite being in accordance with the legal process. The law should provide a course of action that will enable the rapid transfer of information when needed and possibly provide penalties for service providers who are intentionally slow to respond in providing critical location information.

NDAA appreciates the privacy concerns of America's citizens and strives for all of America's State and local prosecutors to minimize unnecessary intrusions into citizen's privacy. While there are countless articles expressing concern about the amount of location evidence obtained by law enforcement and private companies, not a lot has been publicized about the good that has come from the proper use of location evidence by law enforcement to solve crimes and to save lives. There are literally thousands of instances where the proper gathering and use of this important evidence has led to the rescue of abducted children, the identification and prosecution

of sexual predators, and the apprehension and conviction of a terrorist looking to harm innocent Americans. We assert that this legislation is a solution in search of a problem and as the true defenders of the public's freedom and rights America's prosecutors believe that the current system of police discretion and judicial oversight is working; for if it were not the evidence would be found in cases challenging the conduct of the police in the Courts.

Chairman Sensenbrenner, Ranking Member Scott, members of the Subcommittee, I appreciate the opportunity to testify before you on this important legislation and will answer any questions which you may have.