Cellular Tracking
Legal Issues

June 27, 2006
- DOJ’s Policy on Cellsite Simulators: **Pen Register Device** *(18 U.S.C. § 3127(3))*
  - LIABILITY RISks & Best Practices

- Loan of ELSUR Policy
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- Emergency Pen Register Authority
  - Federal v. State Orders
  - Voluntary Disclosures

- Prospective Cell Site Location data
  - 

- Protecting Sensitive Techniques
  - 

<table>
<thead>
<tr>
<th>Old Definition</th>
<th>New Definition</th>
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<td>&quot;pen register&quot; means a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached....</td>
<td>&quot;pen register&quot; means a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication....</td>
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• § 3127 Pen Register device or process:
  – “records or decodes dialing, routing, addressing, or signaling information
  – transmitted by an instrument or facility from which a wire or electronic communication is transmitted”

DOJ/CCIPS:

http://30.100.99.18/ogc/usabook/usabook/esis/13esis.htm
STATE LAW FUGITIVES:

- **U.S. Marshals** (including FBI agents serving as deputy marshals) are authorized to investigate fugitive matters "as directed by the Attorney General." 28 USC 566(e)(1)(B)
  - Includes pursuit of fugitives wanted on state warrants when done pursuant to a "special apprehension program" (e.g., Fugitive Investigative strike teams) approved by the Attorney General;
  - IF the investigation of a state fugitive is conducted pursuant to such an authorized "special apprehension program" then the US Marshall is, in effect, executing "federal law" within the State; AND
  - USMS “May exercise the same powers which a sheriff of the State may exercise in executing the laws thereof” (28 USC 564), **INCLUDING the power to arrest a state law fugitive**

- DOJ, Office of Legal Counsel memo to FBI, General Counsel: “Authority to Pursue Non-Federal Fugitives” (Feb. 21, 1995).
Agents of the United States Marshals Service have sole and inherent authority among federal law enforcement to pursue non-federal fugitives. 28 U.S.C. § 566(e)(1)(B). Pursuant to the Attorney General's National Anti-Violent Crime Initiative, the Presidential Threat Protection Act of 2000 (Pub. L. 106-544), and the Department of Justice Policy on Fugitive Apprehension (Aug. 11, 1988), when participating on a task force duly-sanctioned by a U.S. Attorney's Office, the Service is allocated federal funds and is expressly tasked with investigating and apprehending violent or otherwise significant state fugitives. No federal charge, such as Unlawful Flight to Avoid Prosecution, is necessary.
FBI SAs as Deputy USMS

An FBI agent serving as a **Deputy US Marshall** could also arrest a state law fugitive under the same lawful authority.

- **BUT if not deputized**, FBI agents have the authority to investigate/arrest state law fugitives **ONLY**
  - **if there is a reasonable indication that the state law fugitive will violate the Fugitive Felons Act (FFA or UFAP),**
advise court of potential for incidental collection on innocent users
Location (Tower/Sector) data from Provider Function vs.
- **Compare, United States v. Van Horn**, 789 F.2d 1492 (11th Cir.), cert. denied, 479 U.S. 854 (1986) (concealed microphone in office, defendant sought information about location of device claiming necessary to demonstrate that voices on tape could have been distorted by way mic was hidden and the distortion led to misidentification of the voice), recognized a qualified government privilege not to disclose sensitive investigative techniques.

- **With United States v. Foster**, 986 F.2d 541, 543 (D.C. Cir. 1993) (defendant sought location of observation post: officer’s observation of drug transaction was key evidence implicating defendant; surveillance not taped or photographed, so no alternative evidence for jury to examine to determine whether surveillance post provided clear view from which officer could make accurate identification of defendant).
  - Defendant sought nature & details of pen register used to determine the geographical location of a cellular phone
  - Court found the information protected by qualified investigative techniques privilege & national security privilege
  - Balanced government’s interest in maintaining privilege with Defendant’s need for the information

Defendant had the Product of the Surveillance: the cellphone used in making threatening calls was found in defendant’s house during search of residence;
Contact Info:

ASSISTANT GENERAL COUNSEL,
Science & Technology Law Unit,
Office of the General Counsel

• DOJ (CCIPS): www.cybercrime.gov
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Potential disruption of service to phones while temporarily registered with government device during active interrogation.

- 47 U.S.C. § 333 prohibits interference with cellular frequencies

- 18 USC 3124: requires that a pen register be implemented with "minimum of interference" to those accorded service-
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Function vs. Location (Tower/Sector) data from Provider
FEDERAL BUREAU OF INVESTIGATION

Precedence: Routine     Date: 03/11/2009

To: Operational Technology  Attn: Tracking Technology Unit

From: Security
Security Operations Section
Physical Security Unit: PA555
Contact: ________________

Approved By: ________________
Drafted By: ________________

Case ID #: 261D-HQ-C1188941-TECHSEC

Title: PHYSICAL SECURITY MATTERS
ENGINEERING RESEARCH FACILITY, QUANTICO, VA

Synopsis: ________________

CELL/OTD 021184