

Kansas Senate

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21st District

Senate Corrections and Juvenile Justice Committee – Chairman

Senate Judiciary Committee – Vice Chairman

**Written Testimony for the U.S. House of Representatives
Energy and Commerce Committee – Subcommittee on Communication & Technology
H.R. 4889 – The Kelsey Smith Act of 2016**

April 13, 2016

Chairman Walden, Vice Chairman Latta, Ranking Member Eshoo, and honorable committee members:

Thank you for allowing me to submit written testimony in support of H.R. 4889, the Kelsey Smith Act of 2016. This bill means a great deal to me. It is named after my daughter. She was kidnapped, raped, sodomized and murdered on June 2, 2007. Kelsey was taken in broad daylight in a parking lot of a major department store, located across from a large and busy shopping mall. She was buying a gift for her boyfriend of six months at the store. They were to have gone to a party later that evening to celebrate high school graduation and their six month “anniversary” of being boyfriend and girlfriend. She was eighteen years old.

Seventeen law enforcement agencies participated in her case – federal, state and local agencies. Hundreds of people from the community responded to help canvass neighborhoods, search fields and

wooded areas, or pass out fliers with Kelsey's picture and information on them. Missey and I contacted every news outlet in our area as well as national news networks. I began calling radio stations asking them to give a description of Kelsey. Missey and I worked tirelessly to bring attention to Kelsey so that she could be located. We did interviews with every news station that would have us. We went on talk shows – Nancy Grace, Inside Edition, and Larry King, to name a few, to bring awareness to Kelsey's story and to bring her home alive.

Within hours of Kelsey having gone missing – law enforcement was not able to determine that she had been kidnapped until surveillance video was obtained and analyzed from the department store – Missey was on the phone with our cell phone provider – Verizon – attempting to get them to release the location of Kelsey's cellphone. They would not do it. Kelsey was eventually found 18 miles away from where she had been kidnapped and in another state (Missouri). She had been savagely raped, sodomized, strangled to death with her own belt, and left, naked, in a wooded area. Many of the agents and officers working on Kelsey's case had daughters. F.B.I. agents on the scene later told me when Kelsey was found the agents and officers dropped to their knees in grief. In that instant they all became Kelsey's dad. The key that led them to Kelsey was the eventual release of her cellphone's location. Once that information finally got into the hands of law enforcement Kelsey's body was located in forty-five minutes.

The delay in receiving this potentially lifesaving information was not due to any error by law enforcement. All of the agencies and their agents, officers, and support personnel responded in exemplary fashion. They were true professionals. I know. I have nearly twenty years' experience as a law enforcement officer and was an officer when Kelsey was kidnapped. The error was committed by the telecom company. The first error was that a customer service representative made a decision at two o'clock in the morning to not act on the locate request for Kelsey's phone. In essence, an employee

trained to handle service issues or calling plan upgrades made the decision on what action should be taken – or not taken, in this case – in an emergency. The second error is that without legislative certainty, no business will knowingly put itself at risk of litigation by an affirmative act. Releasing “records,” even the location of a cellular device in an emergency, could – and did in Kelsey’s case – make a business pause or refuse to cooperate. They refused to release the information despite having been served with all the legal process required to obtain the information. H.R. 4889 provides a safe avenue to use for companies.

These circumstances led to the bill that is now under consideration by this subcommittee. It is law in twenty-two states. Of the thirty-one members of this subcommittee, ten of you have this law in your home state. It has been a long process. Missey has gone to many of the states and provided testimony in support of the bill. I have accompanied her and provided oral testimony when I could – written testimony when I could not be there in person. My service in the Kansas State Senate sometimes prohibits me from being able to go to other states to testify. My public service is driven by Kelsey’s memory. I work diligently to craft and pass legislation with the goal of protecting the citizens of Kansas. I agree with President Ronald Reagan’s statement he made in 1981 - “Government's first duty is to protect the people, not run their lives.” This is exactly what H.R. 4889 does. It fulfills the “first duty” of government. It is necessary to have this protection in place at both the state and federal level. Wireless devices are subject to a bifurcated regulation system – Federalism – by both state and federal government.

I can speak from the experience of a law enforcement veteran as to the value of this law. It will, has, and can save lives. Time is of the essence when a person goes missing and, statistically speaking, if the missing person is not found within 48 hours their chance of surviving the ordeal is minimal. If the victim is a child, chances of survival rapidly decrease after two to four hours. The Kelsey Smith Act was

signed into law in Kansas on April 17, 2009. Since then it has been used multiple times by law enforcement with favorable results in Kansas as well as other states that have enacted the law. It is a tool that gives law enforcement an immediate edge in a case where a person is missing and there is a reasonable belief that person is in danger of physical harm or death. Technology has advanced and it is necessary for us to advance with the technology to keep people safe. H.R. 4889 allows law enforcement to use evidence based best practices. The telecom providers understand this. They were instrumental in crafting the law in Kansas as well as in other states.

I can speak from the experience of a legislator. The Kelsey Smith Act has no fiscal note. My understanding is that in the twenty-two states that now have the law only one state had a fiscal note. The fiscal note was only generated because according to that state's law all legislation has a cost to enact that legislation. Even so the fiscal note was miniscule. In today's environment imagine a law that fulfills the "first duty" of government and at no cost to the citizens.

I can speak from the experience of a father whose daughter has gone missing. The agony of not knowing what has happened to your daughter or knowing where she is for four days is indescribable. The refusal of a cell phone company to cooperate with a simple request to locate my daughter's cell phone, and then disregard legal process, was inexcusable.

What was the cost of four days of searching for Kelsey by seventeen law enforcement agencies? Why was it even necessary? The technology was there to find her in forty-five minutes – and that was in 2007. The locate time is much quicker now. Why aren't we using this technology everywhere? I don't know the answer to the first question – although I'm sure the cost was in the hundreds of thousands of dollars if not more. The answer to the second question is fear. We don't use this technology everywhere for these specific instances because of fear. The fear is baseless.

The leading opponent to this legislation across the United States is the American Civil Liberties Union. Here are the objections I have heard in the past from them and I suspect you will hear these as well:

- 1) It's a violation of privacy.

Response: There is no such thing. According to the ACLU's website: *"The right to privacy is not mentioned in the Constitution, but the Supreme Court has said that several of the amendments create this right."* Therein lies the problem. Courts and Constitutions do not create rights. God grants each of us "with certain unalienable Rights." The ACLU believes that the state grants us our rights. Obviously, only one view is correct. A rejection of the foundational principle of God-given rights would inevitably lead someone to come to different conclusions about any number of things compared to someone who believes that rights are granted by God. If rights are not God-given then the only other option is rights are granted by the state – by government. To be more frank – rights would be granted by the majority party in power at the time. Anything given by the state can be taken away by the state.

There is clearly a right for the people to "be secure in their persons, houses, papers, and effects," but that is not an absolute right, which leads me to the second common objection:

- 2) It's a violation of the 4th amendment's search and seizure provision.

Response: According to the fourth amendment of the U.S. Constitution, *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."* The fourth amendment only protects against unreasonable searches. H.R. 4889 makes no provision to "search" or "seize" anything. It

does not allow content on a cellular device to be “seized” – pictures, texts, phone numbers, documents, and recordings are not allowed to be viewed. The only “thing” allowed is the location of a device. Truth be told, someone who has been kidnapped would dearly love to let law enforcement know where they are but can’t because their abductor is preventing them from doing so. This merely gives law enforcement a place to start looking and is no different than someone telling law enforcement where they last saw that person except for one fact – it is an accurate location.

The bill releases no personal information to anyone. All it releases is the location of a cellular device so law enforcement can find a person who is danger of serious bodily harm or death. This bill can expedite the investigation and give law enforcement a huge advantage in finding the missing person alive.

In closing, my wife has said it takes either lawsuits or legislation to make big corporations take notice. As a state senator in Kansas I believe that the Legislature’s primary duty is to provide for the public safety. Kelsey’s Law is an excellent example of how government can do that. I respectfully request this subcommittee recommend H.R. 4889 favorable for passage. Fulfill the first duty of government, please.

Thank you.

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