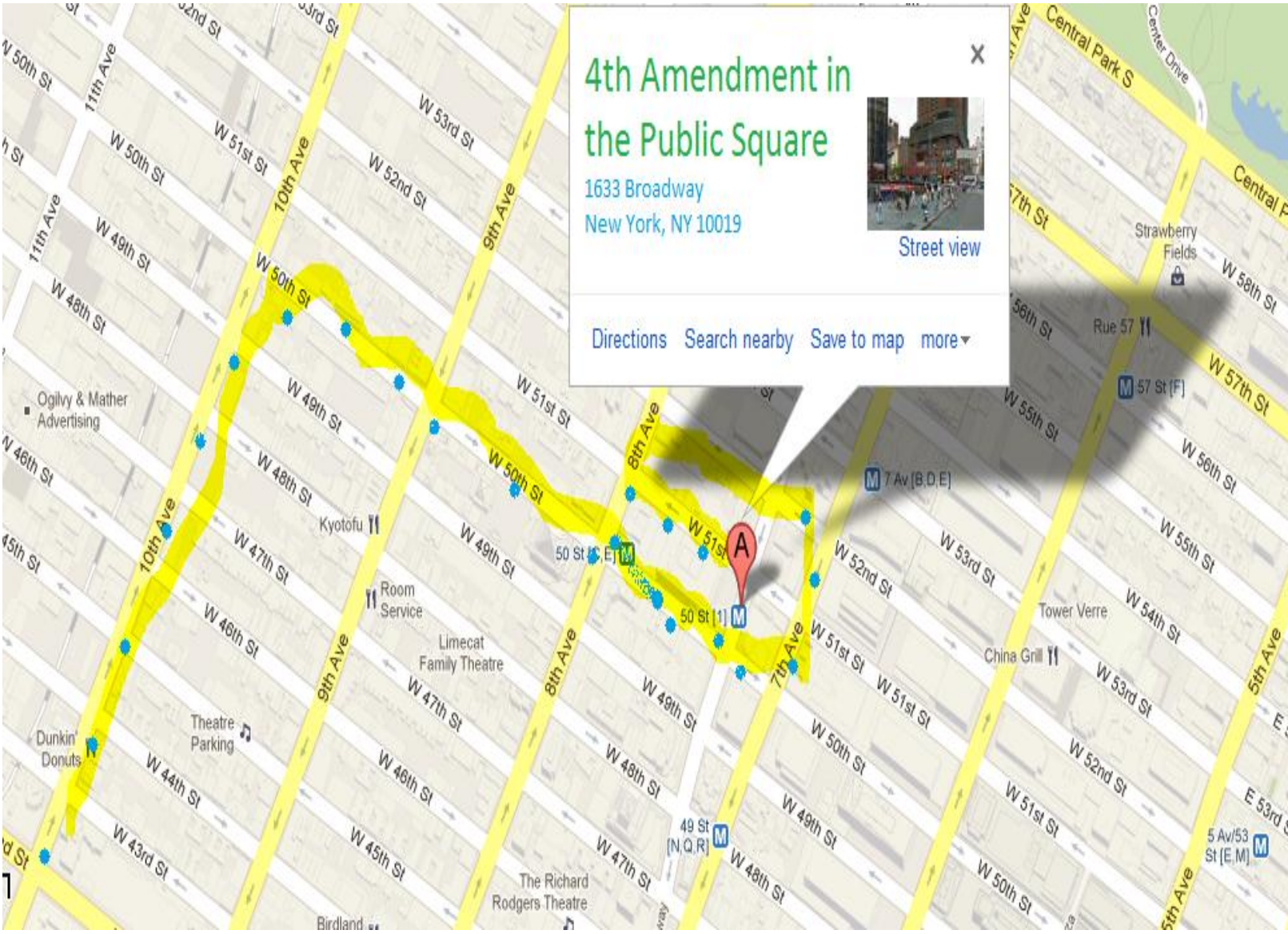
New York American Inn of Court

April 18, 2012



Outline and Team Members

(Written Material on-line at Inn Website)

New York American Inn of Court

April 18, 2012

The Fourth Amendment in the Public Square

David Weild & Paul Mahoney, co-chairs

6:30 **Welcome and Introduction**

6:35 **Where are We? : GPS Law in 2012**

United States v. *Jones* – U.S. Supreme Court's decision on application of warrant requirement to Global Positioning Satellite matters.

People v. *Weaver* – New York Court of Appeals on GPS warrants

6:50 **How Did We Get Here? :**

Traditional 4th Amendment Analysis before *Jones*

7:00 **Moving Beyond GPS – Public Cameras / Cell Phones**

7:20 **My Privacy / Your Privacy: Social Media**

7:40 **Invasions and Expectations of Privacy**

7:50 **Audience Discussion, Challenges and Predictions**

Team Members

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* JONES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10–1259. Argued November 8, 2011—Decided January 23, 2012

The Government obtained a search warrant permitting it to install a Global-Positioning-System (GPS) tracking device on a vehicle registered to respondent Jones's wife. The warrant authorized installation in the District of Columbia and within 10 days, but agents installed the device on the 11th day and in Maryland. The Government then tracked the vehicle's movements for 28 days. It subsequently secured an indictment of Jones and others on drug trafficking conspiracy charges. The District Court suppressed the GPS data obtained while the vehicle was parked at Jones's residence, but held the remaining data admissible because Jones had no reasonable expectation of privacy when the vehicle was on public streets. Jones was convicted. The D. C. Circuit reversed, concluding that admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment.

Held: 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. Pp. 3–12.

(a) The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Here, the Government's physical intrusion on an "effect" for the purpose of obtaining information constitutes a "search." This type of encroachment on an area enumerated in the Amendment would have been considered a search within the meaning of the Amendment at the time it was adopted. Pp. 3–4.

(b) This conclusion is consistent with this Court's Fourth Amendment jurisprudence, which until the latter half of the 20th century was tied to common-law trespass. Later cases, which have deviated from that exclusively property-based approach, have applied the

Syllabus

analysis of Justice Harlan's concurrence in *Katz* v. *United States*, 389 U. S. 347, which said that the Fourth Amendment protects a person's "reasonable expectation of privacy," *id.*, at 360. Here, the Court need not address the Government's contention that Jones had no "reasonable expectation of privacy," because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, the Court must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo* v. *United States*, 533 U. S. 27, 34. *Katz* did not repudiate the understanding that the Fourth Amendment embodies a particular concern for government trespass upon the areas it enumerates. The *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test. See *Alderman* v. *United States*, 394 U. S. 165, 176; *Soldal* v. *Cook County*, 506 U. S. 56, 64. *United States* v. *Knotts*, 460 U. S. 276, and *United States* v. *Karo*, 468 U. S. 705—post-*Katz* cases rejecting Fourth Amendment challenges to "beepers," electronic tracking devices representing another form of electronic monitoring—do not foreclose the conclusion that a search occurred here. *New York* v. *Class*, 475 U. S. 106, and *Oliver* v. *United States*, 466 U. S. 170, also do not support the Government's position. Pp. 4–12.

(c) The Government's alternative argument—that if the attachment and use of the device was a search, it was a reasonable one—is forfeited because it was not raised below. P. 12.

615 F. 3d 544, affirmed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and SOTOMAYOR, JJ., joined. SOTOMAYOR, J., filed a concurring opinion. ALITO, J., filed an opinion concurring in the judgment, in which GINSBURG, BREYER, and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 10–1259

UNITED STATES, PETITIONER *v.* ANTOINE JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 23, 2012]

JUSTICE SCALIA delivered the opinion of the Court.

We decide whether the attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment.

I

In 2004 respondent Antoine Jones, owner and operator of a nightclub in the District of Columbia, came under suspicion of trafficking in narcotics and was made the target of an investigation by a joint FBI and Metropolitan Police Department task force. Officers employed various investigative techniques, including visual surveillance of the nightclub, installation of a camera focused on the front door of the club, and a pen register and wiretap covering Jones's cellular phone.

Based in part on information gathered from these sources, in 2005 the Government applied to the United States District Court for the District of Columbia for a warrant authorizing the use of an electronic tracking device on the Jeep Grand Cherokee registered to Jones's

wife. A warrant issued, authorizing installation of the device in the District of Columbia and within 10 days.

On the 11th day, and not in the District of Columbia but in Maryland,[1] agents installed a GPS tracking device on the undercarriage of the Jeep while it was parked in a public parking lot. Over the next 28 days, the Government used the device to track the vehicle's movements, and once had to replace the device's battery when the vehicle was parked in a different public lot in Maryland. By means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer. It relayed more than 2,000 pages of data over the 4-week period.

The Government ultimately obtained a multiple-count indictment charging Jones and several alleged co-conspirators with, as relevant here, conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U. S. C. §§841 and 846. Before trial, Jones filed a motion to suppress evidence obtained through the GPS device. The District Court granted the motion only in part, suppressing the data obtained while the vehicle was parked in the garage adjoining Jones's residence. 451 F. Supp. 2d 71, 88 (2006). It held the remaining data admissible, because "'[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.'" *Ibid.* (quoting *United States* v. *Knotts*, 460 U. S. 276, 281 (1983)). Jones's trial in October 2006 produced a hung jury on the conspiracy count.

In March 2007, a grand jury returned another indict-

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[1] In this litigation, the Government has conceded noncompliance with the warrant and has argued only that a warrant was not required. *United States* v. *Maynard*, 615 F. 3d 544, 566, n. (CADC 2010).

ment, charging Jones and others with the same conspiracy. The Government introduced at trial the same GPS-derived locational data admitted in the first trial, which connected Jones to the alleged conspirators' stash house that contained $850,000 in cash, 97 kilograms of cocaine, and 1 kilogram of cocaine base. The jury returned a guilty verdict, and the District Court sentenced Jones to life imprisonment.

The United States Court of Appeals for the District of Columbia Circuit reversed the conviction because of admission of the evidence obtained by warrantless use of the GPS device which, it said, violated the Fourth Amendment. *United States* v. *Maynard*, 615 F. 3d 544 (2010). The D. C. Circuit denied the Government's petition for rehearing en banc, with four judges dissenting. 625 F. 3d 766 (2010). We granted certiorari, 564 U. S. ___ (2011).

II

A

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It is beyond dispute that a vehicle is an "effect" as that term is used in the Amendment. *United States* v. *Chadwick*, 433 U. S. 1, 12 (1977). We hold that the Government's installation of a GPS device on a target's vehicle,[2] and its use of that device to monitor the vehicle's movements, constitutes a "search."

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[2] As we have noted, the Jeep was registered to Jones's wife. The Government acknowledged, however, that Jones was "the exclusive driver." *Id.*, at 555, n. (internal quotation marks omitted). If Jones was not the owner he had at least the property rights of a bailee. The Court of Appeals concluded that the vehicle's registration did not affect his ability to make a Fourth Amendment objection, *ibid.*, and the Government has not challenged that determination here. We therefore do not consider the Fourth Amendment significance of Jones's status.

It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. *Entick* v. *Carrington*, 95 Eng. Rep. 807 (C. P. 1765), is a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law'" with regard to search and seizure. *Brower* v. *County of Inyo*, 489 U. S. 593, 596 (1989) (quoting *Boyd* v. *United States*, 116 U. S. 616, 626 (1886)). In that case, Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis:

> "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." *Entick, supra,* at 817.

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous.

Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. *Kyllo* v. *United States*, 533 U. S. 27, 31 (2001); Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801, 816 (2004). Thus, in *Olmstead* v. *United States*, 277 U. S.

438 (1928), we held that wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because "[t]here was no entry of the houses or offices of the defendants," *id.*, at 464.

Our later cases, of course, have deviated from that exclusively property-based approach. In *Katz* v. *United States*, 389 U. S. 347, 351 (1967), we said that "the Fourth Amendment protects people, not places," and found a violation in attachment of an eavesdropping device to a public telephone booth. Our later cases have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's "reasonable expectation of privacy," *id.*, at 360. See, *e.g.*, *Bond* v. *United States*, 529 U. S. 334 (2000); *California* v. *Ciraolo*, 476 U. S. 207 (1986); *Smith* v. *Maryland*, 442 U. S. 735 (1979).

The Government contends that the Harlan standard shows that no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, *supra*, at 34. As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates.[3] *Katz* did not repudiate

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[3]JUSTICE ALITO's concurrence (hereinafter concurrence) doubts the wisdom of our approach because "it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case." *Post*, at 3 (opinion concurring in judgment). But in fact it posits a situation that is not far afield—a constable's concealing himself

that understanding. Less than two years later the Court upheld defendants' contention that the Government could not introduce against them conversations between *other* people obtained by warrantless placement of electronic surveillance devices in their homes. The opinion rejected the dissent's contention that there was no Fourth Amendment violation "unless the conversational privacy of the homeowner himself is invaded."[4] *Alderman* v. *United States*, 394 U. S. 165, 176 (1969). "[W]e [do not] believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home . . . ." *Id.*, at 180.

More recently, in *Soldal* v. *Cook County*, 506 U. S. 56 (1992), the Court unanimously rejected the argument that although a "seizure" had occurred "in a 'technical' sense" when a trailer home was forcibly removed, *id.*, at 62, no Fourth Amendment violation occurred because law enforcement had not "invade[d] the [individuals'] privacy," *id.*, at 60. *Katz*, the Court explained, established that "property rights are not the sole measure of Fourth

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in the target's coach in order to track its movements. *Ibid.* There is no doubt that the information gained by that trespassory activity would be the product of an unlawful search—whether that information consisted of the conversations occurring in the coach, or of the destinations to which the coach traveled.

In any case, it is quite irrelevant whether there was an 18th-century analog. Whatever new methods of investigation may be devised, our task, *at a minimum*, is to decide whether the action in question would have constituted a "search" within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.

[4] Thus, the concurrence's attempt to recast *Alderman* as meaning that individuals have a "legitimate expectation of privacy in all conversations that [take] place under their roof," *post*, at 6–7, is foreclosed by the Court's opinion. The Court took as a given that the homeowner's "conversational privacy" had not been violated.

Amendment violations," but did not "snuf[f] out the previously recognized protection for property." 506 U. S., at 64. As Justice Brennan explained in his concurrence in *Knotts*, *Katz* did not erode the principle "that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." 460 U. S., at 286 (opinion concurring in judgment). We have embodied that preservation of past rights in our very definition of "reasonable expectation of privacy" which we have said to be an expectation "that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Minnesota* v. *Carter*, 525 U. S. 83, 88 (1998) (internal quotation marks omitted). *Katz* did not narrow the Fourth Amendment's scope.[5]

The Government contends that several of our post-*Katz* cases foreclose the conclusion that what occurred here constituted a search. It relies principally on two cases in

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[5]The concurrence notes that post-*Katz* we have explained that "'an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation.'" *Post*, at 6 (quoting *United States* v. *Karo*, 468 U. S. 705, 713 (1984)). That is undoubtedly true, and undoubtedly irrelevant. *Karo* was considering whether a seizure occurred, and as the concurrence explains, a seizure of property occurs, not when there is a trespass, but "when there is some meaningful interference with an individual's possessory interests in that property." *Post*, at 2 (internal quotation marks omitted). Likewise with a search. Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information.

Related to this, and similarly irrelevant, is the concurrence's point that, if analyzed separately, neither the installation of the device nor its use would constitute a Fourth Amendment search. See *ibid.* Of course not. A trespass on "houses" or "effects," or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy.

which we rejected Fourth Amendment challenges to "beepers," electronic tracking devices that represent another form of electronic monitoring. The first case, *Knotts*, upheld against Fourth Amendment challenge the use of a "beeper" that had been placed in a container of chloroform, allowing law enforcement to monitor the location of the container. 460 U. S., at 278. We said that there had been no infringement of Knotts' reasonable expectation of privacy since the information obtained—the location of the automobile carrying the container on public roads, and the location of the off-loaded container in open fields near Knotts' cabin—had been voluntarily conveyed to the public.[6] *Id.*, at 281–282. But as we have discussed, the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test. The holding in *Knotts* addressed only the former, since the latter was not at issue. The beeper had been placed in the container before it came into Knotts' possession, with the consent of the then-owner. 460 U. S., at 278. Knotts did not challenge that installation, and we specifically declined to consider its effect on the Fourth Amendment analysis. *Id.*, at 279, n. *Knotts* would be relevant, perhaps, if the Government were making the argument that what would otherwise be an unconstitutional search is not such where it produces only public information. The Government does not make that argument, and we know of no case that would support it.

The second "beeper" case, *United States* v. *Karo*, 468 U. S. 705 (1984), does not suggest a different conclusion. There we addressed the question left open by *Knotts*, whether the installation of a beeper in a container

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[6] *Knotts* noted the "limited use which the government made of the signals from this particular beeper," 460 U. S., at 284; and reserved the question whether "different constitutional principles may be applicable" to "dragnet-type law enforcement practices" of the type that GPS tracking made possible here, *ibid.*

amounted to a search or seizure. 468 U. S., at 713. As in *Knotts*, at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later. 468 U. S., at 708. Thus, the specific question we considered was whether the installation "*with the consent of the original owner* constitute[d] a search or seizure . . . when the container is delivered to a buyer having no knowledge of the presence of the beeper." *Id.*, at 707 (emphasis added). We held not. The Government, we said, came into physical contact with the container only before it belonged to the defendant Karo; and the transfer of the container with the unmonitored beeper inside did not convey any information and thus did not invade Karo's privacy. See *id.*, at 712. That conclusion is perfectly consistent with the one we reach here. Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location. Cf. *On Lee* v. *United States*, 343 U. S. 747, 751–752 (1952) (no search or seizure where an informant, who was wearing a concealed microphone, was invited into the defendant's business). Jones, who possessed the Jeep at the time the Government trespassorily inserted the information-gathering device, is on much different footing.

The Government also points to our exposition in *New York* v. *Class*, 475 U. S. 106 (1986), that "[t]he exterior of a car . . . is thrust into the public eye, and thus to examine it does not constitute a 'search.'" *Id.*, at 114. That statement is of marginal relevance here since, as the Government acknowledges, "the officers in this case did *more* than conduct a visual inspection of respondent's vehicle," Brief for United States 41 (emphasis added). By attaching the device to the Jeep, officers encroached on a protected area. In *Class* itself we suggested that this would make a difference, for we concluded that an officer's momentary reaching into the interior of a vehicle did constitute a

search.[7] 475 U. S., at 114–115.

Finally, the Government's position gains little support from our conclusion in *Oliver* v. *United States*, 466 U. S. 170 (1984), that officers' information-gathering intrusion on an "open field" did not constitute a Fourth Amendment search even though it was a trespass at common law, *id.*, at 183. Quite simply, an open field, unlike the curtilage of a home, see *United States* v. *Dunn*, 480 U. S. 294, 300 (1987), is not one of those protected areas enumerated in the Fourth Amendment. *Oliver, supra*, at 176–177. See also *Hester* v. *United States*, 265 U. S. 57, 59 (1924). The Government's physical intrusion on such an area—unlike its intrusion on the "effect" at issue here—is of no Fourth Amendment significance.[8]

B

The concurrence begins by accusing us of applying "18th-century tort law." *Post*, at 1. That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at*

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[7]The Government also points to *Cardwell* v. *Lewis*, 417 U. S. 583 (1974), in which the Court rejected the claim that the inspection of an impounded vehicle's tire tread and the collection of paint scrapings from its exterior violated the Fourth Amendment. Whether the plurality said so because no search occurred or because the search was reasonable is unclear. Compare *id.*, at 591 (opinion of Blackmun, J.) ("[W]e fail to comprehend what expectation of privacy was infringed"), with *id.*, at 592 ("Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable . . . ").

[8]Thus, our theory is *not* that the Fourth Amendment is concerned with "*any* technical trespass that led to the gathering of evidence." *Post*, at 3 (ALITO, J., concurring in judgment) (emphasis added). The Fourth Amendment protects against trespassory searches only with regard to those items ("persons, houses, papers, and effects") that it enumerates. The trespass that occurred in *Oliver* may properly be understood as a "search," but not one "in the constitutional sense." 466 U. S., at 170, 183.

a minimum the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply *exclusively Katz*'s reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed.

The concurrence faults our approach for "present[ing] particularly vexing problems" in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. *Post*, at 9. We entirely fail to understand that point. For unlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.

In fact, it is the concurrence's insistence on the exclusivity of the *Katz* test that needlessly leads us into "particularly vexing problems" in the present case. This Court has to date not deviated from the understanding that mere visual observation does not constitute a search. See *Kyllo*, 533 U. S., at 31–32. We accordingly held in *Knotts* that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U. S., at 281. Thus, even assuming that the concurrence is correct to say that "[t]raditional surveillance" of Jones for a 4-week period "would have required a large team of agents, multiple vehicles, and perhaps aerial assistance," *post*, at 12, our cases suggest that such visual observation is constitutionally permissible. It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.

And answering it affirmatively leads us needlessly into additional thorny problems. The concurrence posits that "relatively short-term monitoring of a person's movements

on public streets" is okay, but that "the use of longer term GPS monitoring in investigations *of most offenses*" is no good. *Post*, at 13 (emphasis added). That introduces yet another novelty into our jurisprudence. There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated. And even accepting that novelty, it remains unexplained why a 4-week investigation is "surely" too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an "extraordinary offens[e]" which may permit longer observation. See *post*, at 13–14. What of a 2-day monitoring of a suspected purveyor of stolen electronics? Or of a 6-month monitoring of a suspected terrorist? We may have to grapple with these "vexing problems" in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.

III

The Government argues in the alternative that even if the attachment and use of the device was a search, it was reasonable—and thus lawful—under the Fourth Amendment because "officers had reasonable suspicion, and indeed probable cause, to believe that [Jones] was a leader in a large-scale cocaine distribution conspiracy." Brief for United States 50–51. We have no occasion to consider this argument. The Government did not raise it below, and the D. C. Circuit therefore did not address it. See 625 F. 3d, at 767 (Ginsburg, Tatel, and Griffith, JJ., concurring in denial of rehearing en banc). We consider the argument forfeited. See *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 56, n. 4 (2002).

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The judgment of the Court of Appeals for the D. C. Circuit is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 10–1259

UNITED STATES, PETITIONER *v.* ANTOINE JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 23, 2012]

JUSTICE SOTOMAYOR, concurring.

I join the Court's opinion because I agree that a search within the meaning of the Fourth Amendment occurs, at a minimum, "[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area." *Ante,* at 6, n. 3. In this case, the Government installed a Global Positioning System (GPS) tracking device on respondent Antoine Jones' Jeep without a valid warrant and without Jones' consent, then used that device to monitor the Jeep's movements over the course of four weeks. The Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection. See, *e.g., Silverman* v. *United States*, 365 U. S. 505, 511–512 (1961).

Of course, the Fourth Amendment is not concerned only with trespassory intrusions on property. See, *e.g., Kyllo* v. *United States*, 533 U. S. 27, 31–33 (2001). Rather, even in the absence of a trespass, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Id.,* at 33; see also *Smith* v. *Maryland*, 442 U. S. 735, 740–741 (1979); *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring). In *Katz*, this Court enlarged its then-prevailing focus on property rights by announcing

that the reach of the Fourth Amendment does not "turn upon the presence or absence of a physical intrusion." *Id.,* at 353. As the majority's opinion makes clear, however, *Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it. *Ante,* at 8. Thus, "when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." *United States* v. *Knotts*, 460 U. S. 276, 286 (1983) (Brennan, J., concurring in judgment); see also, *e.g., Rakas* v. *Illinois*, 439 U. S. 128, 144, n. 12 (1978). JUSTICE ALITO's approach, which discounts altogether the constitutional relevance of the Government's physical intrusion on Jones' Jeep, erodes that longstanding protection for privacy expectations inherent in items of property that people possess or control. See *post,* at 5–7 (opinion concurring in judgment). By contrast, the trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs. The reaffirmation of that principle suffices to decide this case.

Nonetheless, as JUSTICE ALITO notes, physical intrusion is now unnecessary to many forms of surveillance. *Post,* at 9–12. With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones. See *United States* v. *Pineda-Moreno*, 617 F. 3d 1120, 1125 (CA9 2010) (Kozinski, C. J., dissenting from denial of rehearing en banc). In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion's trespassory test may provide little guidance. But "[s]ituations involving merely the transmission of electronic signals without trespass

would *remain* subject to *Katz* analysis." *Ante,* at 11. As JUSTICE ALITO incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations. *Post,* at 10–11. Under that rubric, I agree with JUSTICE ALITO that, at the very least, "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Post,* at 13.

In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. See, *e.g., People* v. *Weaver*, 12 N. Y. 3d 433, 441–442, 909 N. E. 2d 1195, 1199 (2009) ("Disclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on"). The Government can store such records and efficiently mine them for information years into the future. *Pineda-Moreno*, 617 F. 3d, at 1124 (opinion of Kozinski, C. J.). And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility." *Illinois* v. *Lidster*, 540 U. S. 419, 426 (2004).

Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net

result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society." *United States* v. *Cuevas-Perez*, 640 F. 3d 272, 285 (CA7 2011) (Flaum, J., concurring).

I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on. I do not regard as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. See *Kyllo*, 533 U. S., at 35, n. 2; *ante,* at 11 (leaving open the possibility that duplicating traditional surveillance "through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy"). I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent "a too permeating police surveillance," *United States* v. *Di Re*, 332 U. S. 581, 595 (1948).*

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* *United States* v. *Knotts*, 460 U. S. 276 (1983), does not foreclose the conclusion that GPS monitoring, in the absence of a physical intrusion, is a Fourth Amendment search. As the majority's opinion notes, *Knotts* reserved the question whether "'different constitutional principles may be applicable'" to invasive law enforcement practices such as GPS tracking. See *ante,* at 8, n. 6 (quoting 460 U. S., at 284).

United States v. *Karo*, 468 U. S. 705 (1984), addressed the Fourth

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. *E.g., Smith*, 442 U. S., at 742; *United States* v. *Miller*, 425 U. S. 435, 443 (1976). This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as JUSTICE ALITO notes, some people may find the "tradeoff" of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," *post,* at 10, and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases

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Amendment implications of the installation of a beeper in a container with the consent of the container's original owner, who was aware that the beeper would be used for surveillance purposes. *Id.,* at 707. Owners of GPS-equipped cars and smartphones do not contemplate that these devices will be used to enable covert surveillance of their movements. To the contrary, subscribers of one such service greeted a similar suggestion with anger. Quain, Changes to OnStar's Privacy Terms Rile Some Users, N. Y. Times (Sept. 22, 2011), online at http://wheels.blogs.nytimes.com/2011/09/22/changes-to-onstars-privacy-terms-rile-some-users (as visited Jan. 19, 2012, and available in Clerk of Court's case file). In addition, the bugged container in *Karo* lacked the close relationship with the target that a car shares with its owner. The bugged container in *Karo* was stationary for much of the Government's surveillance. See 468 U. S., at 708–710. A car's movements, by contrast, are its owner's movements.

to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection. See *Smith*, 442 U. S., at 749 (Marshall, J., dissenting) ("Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes"); see also *Katz*, 389 U. S., at 351–352 ("[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected").

Resolution of these difficult questions in this case is unnecessary, however, because the Government's physical intrusion on Jones' Jeep supplies a narrower basis for decision. I therefore join the majority's opinion.

SUPREME COURT OF THE UNITED STATES

No. 10–1259

UNITED STATES, PETITIONER *v.* ANTOINE JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 23, 2012]

JUSTICE ALITO, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN join, concurring in the judgment.

This case requires us to apply the Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st-century surveillance technique, the use of a Global Positioning System (GPS) device to monitor a vehicle's movements for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law. By attaching a small GPS device[1] to the underside of the vehicle that respondent drove, the law enforcement officers in this case engaged in conduct that might have provided grounds in 1791 for a suit for trespass to chattels.[2] And for this reason, the Court concludes, the installation and use of the GPS device constituted a search. *Ante*, at 3–4.

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[1] Although the record does not reveal the size or weight of the device used in this case, there is now a device in use that weighs two ounces and is the size of a credit card. Tr. of Oral Arg. 27.

[2] At common law, a suit for trespass to chattels could be maintained if there was a violation of "the dignitary interest in the inviolability of chattels," but today there must be "some actual damage to the chattel before the action can be maintained." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts 87 (5th ed. 1984) (hereinafter Prosser & Keeton). Here, there was no actual damage to the vehicle to which the GPS device was attached.

This holding, in my judgment, is unwise. It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial.

I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.

I

A

The Fourth Amendment prohibits "unreasonable searches and seizures," and the Court makes very little effort to explain how the attachment or use of the GPS device fits within these terms. The Court does not contend that there was a seizure. A seizure of property occurs when there is "some meaningful interference with an individual's possessory interests in that property," *United States* v. *Jacobsen,* 466 U. S. 109, 113 (1984), and here there was none. Indeed, the success of the surveillance technique that the officers employed was dependent on the fact that the GPS did not interfere in any way with the operation of the vehicle, for if any such interference had been detected, the device might have been discovered.

The Court does claim that the installation and use of the GPS constituted a search, see *ante,* at 3–4, but this conclusion is dependent on the questionable proposition that these two procedures cannot be separated for purposes of Fourth Amendment analysis. If these two procedures are analyzed separately, it is not at all clear from the Court's opinion why either should be regarded as a search. It is clear that the attachment of the GPS device was not itself a search; if the device had not functioned or if the officers had not used it, no information would have been obtained. And the Court does not contend that the use of the device constituted a search either. On the contrary, the Court

accepts the holding in *United States* v. *Knotts*, 460 U. S. 276 (1983), that the use of a surreptitiously planted electronic device to monitor a vehicle's movements on public roads did not amount to a search. See *ante*, at 7.

The Court argues—and I agree—that "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Ante*, at 5 (quoting *Kyllo* v. *United States*, 533 U. S. 27, 34 (2001)). But it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?[3]) The Court's theory seems to be that the concept of a search, as originally understood, comprehended any technical trespass that led to the gathering of evidence, but we know that this is incorrect. At common law, any unauthorized intrusion on private property was actionable, see Prosser & Keeton 75, but a trespass on open fields, as opposed to the "curtilage" of a home, does not fall within the scope of the Fourth Amendment because private property outside the curtilage is not part of a "hous[e]" within the meaning of the Fourth Amendment. See *Oliver* v. *United State*s, 466 U. S. 170 (1984); *Hester* v. *United States*, 265 U. S. 57 (1924).

B

The Court's reasoning in this case is very similar to that in the Court's early decisions involving wiretapping and electronic eavesdropping, namely, that a technical trespass followed by the gathering of evidence constitutes a

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[3] The Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.

search. In the early electronic surveillance cases, the Court concluded that a Fourth Amendment search occurred when private conversations were monitored as a result of an "unauthorized physical penetration into the premises occupied" by the defendant. *Silverman* v. *United States*, 365 U. S. 505, 509 (1961). In *Silverman*, police officers listened to conversations in an attached home by inserting a "spike mike" through the wall that this house shared with the vacant house next door. *Id.,* at 506. This procedure was held to be a search because the mike made contact with a heating duct on the other side of the wall and thus "usurp[ed] . . . an integral part of the premises." *Id.,* at 511.

By contrast, in cases in which there was no trespass, it was held that there was no search. Thus, in *Olmstead* v. *United States*, 277 U. S. 438 (1928), the Court found that the Fourth Amendment did not apply because "[t]he taps from house lines were made in the streets near the houses." *Id.*, at 457. Similarly, the Court concluded that no search occurred in *Goldman* v. *United States*, 316 U. S. 129, 135 (1942), where a "detectaphone" was placed on the outer wall of defendant's office for the purpose of overhearing conversations held within the room.

This trespass-based rule was repeatedly criticized. In *Olmstead*, Justice Brandeis wrote that it was "immaterial where the physical connection with the telephone wires was made." 277 U. S., at 479 (dissenting opinion). Although a private conversation transmitted by wire did not fall within the literal words of the Fourth Amendment, he argued, the Amendment should be understood as prohibiting "every unjustifiable intrusion by the government upon the privacy of the individual." *Id.,* at 478. See also, *e.g.*, *Silverman*, *supra*, at 513 (Douglas, J., concurring) ("The concept of 'an unauthorized physical penetration into the premises,' on which the present decision rests seems to me beside the point. Was not the wrong . . . done when the

intimacies of the home were tapped, recorded, or revealed? The depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not the measure of the injury"); *Goldman*, *supra*, at 139 (Murphy, J., dissenting) ("[T]he search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment").

Katz v. *United States*, 389 U. S. 347 (1967), finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation. *Katz* involved the use of a listening device that was attached to the outside of a public telephone booth and that allowed police officers to eavesdrop on one end of the target's phone conversation. This procedure did not physically intrude on the area occupied by the target, but the *Katz* Court "repudiate[ed]" the old doctrine, *Rakas* v. *Illinois*, 439 U. S. 128, 143 (1978), and held that "[t]he fact that the electronic device employed . . . did not happen to penetrate the wall of the booth can have no constitutional significance," 389 U. S., at 353 ("[T]he reach of th[e] [Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure"); see *Rakas*, *supra*, at 143 (describing *Katz* as holding that the "capacity to claim the protection for the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"); *Kyllo, supra,* at 32 ("We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property"). What mattered, the Court now held, was whether the conduct at issue "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth." *Katz, supra*,

at 353.

Under this approach, as the Court later put it when addressing the relevance of a technical trespass, "an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation." *United States* v. *Karo,* 468 U. S. 705, 713 (1984) (emphasis added). *Ibid.* ("Compar[ing] *Katz* v. *United States*, 389 U. S. 347 (1967) (no trespass, but Fourth Amendment violation), with *Oliver* v. *United States*, 466 U. S. 170 (1984) (trespass, but no Fourth Amendment violation)"). In *Oliver,* the Court wrote:

> "The existence of a property right is but one element in determining whether expectations of privacy are legitimate. 'The premise that property interests control the right of the Government to search and seize has been discredited.' *Katz*, 389 U. S., at 353, (quoting *Warden* v. *Hayden*, 387 U. S. 294, 304 (1967); some internal quotation marks omitted)." 466 U. S., at 183.

II

The majority suggests that two post-*Katz* decisions—*Soldal* v. *Cook County*, 506 U. S. 56 (1992), and *Alderman* v. *United States*, 394 U. S. 165 (1969)—show that a technical trespass is sufficient to establish the existence of a search, but they provide little support.

In *Soldal*, the Court held that towing away a trailer home without the owner's consent constituted a seizure even if this did not invade the occupants' personal privacy. But in the present case, the Court does not find that there was a seizure, and it is clear that none occurred.

In *Alderman,* the Court held that the Fourth Amendment rights of homeowners were implicated by the use of a surreptitiously planted listening device to monitor third-party conversations that occurred within their home. See 394 U. S., at 176–180. *Alderman* is best understood to

mean that the homeowners had a legitimate expectation of privacy in all conversations that took place under their roof. See *Rakas*, 439 U. S., at 144, n. 12 (citing *Alderman* for the proposition that "the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment"); 439 U. S., at 153 (Powell, J., concurring) (citing *Alderman* for the proposition that "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable); *Karo*, *supra*, at 732 (Stevens, J., concurring in part and dissenting in part) (citing *Alderman* in support of the proposition that "a homeowner has a reasonable expectation of privacy in the contents of his home, including items owned by others").

In sum, the majority is hard pressed to find support in post-*Katz* cases for its trespass-based theory.

III

Disharmony with a substantial body of existing case law is only one of the problems with the Court's approach in this case.

I will briefly note four others. First, the Court's reasoning largely disregards what is really important (the *use* of a GPS for the purpose of long-term tracking) and instead attaches great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation). Attaching such an object is generally regarded as so trivial that it does not provide a basis for recovery under modern tort law. See Prosser & Keeton §14, at 87 (harmless or trivial contact with personal property not actionable); D. Dobbs, Law of Torts 124 (2000) (same). But under the Court's reasoning, this conduct

may violate the Fourth Amendment. By contrast, if long-term monitoring can be accomplished without committing a technical trespass—suppose, for example, that the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car—the Court's theory would provide no protection.

Second, the Court's approach leads to incongruous results. If the police attach a GPS device to a car and use the device to follow the car for even a brief time, under the Court's theory, the Fourth Amendment applies. But if the police follow the same car for a much longer period using unmarked cars and aerial assistance, this tracking is not subject to any Fourth Amendment constraints.

In the present case, the Fourth Amendment applies, the Court concludes, because the officers installed the GPS device after respondent's wife, to whom the car was registered, turned it over to respondent for his exclusive use. See *ante*, at 8. But if the GPS had been attached prior to that time, the Court's theory would lead to a different result. The Court proceeds on the assumption that respondent "had at least the property rights of a bailee," *ante*, at 3, n. 2, but a bailee may sue for a trespass to chattel only if the injury occurs during the term of the bailment. See 8A Am. Jur. 2d, Bailment §166, pp. 685–686 (2009). So if the GPS device had been installed before respondent's wife gave him the keys, respondent would have no claim for trespass—and, presumably, no Fourth Amendment claim either.

Third, under the Court's theory, the coverage of the Fourth Amendment may vary from State to State. If the events at issue here had occurred in a community property State[4] or a State that has adopted the Uniform Marital

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[4] See, *e.g.*, Cal. Family Code Ann. §760 (West 2004).

Property Act,[5] respondent would likely be an owner of the vehicle, and it would not matter whether the GPS was installed before or after his wife turned over the keys. In non-community-property States, on the other hand, the registration of the vehicle in the name of respondent's wife would generally be regarded as presumptive evidence that she was the sole owner. See 60 C. J. S., Motor Vehicles §231, pp. 398–399 (2002); 8 Am. Jur. 2d, Automobiles §1208, pp. 859–860 (2007).

Fourth, the Court's reliance on the law of trespass will present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked. For example, suppose that the officers in the present case had followed respondent by surreptitiously activating a stolen vehicle detection system that came with the car when it was purchased. Would the sending of a radio signal to activate this system constitute a trespass to chattels? Trespass to chattels has traditionally required a physical touching of the property. See Restatement (Second) of Torts §217 and Comment *e* (1963 and 1964); Dobbs, *supra*, at 123. In recent years, courts have wrestled with the application of this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the transmission of electrons that occurs when a communication is sent from one computer to another is enough. See, *e.g., CompuServe, Inc.* v. *Cyber Promotions*, *Inc.* 962 F. Supp. 1015, 1021 (SD Ohio 1997); *Thrifty-Tel, Inc.* v. *Bezenek*, 46 Cal. App. 4th 1559, 1566, n. 6 (1996). But may such decisions be followed in applying the Court's trespass theory? Assuming that what matters under the Court's theory is the law of trespass as it existed at the time of the adoption of the Fourth

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[5] See Uniform Marital Property Act §4, 9A U. L. A. 116 (1998).

Amendment, do these recent decisions represent a change in the law or simply the application of the old tort to new situations?

IV

A

The *Katz* expectation-of-privacy test avoids the problems and complications noted above, but it is not without its own difficulties. It involves a degree of circularity, see *Kyllo*, 533 U. S., at 34, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks. See *Minnesota* v. *Carter*, 525 U. S. 83, 97 (1998) (SCALIA, J., concurring). In addition, the *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.[6]

On the other hand, concern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions. This is what ultimately happened with respect to wiretapping. After *Katz*, Congress

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[6] See, *e.g.*, NPR, The End of Privacy http://www.npr.org/series/114250076/the-end-of-privacy (all Internet materials as visited Jan. 20, 2012, and available in Clerk of Court's case file); Time Magazine, Everything About You Is Being Tracked—Get Over It, Joel Stein, Mar. 21, 2011, Vol. 177, No. 11.

did not leave it to the courts to develop a body of Fourth Amendment case law governing that complex subject. Instead, Congress promptly enacted a comprehensive statute, see 18 U. S. C. §§2510–2522 (2006 ed. and Supp. IV), and since that time, the regulation of wiretapping has been governed primarily by statute and not by case law.[7] In an ironic sense, although *Katz* overruled *Olmstead*, Chief Justice Taft's suggestion in the latter case that the regulation of wiretapping was a matter better left for Congress, see 277 U. S., at 465–466, has been borne out.

B

Recent years have seen the emergence of many new devices that permit the monitoring of a person's movements. In some locales, closed-circuit television video monitoring is becoming ubiquitous. On toll roads, automatic toll collection systems create a precise record of the movements of motorists who choose to make use of that convenience. Many motorists purchase cars that are equipped with devices that permit a central station to ascertain the car's location at any time so that roadside assistance may be provided if needed and the car may be found if it is stolen.

Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States.[8] For older phones, the accuracy of the location information depends on the density of the tower network, but new "smart phones," which

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[7] See Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801, 850–851 (2004) (hereinafter Kerr).

[8] See CTIA Consumer Info, 50 Wireless Quick Facts, http://www.ctia.org/consumer_info/index.cfm/AID/10323.

are equipped with a GPS device, permit more precise tracking. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining ("crowdsourcing") the speed of all such phones on any particular road.[9] Similarly, phone-location-tracking services are offered as "social" tools, allowing consumers to find (or to avoid) others who enroll in these services. The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

V

In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken. The surveillance at issue in this case—constant monitoring of the location of a vehicle for four weeks—would have required a large team of agents, multiple vehicles, and perhaps aerial assistance.[10] Only an investigation of unusual importance could have justified such an

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[9] See, *e.g.*, The bright side of sitting in traffic: Crowdsourcing road congestion data, Google Blog, http://googleblog.blogspot.com/2009/08/bright-side-of-sitting-in-traffic.html.

[10] Even with a radio transmitter like those used in *United States* v. *Knotts*, 460 U. S. 276 (1983), or *United States* v. *Karo,* 468 U. S. 705 (1984), such long-term surveillance would have been exceptionally demanding. The beepers used in those cases merely "emit[ted] periodic signals that [could] be picked up by a radio receiver." *Knotts*, 460 U.S., at 277. The signal had a limited range and could be lost if the police did not stay close enough. Indeed, in *Knotts* itself, officers lost the signal from the beeper, and only "with the assistance of a monitoring device located in a helicopter [was] the approximate location of the signal . . . picked up again about one hour later." *Id.*, at 278.

expenditure of law enforcement resources. Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap. In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. See, *e.g.*, Kerr, 102 Mich. L. Rev., at 805–806. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.

To date, however, Congress and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes. The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.

Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. See *Knotts,* 460 U. S., at 281–282. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark. Other cases may present more difficult questions. But where uncertainty exists with respect to whether a certain period of GPS surveil

lance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant.[11] We also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy. In such cases, long-term tracking might have been mounted using previously available techniques.

* * *

For these reasons, I conclude that the lengthy monitoring that occurred in this case constituted a search under the Fourth Amendment. I therefore agree with the majority that the decision of the Court of Appeals must be affirmed.

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[11] In this case, the agents obtained a warrant, but they did not comply with two of the warrant's restrictions: They did not install the GPS device within the 10-day period required by the terms of the warrant and by Fed. Rule Crim. Proc. 41(e)(2)(B)(i), and they did not install the GPS device within the District of Columbia, as required by the terms of the warrant and by 18 U. S. C. §3117(a) and Rule 41(b)(4). In the courts below the Government did not argue, and has not argued here, that the Fourth Amendment does not impose these precise restrictions and that the violation of these restrictions does not demand the suppression of evidence obtained using the tracking device. See, *e.g.*, *United States* v. *Gerber*, 994 F. 2d 1556, 1559–1560 (CA11 1993); *United States* v. *Burke*, 517 F. 2d 377, 386–387 (CA2 1975). Because it was not raised, that question is not before us.

People v Weaver
2009 NY Slip Op 03762 [12 NY3d 433]
May 12, 2009
Lippman, Ch.J.
Court of Appeals
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, July 1, 2009

[*1]

The People of the State of New York, Respondent,
v
Scott C. Weaver, Appellant.

Argued March 24, 2009; decided May 12, 2009

People v Weaver, 52 AD3d 138, reversed.

{**12 NY3d at 436} OPINION OF THE COURT

Chief Judge Lippman.

In the early morning hours of December 21, 2005, a State Police Investigator crept [*2] underneath defendant's street-parked van and placed a global positioning system (GPS) tracking device inside the bumper. The device remained in place for 65 days, constantly monitoring the position of the van. This nonstop surveillance was conducted without a warrant.

The GPS device, known as a "Q-ball," once attached to the van, operated in conjunction with numerous satellites, from which it received tracking data, to fix the van's location. The Q-ball readings indicated the speed of the van and pinpointed its location within 30 feet. Readings were taken approximately every minute while the vehicle was in motion, but less often when it was stationary. The device's battery required replacement during the monitoring period, which resulted in yet another nocturnal visit by the investigator to the van's undercarriage. To download the location information retrieved by

the Q-ball, the investigator would simply drive past the van and press a button on a corresponding receiver unit, causing the tracking history to be transmitted to and saved by a computer in the investigator's vehicle.

It is not clear from the record why defendant was placed under electronic surveillance. What is clear is that he was eventually charged with and tried in a single proceeding for crimes relating to two separate burglaries—one committed in July 2005 at the Latham Meat Market and the other on Christmas Eve of the same year at the Latham K-Mart.

The prosecution sought to have admitted at trial GPS readings showing that, on the evening of the Latham K-Mart{**12 NY3d at 437} burglary at 7:26, defendant's van traversed the store's parking lot at a speed of six miles per hour. Without a hearing, County Court denied defendant's motion to suppress the GPS data, and the electronic surveillance evidence was received. The additional evidence against defendant came primarily from Amber Roche, who was charged in connection with the Latham Meat Market burglary and was deemed an accomplice in the commission of that burglary.

Roche testified that prior to the date of the burglary, she drove through the parking lot of the Latham K-Mart with defendant and John Scott Chiera, while the men looked for the best place to break into the store. She stated that on the night of the burglary, defendant and Chiera left her apartment wearing dark clothing. When they returned, Chiera's hand was bleeding. Other evidence showed that, during the burglary, a jewelry case inside the K-Mart had been smashed and stained with blood containing DNA matching that of Chiera. Notably, Roche's initial statement to the police did not implicate defendant in the K-Mart burglary, but rather indicated that Chiera had committed the crime with a different individual. A few weeks later, Roche gave the police a second statement implicating defendant instead of that individual.

The jury convicted defendant of two counts relating to the K-Mart burglary, but acquitted him of the counts pertaining to the Meat Market burglary. The ensuing judgment of conviction was affirmed by a divided Appellate Division. The majority rejected defendant's argument that his Fourth Amendment rights had been violated by the warrantless placement and use of the GPS device, and found that he had no greater right to relief under the State Constitution. It premised its decision largely upon what it deemed to be defendant's reduced expectation of privacy in the exterior of his vehicle (52 AD3d 138 [3d Dept 2008]).

One Justice dissented and would have suppressed the evidence obtained from the GPS tracking device. The dissenting opinion agreed that there was no Fourth Amendment violation, but found a violation of defendant's corresponding rights under the State Constitution—stating that citizens "have a reasonable expectation that their every move will not be continuously and [*3]indefinitely monitored by a technical device without their knowledge, except where a warrant has been issued based on probable cause" (*id.* at 145). The dissenting Justice granted defendant leave to appeal (10 NY3d 966 [2008]) and we now reverse.{**12 NY3d at 438}

The Fourth Amendment, read literally, protects property and for a long time was read to do no more. In *Olmstead v United States* (277 US 438 [1928]), the Supreme Court, adhering to the notion that a Fourth Amendment infringement was essentially one affecting property,[FN*] refused to find that a telephone wiretap was a search within the amendment's meaning because the wiretap involved no trespass into the houses or offices of the defendants. Justice Brandeis differed and offered as an alternative to the majority's understanding of the amendment this much more encompassing view:

> "The protection guaranteed by the Amendments [the Fourth and Fifth] is much broader in scope [than the protection of property]. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth" (*id.* at 478-479 [dissenting op]).

Brandeis's dissent was resonant, even in the years immediately after the case's decision. And, some 12 years later, at the New York State Constitutional Convention of 1938, the view that there should be constitutional protection against governmental infringements of privacy not involving any offense against property found vindication in this state's analogue to the Fourth Amendment, only then adopted. Our constitutional{**12 NY3d at 439} provision (art I, § 12), in addition to tracking the language of the Fourth Amendment,

provides:

> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

On the federal level, however, Brandeis's seminal and eloquent recognition that privacy and not property per se was the essential value protected by the Fourth Amendment was slower [*4]to find definitive doctrinal acceptance. Finally, however, in *Katz v United States* (389 US 347, 357 [1967]) the Supreme Court overruled *Olmstead*, holding:

> "[T]he underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance" (*id.* at 353).

Since *Katz*, the existence of a privacy interest within the Fourth Amendment's protective ambit has been understood to depend upon whether the individual asserting the interest has demonstrated a subjective expectation of privacy and whether that expectation would be accepted as reasonable by society (*see Katz*, 389 US at 361 [Harlan, J., concurring]). However, while *Katz* purported to deemphasize location as a determinant in judging the reach of the Fourth Amendment, the analysis it seemed to require naturally reintroduced considerations of place back into the calculus since the social reasonableness of an individual's expectation of privacy will quite often turn upon the quality of the space inhabited or traversed, i.e., whether it is{**12 NY3d at 440} public or private space. An individual has been held to have a significantly reduced expectation of privacy when passing along a public way, particularly in a motor vehicle.

The amalgam of issues with which we here deal, arising from the use of a new and potentially doctrine-forcing surveillance technology by government law enforcers to track movements over largely public terrain, was most significantly dealt with by the Supreme

Court in the post-*Katz* era in *United States v Knotts* (460 US 276 [1983]). There, government agents placed a beeper in a five-gallon drum of chloroform to track the container's movements. They then followed the vehicle that transported the container using both visual surveillance and a monitor that received signals from the beeper. Although the officers lost sight of the vehicle, it was eventually located at Knotts's cabin. The Court noted that, although Knotts had an expectation of privacy in his cabin, there was no such expectation attending the movements of the vehicle transporting the container (*id.* at 282). "A person traveling in an automobile on public thoroughfares," the Court observed, "has no reasonable expectation of privacy in his [or her] movements from one place to another" (*id.* at 281). This was so, said the Court, because the particular route taken, stops made and ultimate destination are apparent to any member of the public who happens to observe the vehicle's movements (*see id.* at 281-282). The use of the beeper in addition to the visual surveillance did not change the Court's analysis: "Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case" (*id.* at 282).

At first blush, it would appear that *Knotts* does not bode well for Mr. Weaver, for in his case, as in *Knotts*, the surveillance technology was utilized for the purpose of tracking the progress of a vehicle over what may be safely supposed to have been predominantly public roads and, as in *Knotts*, these movements were at least in theory exposed to "anyone who wanted to [*5]look" (*id.* at 281). This, however, is where the similarity ends.

Knotts involved the use of what we must now, more than a quarter of a century later, recognize to have been a very primitive tracking device. The device was, moreover, used in a focused binary police investigation for the discreet purpose of ascertaining the destination of a particular container of chloroform. And, in this application, during the single trip from the place where the chloroform was purchased to the Knotts cabin, the beeper{**12 NY3d at 441} was fairly described by the Court as having functioned merely as an enhancing adjunct to the surveilling officers' senses; the officers actively followed the vehicle and used the beeper as a means of maintaining and regaining actual visual contact with it. The technology was, in this context, not unconvincingly analogized by the Court to a searchlight, a marine glass, or a field glass (*id.* at 283, citing *United States v Lee*, 274 US 559, 563 [1927]).

Here, we are not presented with the use of a mere beeper to facilitate visual

surveillance during a single trip. GPS is a vastly different and exponentially more sophisticated and powerful technology that is easily and cheaply deployed and has virtually unlimited and remarkably precise tracking capability. With the addition of new GPS satellites, the technology is rapidly improving so that any person or object, such as a car, may be tracked with uncanny accuracy to virtually any interior or exterior location, at any time and regardless of atmospheric conditions. Constant, relentless tracking of anything is now not merely possible but entirely practicable, indeed much more practicable than the surveillance conducted in *Knotts*. GPS is not a mere enhancement of human sensory capacity, it facilitates a new technological perception of the world in which the situation of any object may be followed and exhaustively recorded over, in most cases, a practically unlimited period. The potential for a similar capture of information or "seeing" by law enforcement would require, at a minimum, millions of additional police officers and cameras on every street lamp.

That such a surrogate technological deployment is not—particularly when placed at the unsupervised discretion of agents of the state "engaged in the often competitive enterprise of ferreting out crime" (*Johnson v United States*, 333 US 10, 14 [1948])—compatible with any reasonable notion of personal privacy or ordered liberty would appear to us obvious. One need only consider what the police may learn, practically effortlessly, from planting a single device. The whole of a person's progress through the world, into both public and private spatial spheres, can be charted and recorded over lengthy periods possibly limited only by the need to change the transmitting unit's batteries. Disclosed in the data retrieved from the transmitting unit, nearly instantaneously with the press of a button on the highly portable receiving unit, will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the{**12 NY3d at 442} AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on. What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to name only a few—and of the pattern of our professional and avocational pursuits. When multiple GPS devices are utilized, even more precisely resolved inferences about our activities are possible. And, with GPS becoming an increasingly routine feature in cars and cell phones, it will be possible to tell from the technology with ever increasing precision who we are and are not with, when we are and are

not with them, [*6]and what we do and do not carry on our persons—to mention just a few of the highly feasible empirical configurations.

Knotts, of course, opens by adverting to *Olmstead* and the eventual vindication of the *Olmstead* dissent in *Katz*, and there is every evidence from the decision that the Court was acutely aware of its obligation in the post-*Katz* era to assure, as one court has succinctly (and perhaps disapprovingly) put it, that Fourth Amendment jurisprudence "keep[s] pace with the march of science" (*United States v Garcia*, 474 F3d 994, 997 [7th Cir 2007, Posner, J.]). The science at issue in *Knotts* was, as noted, quite modest, amounting to no more than an incremental improvement over following a car by the unassisted eye (*see id.* at 998). This being so, the Court quite reasonably concluded that the technology "*in this case*" (*Knotts*, 460 US at 282 [emphasis added]) raised no Fourth Amendment issue, but pointedly acknowledged and reserved for another day the question of whether a Fourth Amendment issue would be posed if "twenty-four hour surveillance of any citizen of this country [were] possible, without judicial knowledge or supervision" (*id.* at 283). To say that that day has arrived involves no melodrama; 26 years after *Knotts*, GPS technology, even in its present state of evolution, quite simply and matter-of-factly forces the issue.

It would appear clear to us that the great popularity of GPS technology for its many useful applications may not be taken simply as a massive, undifferentiated concession of personal privacy to agents of the state. Indeed, contemporary technology projects our private activities into public space as never before. Cell technology has moved presumptively private phone conversation from the enclosure of *Katz*'s phone booth to the{**12 NY3d at 443} open sidewalk and the car, and the advent of portable computing devices has resituated transactions of all kinds to relatively public spaces. It is fair to say, and we think consistent with prevalent social views, that this change in venue has not been accompanied by any dramatic diminution in the socially reasonable expectation that our communications and transactions will remain to a large extent private. Here, particularly, where there was no voluntary utilization of the tracking technology, and the technology was surreptitiously installed, there exists no basis to find an expectation of privacy so diminished as to render constitutional concerns de minimis.

It is, of course, true that the expectation of privacy has been deemed diminished in a car upon a public thoroughfare. But, it is one thing to suppose that the diminished expectation affords a police officer certain well-circumscribed options for which a warrant is not

required and quite another to suppose that when we drive or ride in a vehicle our expectations of privacy are so utterly diminished that we effectively consent to the unsupervised disclosure to law enforcement authorities of all that GPS technology can and will reveal. Even before the advent of GPS, it was recognized that a ride in a motor vehicle does not so completely deprive its occupants of any reasonable expectation of privacy:

> "An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he [*7]entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v Ohio* . . . recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks{**12 NY3d at 444} into their automobiles. See *Adams* v. *Williams*, 407 U. S. 143, 146 (1972)" (*Delaware v Prouse*, 440 US 648, 662-663 [1979]).

This view has recently been reaffirmed by the Supreme Court in *Arizona v Gant* (556 US —, 129 S Ct 1710 [2009]), where the Court, in addressing the scope of the search incident to arrest exception to the warrant requirement in the context of a vehicle stop, had occasion to observe, "the State seriously undervalues the privacy interests at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home . . . the former interest is nevertheless important and deserving of constitutional protection" (556 US at —, 129 S Ct at 1720). And, we, of course, have held in reliance upon our own Constitution that the use of a vehicle upon a public way does not effect a complete surrender of any objectively reasonable, socially acceptable privacy expectation (*People v Class*, 63 NY2d 491, 495 n 3 [1984], *revd* 475 US 106 [1986], *on remand* 67 NY2d 431 [1986] [adhering to determination of state constitutional law]).

The residual privacy expectation defendant retained in his vehicle, while perhaps small, was at least adequate to support his claim of a violation of his constitutional right to be free of unreasonable searches and seizures. The massive invasion of privacy entailed by the prolonged use of the GPS device was inconsistent with even the slightest reasonable

expectation of privacy.

While there may and, likely will, be exigent situations in which the requirement of a warrant issued upon probable cause authorizing the use of GPS devices for the purpose of official criminal investigation will be excused, this is not one of them. Plainly, no emergency prompted the attachment of the Q-ball to defendant's van. Indeed, upon this record, it is impossible to discern any reason, apart from hunch or curiosity, for the Q-ball's placement. But even if there were some retrospectively evident reason for the use of the device, it could not validate the search. "Over and again [the Supreme] Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions" (*Katz*, 389 US at 357 [citations and internal quotation marks omitted]). The placement of the Q-ball and the{**12 NY3d at 445} ensuing disclosure of defendant's movements over a 65-day period comes within no exception to the warrant requirement, and the People do not contend otherwise. They contend only that no search occurred, a contention that we find untenable.

In reaching this conclusion, we acknowledge that the determinative issue remains open as a matter of federal constitutional law, since the United States Supreme Court has not yet ruled upon whether the use of GPS by the state for the purpose of criminal investigation constitutes a search under the Fourth Amendment, and, indeed, the issue has not yet been addressed by the vast majority of the Federal Circuit Courts. Thus, we do not presume to decide the question as a matter of federal law. The very same principles are, however, dispositive of this matter under our State Constitution. If, as we have found, defendant had a reasonable expectation of privacy that was infringed by the State's placement and monitoring of the Q-ball on his van to track his [*8]movements over a period of more than two months, there was a search under article I, § 12 of the State Constitution. And that search was illegal because it was executed without a warrant and without justification under any exception to the warrant requirement. In light of the unsettled state of federal law on the issue, we premise our ruling on our State Constitution alone.

We note that we have on many occasions interpreted our own Constitution to provide greater protections when circumstances warrant and have developed an independent body of state law in the area of search and seizure (*see e.g. People v Scott*, 79 NY2d 474 [1992];

People v Harris, 77 NY2d 434 [1991]; *People v Dunn*, 77 NY2d 19 [1990]; *People v Torres*, 74 NY2d 224, 228 [1989]). We have adopted separate standards "when doing so best promotes 'predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens' " (*People v P.J. Video*, 68 NY2d 296, 304 [1986] [citations omitted]). What we articulate today may or may not ultimately be a separate standard. If it is, we believe the disparity would be justified. The alternative would be to countenance an enormous unsupervised intrusion by the police agencies of government upon personal privacy and, in this modern age where criminal investigation will increasingly be conducted by sophisticated technological means, the consequent marginalization of the State Constitution and judiciary in matters crucial to safeguarding the privacy of our citizens.

At a similar crossroads, Justice Brandeis in *Olmstead* queried, "[c]an it be that the Constitution affords no protection against{**12 NY3d at 446} such invasions of individual security?" (277 US at 474.) We today, having understood the lesson of *Olmstead*, reply "no," at least not under our State Constitution. Leaving the matter to the Legislature would be defensible only upon the ground that there had been no intrusion upon defendant's privacy qualifying as an article I, § 12 "search." Nothing prevents the Legislature from acting to regulate the use of GPS devices within constitutional limits, but, we think it manifest that the continuous GPS surveillance and recording by law enforcement authorities of the defendant's every automotive movement cannot be described except as a search of constitutional dimension and consequence.

Contrary to the dissenting views, the gross intrusion at issue is not less cognizable as a search by reason of what the Legislature has or has not done to regulate technological surveillance. Nor does the bare preference for legislatively devised rules and remedies in this area constitute a ground for treating the facts at bar as of subconstitutional import. Before us is a defendant whose movements have, for no apparent reason, been tracked and recorded relentlessly for 65 days. It is quite clear that this would not and, indeed, realistically could not have been done without GPS and that this dragnet use of the technology at the sole discretion of law enforcement authorities to pry into the details of people's daily lives is not consistent with the values at the core of our State Constitution's prohibition against unreasonable searches.

We find persuasive the conclusions of other state courts that have addressed this issue

and have held that the warrantless use of a tracking device is inconsistent with the protections guaranteed by their state constitutions (*State v Jackson*, 150 Wash 2d 251, 76 P3d 217 [2003]; *State v Campbell*, 306 Or 157, 759 P2d 1040 [1988]). The corresponding provision of the Washington State Constitution differs from and has been held to be more protective than the Fourth Amendment. However, the court noted that the use of a GPS device was not merely an augmentation of an officer's senses (*see Jackson*, 150 Wash 2d at 261-262, 76 P3d at 223) and that the means of surveillance allowed the government to access an enormous amount of additional information, [*9]including a person's associations and activities (*see* 150 Wash 2d at 260, 76 P3d at 222). The court concluded that "citizens of this State have a right to be free from the type of governmental intrusion that occurs when a GPS device is attached to a citizen's vehicle, regardless of{**12 NY3d at 447} reduced privacy expectations due to advances in technology" and that a warrant was needed before such a device could be installed (150 Wash 2d at 264, 76 P3d at 224).

Similarly, the Supreme Court of Oregon held that the government's use of a radio transmitter to monitor the location of defendant's car was a search under the State Constitution as it was a significant limitation on the defendant's freedom from scrutiny (*Campbell*, 306 Or at 171, 759 P2d at 1048), and that the warrantless use of the transmitter in the absence of exigent circumstances was "nothing short of a staggering limitation upon personal freedom" (306 Or at 172, 759 P2d at 1049).

Technological advances have produced many valuable tools for law enforcement and, as the years go by, the technology available to aid in the detection of criminal conduct will only become more and more sophisticated. Without judicial oversight, the use of these powerful devices presents a significant and, to our minds, unacceptable risk of abuse. Under our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause.

In light of this disposition, it is not necessary to address defendant's remaining contentions.

Accordingly, the order of the Appellate Division should be reversed, defendant's motion to suppress the evidence obtained from the GPS device should be granted and a new trial ordered.

Smith, J. (dissenting). Using a GPS device, the police discovered that defendant's car was in a K-Mart parking lot on Christmas Eve. This was obviously not a private place, and no one claims that defendant's constitutional rights would be infringed if his car had been observed there by a human eye or a hidden camera. But the majority finds that evidence of the car's location must be suppressed because the police used a more technologically sophisticated way of obtaining it. I think this holding is unsound. The attempt to find in the Constitution a line between ordinary, acceptable means of observation and more efficient, high-tech ones that cannot be used without a warrant seems to me illogical, and doomed to fail.

I am more troubled by another aspect of the case: the surreptitious attachment of the device to the car, without the car owner's consent. (This event is highlighted in the first sentence of the majority's opinion, but goes virtually unmentioned after that.) I conclude, with some hesitation, that this trespass,{**12 NY3d at 448} though a violation of defendant's property rights, did not violate his right to be free from unreasonable searches.

I

It is beyond any question that the police could, without a warrant and without any basis other than a hunch that defendant was up to no good, have assigned an officer, or a team of officers, to follow him everywhere he went, so long as he remained in public places. He could have been followed in a car or a helicopter; he could have been photographed, filmed or recorded on videotape; his movements could have been reported by a cellular telephone or two-way radio. These means could have been used to observe, record and report any trips he made to all the places the majority calls "indisputably private," from the psychiatrist's office to the gay bar (majority op at 441-442). One who travels on the public streets to such destinations takes the chance that he or she will be observed. The Supreme Court was saying no more than the obvious when it said that a person's movements on public thoroughfares are not subject to any reasonable expectation of privacy (*United States v Knotts*, 460 US 276, 281 [1983], quoted in majority op at 440). What, then, is the basis for saying that using a GPS device to obtain the same information requires a warrant?

The majority's answer is that the GPS is new, and vastly more efficient than the investigative tools that preceded it. This is certainly true—but the same was true of the portable camera and the telephone in 1880, the automobile in 1910 and the video camera in

1950. Indeed, the majority distinguishes *Knotts* on the ground that it involved a beeper—"what we must now . . . recognize to have been a very primitive tracking device" (majority op at 440). I suspect that the GPS used in this case will seem primitive a quarter of a century from now. Will that mean that police will then be allowed to use it without a warrant?

The proposition that some devices are too modern and sophisticated to be used freely in police investigation is not a defensible rule of constitutional law. As technology improves, investigation becomes more efficient—and, as long as the investigation does not invade anyone's privacy, that may be a good thing. It bears remembering that criminals can, and will, use the most modern and efficient tools available to them, and will not get warrants before doing so. To limit police use of the same tools is to guarantee that the efficiency of law enforcement will increase more slowly than the efficiency of law breakers. If the people of{**12 NY3d at 449} our state think it worthwhile to impose such limits, that should be done through legislation, not through ad hoc constitutional adjudication, for reasons well explained in Judge Read's dissent (Read, J., dissenting at 457-458).

The Federal and State Constitutions' prohibition of unreasonable searches should be enforced not by limiting the technology that investigators may use, but by limiting the places and things they may observe with it. If defendant had been in his home or some other private place, the police would, absent exigent circumstances, need a warrant to follow him there, whether by physical intrusion or by the use of sophisticated technology (*see Kyllo v United States*, 533 US 27 [2001] [use of thermal-imaging device to detect relative amounts of heat in the home an unlawful search]; *United States v Karo*, 468 US 705, 714 [1984] [monitoring a beeper in a private home violates the rights of those justifiably expecting privacy there]). But the police were free, without a warrant, to use any means they chose to observe his car in the K-Mart parking lot.

The theory that some investigative tools are simply too good to be used without a warrant finds no support in any authority interpreting the Federal or New York Constitution. *Knotts*, despite the majority's attempt to distinguish it, seems to me to establish conclusively that the Fourth Amendment did not prohibit the police "from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them" (460 US at 282). And no New York authority suggests that we would reject *Knotts* as a matter of state constitutional law. *Knotts* was a unanimous decision as to its

result (though three Justices declined to endorse the language I have quoted [460 US at 288 (Stevens, J., concurring)]); and, in my view, it was an easy one. If the majority is holding—as it apparently is—that police may never, in the absence of exigent circumstances or probable cause, track a suspect with a GPS device, it has imposed a totally unjustified limitation on law enforcement. It has also presented future courts with the essentially impossible task of deciding which investigative tools are so [*10]efficient and modern that they are subject to the same prohibition.

II

For the reasons explained above, I would have no problem at all with this case if the device had been attached to the car with the consent of the car's owner or co-owner, or if the police had{**12 NY3d at 450} found some other way to track defendant's movements electronically without trespassing on his property. But, like the majority, I do not care for the idea of a police officer—or anyone else—sneaking under someone's car in the middle of the night to attach a tracking device. I find this the hard aspect of the case (*cf. Knotts*, 460 US at 286 [Brennan, J., concurring] ["this would have been a much more difficult case if respondent had challenged, not merely . . . the monitoring of the beeper . . . but . . . its original installation"]), but I conclude, as did a federal Court of Appeals in a substantially identical case (*United States v Garcia*, 474 F3d 994 [7th Cir 2007]), that what the police did was not an unconstitutional search. (Defendant does not argue that the attachment of the device was a seizure of the car, and I do not consider that possibility.)

As the majority points out, the privacy protected by the constitutional prohibition of unreasonable searches and the property rights protected by the laws against trespass have been divorced for decades. The Supreme Court held in *Katz v United States* (389 US 347, 353 [1967]) that Fourth Amendment protections turn not on whether there was an intrusion upon private property but on whether government conduct "violated the privacy upon which [a person] justifiably relied." The accepted test for whether there has been a "search" for Fourth Amendment purposes has become that stated in Justice Harlan's concurrence in *Katz*: Did government action invade a "reasonable expectation of privacy" (*id.* at 360; *see e.g. Samson v California*, 547 US 843, 847 [2006])? The test under the New York Constitution is the same (*e.g. People v Quackenbush*, 88 NY2d 534, 541 [1996]). The attachment of the GPS device in this case violated defendant's property rights, but it did not invade his privacy.

The device was attached to the outside of the car while it was parked on a public street. No one who chooses to park in such a location can reasonably think that the outside—even the underside—of the car is in a place of privacy. He may reasonably expect that strangers will leave his car alone, but that is not an expectation of privacy; it is an expectation of respect for one's property rights. This distinction is critical: "the existence of a *property* interest does not mean that defendant also had a *privacy* interest protectable by the State and Federal guarantees against unreasonable searches and seizures" (*People v Natal*, 75 NY2d 379, 383 [1990]; *see also People v Reynolds*, 71 NY2d 552 [1988]). No authority, so far as I know, holds that a trespass on{**12 NY3d at 451} private property, without more, is an unlawful search when the property is in a public place. Such a search occurs only when, as a result of the trespass, some information is acquired that the property owner reasonably expected to keep private (*e.g. Bond v United States*, 529 US 334 [2000] [suppression of drugs found in bus passenger's luggage]; *People v Hollman*, 79 NY2d 181 [1992] [same]).

I am admittedly relying on a fine distinction, but I think I am justified in doing so. When the government violates privacy, and not just property, rights, the exclusionary rule applies; that rule is a blunt instrument, whose effect is often to guarantee an unjust result in a criminal case—in Judge Cardozo's famous phrase, to set the criminal free because the constable has blundered (*People v Defore*, 242 NY 13, 21 [1926], *cert denied* 270 US 657 [1926]). The rule's application should not be expanded to punish every action by a police officer that a court may find distasteful; it [*11]should be strictly limited to the protection of constitutional rights—in this case, the privacy rights that are the concern of the Search and Seizure Clauses of the State and Federal Constitutions. Because no one invaded defendant's privacy here, his motion to suppress the evidence obtained from the GPS device should be denied.

Read, J. (dissenting). The majority opinion—while destined to elicit editorial approval—is wrong on the law and unnecessarily burdens law enforcement and the courts, and, more importantly, all New Yorkers. Although aspects of this case are indeed troubling—notably, the unexplained length of time (65 days) the GPS tracking device was affixed to defendant's van—I agree with Judge Smith that there was simply no search within the meaning of the Federal or State Constitution. I write separately to emphasize two untoward consequences of today's decision: first, our state constitutional jurisprudence has been brushed aside; second, we are handcuffing the Legislature by improperly

constitutionalizing a subject more effectively dealt with legislatively than judicially in our system of government.

The Federal Background

To date, the United States Supreme Court has never defined a search within the meaning of the Fourth Amendment to encompass the government's use of tracking devices in lieu of or supplemental to visual surveillance, so long as the tracking occurs outside the home (*see United States v Knotts*, 460 US{**12 NY3d at 452} 276, 282-285 [1983] [monitoring of a tracking device that was inserted into a container but did not reveal information about the inside of a home merely substituted for or supplemented visual surveillance that would have revealed the same facts];[FN1] *United States v [*12]Karo*, 468 US 705, 714-715, 719 [1984] [transfer of a container with a tracking device inside is not a search nor was monitoring it outside the home; monitoring inside a home, however, is a search]; *Kyllo v United States*, 533 US 27, 34 [2001] [using a thermal-imaging device to "obtain( ) by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area, constitutes a search—at least where . . . the technology in question is not in general public use" (internal quotation marks and citation omitted)]). As the majority points out, the Supreme Court has not decided the exact question on this appeal: whether the government's use of this particular technology—a GPS tracking device attached to a car—constitutes a search within the meaning of the Fourth Amendment.[FN2] Still, every lower court judge analyzing the likely outcome of this case as a matter of federal constitutional law has concluded, based on *Knotts* and *Karo* and *Kyllo*, that there was no Fourth Amendment violation. The majority therefore places this decision squarely on independent state constitutional grounds, holding that "there was a search{**12 NY3d at 453} under article I, § 12 of the State Constitution. And that search was illegal because it was executed without a warrant and without justification under any exception to the warrant requirement" (majority op at 445).

Interpreting Our State Constitution

We set out our methodology for state constitutional interpretation in *People v P.J. Video* (68 NY2d 296, 302 [1986]), which described two bases for relying on independent state constitutional grounds: interpretive and noninterpretive review. Interpretive review essentially flows from textual differences between a provision of the State Constitution and its federal counterpart, and is not available here since the operative language of the Fourth

Amendment and article I, section 12 is the same (*see People v Harris*, 77 NY2d 434, 437 [1991] ["Because the language of the Fourth Amendment . . . and section 12 of article I . . . is identical, it may be assumed, as a general proposition, that the two provisions confer similar rights"]). "To contrast" with interpretive analysis, we stated that

> "noninterpetive review proceeds from a judicial perception of sound policy, justice and fundamental fairness. A noninterpretive analysis attempts to discover, for example, any preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right" (*P.J. Video*, 68 NY2d at 303 [citation [*13]omitted]).

Here, the majority has not come close to justifying its holding as a matter of state constitutional law in the way called for by *P.J. Video*. First, the majority states that "we have on many occasions interpreted our own Constitution to provide greater protections when circumstances warrant and have developed an independent body of state law in the area of search and seizure" (majority op at 445). This is the assertion of a truism—i.e., that we can and have interpreted article I, section 12 more broadly than the Supreme Court has interpreted the Fourth Amendment. The majority does not identify, much less discuss, the "circumstances" requiring a departure from the federal approach here.{**12 NY3d at 454}

Next, the majority cites a number of cases where we have, in fact, parted ways with the Supreme Court (majority op at 445). But there is no discussion of how the *reasoning* of those cases—*Harris* (involving the defendant's arrest inside his apartment); *People v Dunn* (77 NY2d 19 [1990] [a "canine sniff" revealing the presence of drugs inside the defendant's apartment]); *People v Scott* (79 NY2d 474 [1992] [search of private land owned by the defendant]); and *People v Torres* (74 NY2d 224 [1989] [search of the interior passenger compartment of the defendant's car])—supports deviation from federal precedent in this case. A person's home has always enjoyed a special status as a haven from government intrusion under the Federal and State Constitutions, but in *Dunn* we concluded that the "canine sniff," although a search of the defendant's apartment within the meaning of article I, section 12, could "be used *without a warrant or probable cause*, provided that the police ha[d] a reasonable suspicion that a residence contain[ed] illicit contraband" (*Dunn*, 77 NY2d at 26 [emphasis added]). The majority does not explain why a much higher standard must now be met by law enforcement authorities to justify use of a GPS tracking device attached

to a vehicle by a magnet. The majority does not explain how its holding fits in with those decisions where we have recognized the diminished expectation of privacy in a vehicle on a public highway (*see e.g. People v Yancy*, 86 NY2d 239 [1995]; *People v Scott*, 63 NY2d 518 [1984]; *People v Belton*, 55 NY2d 49 [1982]) or with the proposition that, generally, "conduct and activity which is readily open to public view is not protected" by the Fourth Amendment (*People v Reynolds*, 71 NY2d 552, 557 [1988]).

Finally, the majority adverts to the decisions of the highest courts in Washington and Oregon. But the majority does not explain how other state courts' decisions interpreting their own (and different) constitutions are possibly relevant to a noninterpretive analysis, which is explicitly keyed to factors *peculiar* to the State of New York.[FN3] [*14]

{**12 NY3d at 455}The majority also ignores *People v Di Raffaele* (55 NY2d 234, 242 [1982]), where we declined "to establish a more restrictive standard under the provisions of section 12 of article I of the New York State Constitution" for telephone toll billing records, "concluding that there [was] no sufficient reason for . . . differentiation" from the Fourth Amendment. Similarly, we concluded that the police could place a pen register on a telephone line without a warrant (*People v Guerra*, 65 NY2d 60 [1985]). In *Guerra*, there concededly was no violation of the Fourth Amendment, and we rejected the defendant's plea that article I, section 12 afforded greater protection.

As our case law now stands, then, the State Constitution does not require the police to obtain a warrant in order to follow or "tail" my car to an abortion clinic or a strip club (*see* majority op at 441-442). The police may gather such details as, for example, whether I was actually in the car for this trip, and, if so, whether I was the driver or a passenger, whether I was traveling alone or with others, whether I met anyone outside an abortion clinic or a strip club, and whether I walked inside these establishments, either by myself or accompanied. In addition, the police may photograph me while I am doing these things. A warrant is also not required by the State Constitution in order for the police to review telephone toll billing records or use a pen register and thereby find out how often someone (not necessarily me) calls an abortion clinic or a strip club from my residence. But, as a result of today's decision, a warrant is mandated before the police may attach a GPS tracking device to my car and thereby discover if or how often someone (again, not necessarily me) drives my car by or parks it near an abortion clinic or a strip club. These results are difficult to reconcile; the Court seems to interpret article I, section 12 as affording the *greatest* state constitutional

protection to the surveillance technique that garners the *least* specific information about "[t]he whole of [my] progress through the world" (majority op at 441).

The facts in this case illustrate how GPS monitoring technology is less revealing than old-fashioned physical surveillance. Defendant apparently owned two vehicles—a van and a Mercedes Benz automobile. The investigator from the New York State Police attached the battery-powered GPS tracking device to the van on December 21, 2005. The data subsequently{**12 NY3d at 456} retrieved from the device showed that at 7:17 p.m. on December 24, 2005, the van moved from the street where defendant resided to the K-Mart's parking lot, returning at 7:55 p.m. The van then remained parked overnight, not moving again until 7:41 a.m. on December 26, 2005. In other words, defendant's van was nowhere near the K-Mart at the time the store was broken into at roughly 11:00 p.m. on Christmas Eve. The testimony of a witness was necessary for the jury to draw the inference that defendant had driven the van to scout out the K-Mart early on the evening of the break-in because the police did not actually see him behind the wheel. If the police had been watching defendant rather than just monitoring the movements of his van, they might have gathered direct proof of their theory of the crime: that late on Christmas Eve he drove his Mercedes to the K-Mart, and waited in the car while his accomplice burglarized the store.

According to the investigator, the State Police maintain a "small fleet of undercover cars," which may be made available to assist local police agencies with surveillance. The GPS monitoring technology used in this case was less intrusive or informative than physical [*15]surveillance of defendant would have been; it was a less optimal way for the police to figure out defendant's movements. But the State Police have limited resources. They may not always have personnel handy to engage in surveillance at the request of a local police agency, or a vehicle's location (for example, in a sparsely populated area) may make it difficult to trail or watch undetected. As Judge Smith observes, to limit police use of GPS monitoring technology, which is readily available to criminals, "guarantee[s] that the efficiency of law enforcement will increase more slowly than the efficiency of law breakers" (Smith, J., dissenting at 448).

Finally, the majority does not examine relevant state statutory law, as called for by noninterpretive analysis. In fact, the Legislature has enacted elaborate statutory provisions to regulate police surveillance; in particular, CPL articles 700 (eavesdropping and video surveillance warrants) and 705 (pen registers and trap and trace devices), adopted after our

decision in *Guerra*. But Penal Law § 250.00 (5) (c) specifically states that an "[e]lectronic communication" does *not* include "any communication made through a tracking device consisting of an electronic or mechanical device which permits the tracking of the movement of a person or object." CPL article 700 only requires warrants for those electronic communications covered{**12 NY3d at 457} by Penal Law § 250.00 (5). In short, the warrant requirement pronounced by the majority today is contrary to, not consistent with, "preexisting State statutory . . . law" (*P.J. Video*, 68 NY2d at 303).

The analytical methodology embodied in our decision in *P.J. Video* has its critics (*see generally* James A. Gardner, Interpreting State Constitutions: A Jurisprudence of Function in a Federal System, at 41-45 [University of Chicago Press 2005]). And there are certainly alternative theories of state constitutional interpretation available for us to adopt (*id.*). Unless the Court frankly embraces another approach, however, we should decide our state constitutional cases in accordance with the principles enunciated in *P.J. Video*: precedent is not "a custom [m]ore honored in the breach than the observance" (Hamlet, act I, scene iv). By disregarding our precedent in this area, a methodology already seen by some as excessively malleable is rendered patently standardless. The public may be left with the impression that we do indeed treat the State Constitution as "a handy grab bag filled with a bevy of clauses [to] be exploited in order to circumvent disfavored United States Supreme Court decisions" (*see* Ronald K.L. Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 Hastings Const LQ 1, 2 [1981]).

The Role of the Legislature

We are all familiar with GPS monitoring technology, which is widely used in modern society and serves many worthwhile purposes. For example, GPS tracking devices help us drive our automobiles without getting lost; they may be used to find a stolen vehicle; they assist employers in routing their fleet vehicles and knowing the location of their employees; they can identify the location of miners who are trapped underground as a result of an accident; they may pinpoint the whereabouts of an errant pet; and parents may install GPS devices on their children's cell phones so as to keep track of them.

Certainly, GPS monitoring technology may be abused by law enforcement authorities. As a result, many states have enacted comprehensive legislation governing its use by police for investigative purposes. Generally speaking, these provisions require the police or a prosecutor to make an application to a judge before installing or using a mobile tracking

device. The [*16]provisions differ considerably in terms of the quantum and nature of the proof required for judicial authorization; but they{**12 NY3d at 458} do not compel the high threshold insisted upon by the majority here.

For example, at one end of the spectrum are those states that permit the installation and use of a mobile tracking device upon a showing by the applicant "that the information likely to be obtained is relevant to an ongoing criminal investigation" (Utah Code Ann § 77-23a-15.5 [3] [b]; *see also* Minn Stat § 626A.37 [1]; Fla Stat § 934.42 [2] [b]). At the other end of the spectrum are those states requiring a showing of probable cause. But the probable cause in these statutes is not the same as that mandated by the majority here—probable cause to believe that installation of the GPS tracking device on a vehicle will disclose evidence of a crime. Rather, these states merely call for the applicant to certify that "probable cause exists to believe that the information likely to be obtained [from installation and use of a mobile tracking device] is relevant to an ongoing criminal investigation" (SC Code Ann § 17-30-140 [B] [2]; *see also* Okla Stat, tit 13, § 177.6 [A] [no warrant for tracking device "shall issue unless probable cause is shown for believing that such installation or use will lead to the discovery of evidence, fruits, or instrumentalities of the commission or attempted commission of an offense"]; Haw Rev Stat § 803-44.7 [b] [judge should be satisfied "that there are sufficient facts and circumstances contained within the application to establish probable cause to believe that the use of a mobile tracking device will discover the fruits, instrumentalities, or evidence of a crime or is relevant to an ongoing criminal investigation"]). In the middle of the spectrum are those states that apply a "reasonable suspicion" requirement. In Pennsylvania, for example, an applicant must "provide a statement setting forth all facts and circumstances which provide the applicant with a reasonable suspicion that criminal activity has been, is or will be in progress and that the use of a mobile tracking device will yield information relevant to the investigation of criminal activity" (18 Pa Cons Stat § 5761 [c] [4]; *see also* Tex Code Crim Proc Ann, art 18.21, § 14 [c] [5]).

Police surveillance techniques implicate competing values of great importance to all New Yorkers—privacy and security. Absent this decision, our Legislature would have been in a position to look at the variety of GPS-related investigative tools currently available to law enforcement authorities, balance these competing values and fashion a comprehensive regulatory{**12 NY3d at 459} program (*see e.g.* CPL arts 700 and 705) readily capable of

amendment as the science evolves. As the variety of approaches enacted by our sister states' legislatures shows, there are numerous ways to deal with these issues.

Of course, the Legislature is still free to act in this area. But by constitutionalizing this particular GPS monitoring technology, my colleagues in the majority have defined what the Legislature cannot do in a fashion that may make little sense. For example, perhaps the most controversial aspect of this case was the length of time—65 days—the GPS tracking device remained attached to defendant's van. The Legislature might have considered whether to allow law enforcement (with or without a warrant) to place such a device on a vehicle for a limited period of time, based on a reasonable suspicion that this would produce information relevant to an investigation of criminal activity. Because of today's decision, however, this and any number of other potential options that the Legislature (and most New Yorkers) might view as respectful of both privacy and security are off the table: instead, law enforcement authorities will have to obtain a warrant based on probable cause to believe that installation of a GPS tracking device [*17]will disclose evidence of a crime. Further, different judges may impose different temporal or other restrictions in the warrant, creating a lack of uniformity even where GPS tracking is permitted. As a result, the utility of this particular GPS monitoring technology as a police investigative tool has been significantly diminished. In effect, by torturing precedent to "find" a new subject of state constitutional protection, the majority has limited the Legislature's liberty to act in the best interests of the state's citizens as a whole.

Conclusion

Surely, it is up to the judiciary to protect New Yorkers' individual constitutional rights—there is no doubt whatsoever about that; surely, we may establish a greater level of protection under our State Constitution for those rights than the Supreme Court recognizes under a parallel provision of the national Constitution—equally, there is no doubt whatsoever about that; and surely, technological advances may threaten individual privacy by enabling otherwise prohibitively costly surveillance. As a result, safeguards against potential government (and perhaps{**12 NY3d at 460} private[FN4]) abuse of these technologies should be explored in New York: protections have, after all, been put into place by many other states' legislatures. But as the majority opinion's thin legal analysis and Judge Smith's dissent show, federal and New York precedents do not transmute GPS-assisted monitoring for information that could have been easily gotten by traditional physical surveillance into a constitutionally prohibited search. By ruling otherwise, the majority calls

the Court's institutional integrity into question, and denies New Yorkers the full benefit of the carefully wrought balance between privacy and security interests that other states have struck for their citizens through legislation. For these reasons and those expressed by Judge Smith, I respectfully dissent.

Judges Ciparick, Pigott and Jones concur with Chief Judge Lippman; Judge Smith dissents in a separate opinion in which Judges Graffeo and Read concur; Judge Read dissents in another opinion in which Judge Graffeo concurs.

Order reversed, etc.

Footnotes

Footnote *: The Court noted: "The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized" (277 US at 464).

Footnote 1: The Court did *not*, in *Knotts*, "pointedly acknowledge[ ] and reserve[ ] for another day the question of whether a Fourth Amendment issue would be posed if 'twenty-four hour surveillance of any citizen of this country [were] possible, without judicial knowledge or supervision' " (majority op at 442, quoting *Knotts*, 460 US at 283 [which, in turn, was quoting the respondent's brief in that case]). The Court merely noted that the *respondent* "expresse[d] the generalized view" that this would be the result of the holding sought by the government (460 US at 283). The Court responded that "if such *dragnet type* law enforcement practices as [the] respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable" (*id.* at 284 [emphasis added]; *see also United States v Garcia*, 474 F3d 994, 998 [7th Cir 2007] [After refusing to suppress evidence obtained from GPS tracking device placed on the defendant's car without a warrant, court observed that "(i)t would be premature to rule that . . . a program of mass surveillance could not possibly raise a question under the Fourth Amendment"]). This case—like *Knotts* and *Garcia*—involves the use of GPS monitoring technology in the criminal investigation of an individual suspect, not dragnet-type or mass surveillance.

Footnote 2: Despite an implication to the contrary, the Supreme Court's recent decision in *Arizona v Gant* (556 US —, 129 S Ct 1710 [2009]) does not support the majority's position. *Gant* addressed a search of the interior of a car, an unquestionably protected area. The decision suggests nothing about whether tracking the movements of a vehicle on public roadways constitutes a search under the Fourth Amendment.

Footnote 3: *State v Jackson* (150 Wash 2d 251, 76 P3d 217 [2003]) relied in large part on the broader language of the Washington State Constitution's search-and-seizure clause. And

State v Campbell (306 Or 157, 759 P2d 1040 [1988]) rejected the reasonable-expectation-of-privacy test in *Katz v United States* (389 US 347, 360 [1967, Harlan, J., concurring]) in holding that the warrantless use of a GPS tracking device violated the Oregon State Constitution. The operative language of article I, section 12 of the New York State Constitution and the Fourth Amendment is—as previously noted—identical. Moreover, we have consistently adhered to the *Katz* test in determining whether a search has taken place, even when recognizing more expansive rights under our Constitution (*see Scott*, 79 NY2d at 486).

Footnote 4: The "Q-ball" involved in this case is apparently relatively cheap and widely available to the public (*see Kyllo*, 533 US at 34 [suggesting that law enforcement does not engage in a constitutionally prohibited search when it uses technology readily accessible to the public]). There is no reason to doubt that private citizens (say, for example, a suspicious spouse) have used these GPS tracking devices to surreptitiously monitor the movements of fellow citizens' vehicles. Today's decision does nothing to prevent this from happening or to curb its incidence.

Supreme Court of the United States
UNITED STATES, Petitioner
v.
Leroy Carlton KNOTTS.

No. 81-1802.
Argued Dec. 6, 1982.
Decided March 2, 1983.

After a cabin owner's motion to suppress evidence based on the warrantless monitoring of a beeper was denied, the owner was convicted in the United States District Court for the District of Minnesota, Donald D. Alsop, J., of conspiring to manufacture controlled substances, and he appealed. A divided panel of the Court of Appeals for the Eighth Circuit, 662 F.2d 515, reversed the conviction, finding that the monitoring of the beeper was prohibited by the Fourth Amendment. Certiorari was granted. The Supreme Court, Justice Rehnquist, held that monitoring the signal of a beeper placed in a container of chemicals that were being transported to the owner's cabin did not invade any legitimate expectation of privacy on the cabin owner's part and, therefore, there was neither a “search” nor a “seizure” within the contemplation of the Fourth Amendment.

Reversed.

Justice Brennan filed an opinion concurring in the judgment, in which Justice Marshall joined.

Justice Blackmun filed an opinion concurring in the judgment in which Justices Brennan, Marshall and Stevens joined.

Justice Stevens filed an opinion concurring in the judgment in which Justices Brennan and Marshall joined.

West Headnotes

[1] Searches and Seizures 349 61

349 Searches and Seizures
349I In General
349k60 Motor Vehicles
349k61 k. Expectation of Privacy. Most Cited Cases
(Formerly 349k7(10))
Person travelling in automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. U.S.C.A. Const.Amend. 4.

[2] Searches and Seizures 349 60.1

349 Searches and Seizures
349I In General
349k60 Motor Vehicles
349k60.1 k. In General. Most Cited Cases
(Formerly 349k60, 349k7(10))
When driver travelled over public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in particular direction, the fact of whatever stops he made and the fact of his final destination when he exited from public road onto private property. U.S.C.A. Const.Amend. 4.

[3] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases
(Formerly 349k7(10))
Although cabin owner had traditional expectation of privacy within dwelling insofar as cabin was concerned, that expectation of privacy did not extend to visual observation of driver's automobile arriving on owner's premises after leaving public highway, nor to movements of objects such as container of chemical used to manufacture illicit drugs in driver's automobile outside the cabin in open

fields. U.S.C.A. Const.Amend. 4.

[4] Telecommunications 372 1486

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(C) Tracking Devices
372k1486 k. Transponders or "Beepers" in General; Warrantless Proceedings. Most Cited Cases
(Formerly 372k540, 349k7(20))

Where visual surveillance from public places along driver's route to owner's cabin or from adjoining owner's premises would have sufficed to reveal driver's arrival with container of chemical used to manufacture illicit drugs, fact that police officers relied not only on visual surveillance, but on use of beeper to signal presence of driver's automobile to police receiver did not violate Fourth Amendment. U.S.C.A. Const.Amend. 4.

[5] Telecommunications 372 1436

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1436 k. In General. Most Cited Cases
(Formerly 372k494.1, 372k494)

Telecommunications 372 1486

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(C) Tracking Devices
372k1486 k. Transponders or "Beepers" in General; Warrantless Proceedings. Most Cited Cases
(Formerly 372k540)

Claim that allowing police to use scientific devices such as beeper to be more effective in detecting crime would impermissibly lead to 24-hour surveillance of any citizen without judicial knowledge or supervision had no constitutional foundation. U.S.C.A. Const.Amend. 4.

[6] Telecommunications 372 1486

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(C) Tracking Devices
372k1486 k. Transponders or "Beepers" in General; Warrantless Proceedings. Most Cited Cases
(Formerly 372k540, 349k7(20))

Fact that beeper was placed in container of chemical used to manufacture illicit drugs in order to trace chemical and that police officers monitored beeper signals as chemical was transported to owner's property did not violate Fourth Amendment where there was no indication that beeper was used in any way to reveal information as to movement of drum of chemical within cabin or in any way that would not have been visible to naked eye from outside of cabin. U.S.C.A. Const.Amend. 4.

[7] Searches and Seizures 349 21

349 Searches and Seizures
349I In General
349k13 What Constitutes Search or Seizure
349k21 k. Use of Electronic Devices; Tracking Devices or "Beepers.". Most Cited Cases
(Formerly 349k7(1), 349k7(10))

Monitoring signals of beeper placed in container of chemical used to manufacture illicit drugs as driver transported chemical to owner's property did not invade any legitimate expectation of privacy on owner's part and, therefore, there was neither "search" nor "seizure" within contemplation of Fourth Amendment. U.S.C.A. Const.Amend. 4.

****1082** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared

by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed.2d 499.

***276** Having reason to believe that one Armstrong was purchasing chloroform to be used in the manufacture of illicit drugs, Minnesota law enforcement officers arranged with the seller to place a "beeper" (a radio transmitter) inside a chloroform container that was sold to Armstrong. Officers then followed the car in which the chloroform was placed, maintaining contact by using both visual surveillance and a monitor which received the beeper signals, and ultimately tracing the chloroform, by beeper monitoring alone, to respondent's secluded cabin in Wisconsin. Following three days of intermittent visual surveillance of the cabin, officers secured a search warrant and discovered the chloroform container, and a drug laboratory in the cabin, including chemicals and formulas for producing amphetamine. After his motion to suppress evidence based on the warrantless monitoring of the beeper was denied, respondent was convicted in Federal District Court for conspiring to manufacture controlled substances in violation of 21 U.S.C. § 846. The Court of Appeals reversed, holding that the monitoring of the beeper was prohibited by the Fourth Amendment.

Held: Monitoring the beeper signals did not invade any legitimate expectation of privacy on respondent's part, and thus there was neither a "search" nor a "seizure" within the contemplation of the Fourth Amendment. The beeper surveillance amounted principally to following an automobile on public streets and highways. A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements. While respondent had the traditional expectation of privacy within a dwelling place insofar as his cabin was concerned, such expectation of privacy would not have extended to the visual observation from public places of the automobile arriving on his premises after leaving a public highway, or ****1083** to movements of objects such as the chloroform container outside the cabin. The fact that the officers relied not only on visual surveillance, but on the use of the beeper, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting their sensory faculties with such enhancement as science and technology afforded them in this case. There is no indication that the beeper was used in any way to reveal information as to the movement of the chloroform container within the cabin, or in any ***277** way that would not have been visible to the naked eye from outside the cabin. Pp. 1084-1087.

662 F.2d 515 (CA8 1981), reversed.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Jensen, Elliott Schulder,* and *Gloria C. Phares.*

Mark W. Peterson, argued the cause and filed a brief for respondent.

REHNQUIST, Justice.

A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver. In this case, a beeper was placed in a five gallon drum containing chloroform purchased by one of respondent's codefendants. By monitoring the progress of a car carrying the chloroform Minnesota law enforcement agents were able to trace the can of chloroform from its place of purchase in Minneapolis, Minnesota to respondent's secluded cabin near Shell Lake, Wisconsin. The issue presented by the case is whether such use of a beeper violated respondent's rights secured by the Fourth Amendment to the United States Constitution.

I

Respondent and two codefendants were charged in the United States District Court for the District of Minnesota with conspiracy to manufacture controlled substances, including but not limited to methamphetamine, in violation of 21 U.S.C. §

846 (1976). One of the codefendants, Darryl Petschen, ***278** was tried jointly with respondent; the other codefendant, Tristan Armstrong, pleaded guilty and testified for the government at trial.

Suspicion attached to this trio when the 3M Company, which manufactures chemicals in St. Paul, notified a narcotics investigator for the Minnesota Bureau of Criminal Apprehension that Armstrong, a former 3M employee, had been stealing chemicals which could be used in manufacturing illicit drugs. Visual surveillance of Armstrong revealed that after leaving the employ of 3M Company, he had been purchasing similar chemicals from the Hawkins Chemical Company in Minneapolis. The Minnesota narcotics officers observed that after Armstrong had made a purchase, he would deliver the chemicals to codefendant Petschen.

With the consent of the Hawkins Chemical Company, officers installed a beeper inside a five gallon container of chloroform, one of the so-called "precursor" chemicals used to manufacture illicit drugs. Hawkins agreed that when Armstrong next purchased chloroform, the chloroform would be placed in this particular container. When Armstrong made the purchase, officers followed the car in which the chloroform had been placed, maintaining contact by using both visual surveillance and a monitor which received the signals sent from the beeper.

Armstrong proceeded to Petschen's house, where the container was transferred to Petschen's automobile. Officers then followed that vehicle eastward towards the state line, across the St. Croix River, and into Wisconsin. During the latter part of this journey, Petschen began making evasive maneuvers, and the pursuing agents ended their visual surveillance. At about the same time officers lost the signal from the beeper, but with the assistance of a monitoring device located in a helicopter the approximate location of the signal was picked up again about one hour later. The signal now was stationary and the location identified was a cabin occupied by respondent near Shell Lake, Wisconsin. The record before us does not reveal that the beeper ****1084** was used after the ***279** location in the area of the cabin had been initially determined.

Relying on the location of the chloroform derived through the use of the beeper and additional information obtained during three days of intermittent visual surveillance of respondent's cabin, officers secured a search warrant. During execution of the warrant, officers discovered a fully operable, clandestine drug laboratory in the cabin. In the laboratory area officers found formulas for amphetamine and methamphetamine, over $10,000 worth of laboratory equipment, and chemicals in quantities sufficient to produce 14 pounds of pure amphetamine. Under a barrel outside the cabin, officers located the five gallon container of chloroform.

After his motion to suppress evidence based on the warrantless monitoring of the beeper was denied, respondent was convicted for conspiring to manufacture controlled substances in violation of 21 U.S.C. § 846 (1976). He was sentenced to five years imprisonment. A divided panel of the United States Court of Appeals for the Eighth Circuit reversed the conviction, finding that the monitoring of the beeper was prohibited by the Fourth Amendment because its use had violated respondent's reasonable expectation of privacy, and that all information derived after the location of the cabin was a fruit of the illegal beeper monitoring.[FN**] ***280** 662 F.2d 515 (1981). We granted certiorari, 457 U.S. 1131, 102 S.Ct. 2956, 73 L.Ed.2d 1348 (1982), and we now reverse the judgment of the Court of Appeals.

FN** Respondent does not challenge the warrantless installation of the beeper in the chloroform container, suggesting in oral argument that he did not believe he had standing to make such a challenge. We note that while several Courts of Appeals have approved warrantless installations, see *United States v. Bernard*, 625 F.2d 854 (CA9 1980); *United States v. Lewis*, 621

F.2d 1382 (CA5 1980), cert. denied, 450 U.S. 935, 101 S.Ct. 1400, 67 L.Ed.2d 370 (1981); *United States v. Bruneau*, 594 F.2d 1190 (CA8), cert. denied, 444 U.S. 847, 100 S.Ct. 94, 62 L.Ed.2d 61 (1979); *United States v. Miroyan*, 577 F.2d 489 (CA9), cert. denied, 439 U.S. 896, 99 S.Ct. 258, 58 L.Ed. 2d 243 (1978); *United States v. Cheshire*, 569 F.2d 887 (CA5), cert. denied, 437 U.S. 907, 98 S.Ct. 3097, 57 L.Ed.2d 1138 (1978); *United States v. Curtis*, 562 F.2d 1153 (CA9 1977), cert. denied, 439 U.S. 910, 99 S.Ct. 279, 58 L.Ed.2d 256 (1978); *United States v. Abel*, 548 F.2d 591 (CA5), cert. denied, 431 U.S. 956, 97 S.Ct. 2678, 53 L.Ed.2d 273 (1977) ; *United States v. Hufford*, 539 F.2d 32 (CA9), cert. denied, 429 U.S. 1002, 97 S.Ct. 533, 50 L.Ed.2d 614 (1976), we have not before and do not now pass on the issue.

II

In *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed.2d 944 (1928), this Court held that the wiretapping of a defendant's private telephone line did not violate the Fourth Amendment because the wiretapping had been effectuated without a physical trespass by the government. Justice Brandeis, joined by Justice Stone, dissented from that decision, believing that the actions of the government in that case constituted an "unjustifiable intrusion ... upon the privacy of the individual," and therefore a violation of the Fourth Amendment. *Id.*, at 478, 48 S.Ct., at 572 (Brandeis, J., dissenting). Nearly 40 years later, in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Court overruled *Olmstead* saying that the Fourth Amendment's reach "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." 389 U.S., at 353, 88 S.Ct., at 512. The Court said:

"The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Ibid.*

In *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), we elaborated on the principles stated in *Katz:*

"Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection****1085** can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action. [Citations omitted]. This inquiry, as Justice Harlan aptly noted in his *Katz* concurrence, normally embraces ***281** two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' 389 U.S., at 361 [88 S.Ct., at 516]-whether, in the words of the *Katz* majority, the individual has shown that 'he seeks to preserve [something] as private.' *Id.*, at 351 [88 S.Ct., at 511]. The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable," ' *id.*, at 361 [88 S.Ct., at 516]-whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances. *Id.*, at 353 [88 S.Ct., at 512]. *See Rakas v. Illinois*, 439 U.S. [128], at 143-144, n. 12 [99 S.Ct. 421 at 430, 58 L.Ed.2d 387]; *id.*, at 151 [99 S.Ct., at 434] (concurring opinion); *United States v. White*, 401 U.S. [745], at 752 [91 S.Ct. 1122 at 1126, 28 L.Ed.2d 453] (plurality opinion)." 442 U.S., at 740-741, 99 S.Ct., at 2580 (footnote omitted).

The governmental surveillance conducted by means of the beeper in this case amounted principally to the following of an automobile on public streets and highways. We have commented more than once on the diminished expectation of privacy

in an automobile:

"One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell v. Lewis,* 417 U.S. 583, 590, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (plurality). See also *Rakas v. Illinois,* 439 U.S. 128, 153-154, and n. 2, 99 S.Ct. 421, 435-436, and n. 2, 58 L.Ed.2d 387 (1978) (POWELL, J., concurring); *South Dakota v. Opperman,* 428 U.S. 364, 368, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976).

[1][2] A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular***282** roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

[3] Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned:

"Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also of grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson v. United States,* 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-369, 92 L.Ed. 436 (1948) (footnote omitted), quoted with approval in *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980).

But no such expectation of privacy extended to the visual observation of Petschen's automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the "open fields." *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924).

****1086** [4] Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case. In *United States v. Lee,* 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (1927), the Court said:

***283** "But no search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches. For aught that appears, the cases of liquor were on deck and, like the defendants, were discovered before the motor boat was boarded. Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." *Id.,* at 563, 47 S.Ct., at 748.

We have recently had occasion to deal with another claim which was to some extent a factual counterpart of respondent's assertions here. In *Smith v. Maryland, supra,* we said:

"This analysis dictates that [Smith] can claim no legitimate expectation of privacy here. When he used his phone, [Smith] voluntarily conveyed numerical information to the telephone company and

'exposed' that information to its equipment in the ordinary course of business. In so doing, [Smith] assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. [Smith] concedes that if he had placed his calls through an operator, he could claim no legitimate expectation of privacy. [Citation omitted]. We are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate." 442 U.S., at 744-745, 99 S.Ct., at 2582.

[5] Respondent does not actually quarrel with this analysis, though he expresses the generalized view that the result of the holding sought by the government would be that "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision." Br. for Resp., at 9 (footnote omitted). But the fact is that the "reality hardly suggests abuse," ***284***Zurcher v. Stanford Daily*, 436 U.S. 547, 566, 98 S.Ct. 1970, 1982, 56 L.Ed.2d 525 (1978); if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable. *Ibid.* Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.

Respondent specifically attacks the use of the beeper insofar as it was used to determine that the can of chloroform had come to rest on his property at Shell Lake, Wisconsin. He repeatedly challenges the "use of the beeper to determine the location of the chemical drum at Respondent's premises," Br. for Resp., at 26; he states that "[t]he government thus overlooks the fact that this case involves the sanctity of Respondent's residence, which is accorded the greatest protection available under the Fourth Amendment." *Ibid.* The Court of Appeals appears to have rested its decision on this ground:

"As noted above, a principal rationale for allowing warrantless tracking of beepers, particularly beepers in or on an auto, is that beepers are merely a more effective means of observing what is already ****1087** public. But people pass daily from public to private spheres. When police agents track bugged personal property without first obtaining a warrant, they must do so at the risk that this enhanced surveillance, intrusive at best, might push fortuitously and unreasonably into the private sphere protected by the Fourth Amendment." Pet., at 6a.

[6] We think that respondent's contentions, and the above quoted language from the opinion of the Court of Appeals, to some extent lose sight of the limited use which the government made of the signals from this particular beeper. As we have noted, nothing in this record indicates that the beeper ***285** signal was received or relied upon after it had indicated that the drum containing the chloroform had ended its automotive journey at rest on respondent's premises in rural Wisconsin. Admittedly, because of the failure of the visual surveillance, the beeper enabled the law enforcement officials in this case to ascertain the ultimate resting place of the chloroform when they would not have been able to do so had they relied solely on their naked eyes. But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise. A police car following Petschen at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin owned by respondent, with the drum of chloroform still in the car. This fact, along with others, was used by the government in obtaining a search warrant which led to the discovery of the clandestine drug laboratory. But there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible

to the naked eye from outside the cabin. Just as notions of physical trespass based on the law of real property were not dispositive in *Katz, supra,* neither were they dispositive in *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed.2d 898 (1924).

[7] We thus return to the question posed at the beginning of our inquiry in discussing *Katz, supra;* did monitoring the beeper signals complained of by respondent invade any legitimate expectation of privacy on his part? For the reasons previously stated, we hold they did not. Since they did not, there was neither a "search" nor a "seizure" within the contemplation of the Fourth Amendment. The judgment of the Court of Appeals is therefore

Reversed.

Justice BRENNAN, with whom Justice MARSHALL joins, concurring in the judgment.

I join Justice BLACKMUN's and Justice STEVENS' opinions concurring in the judgment. I should add, however, ***286** that I think this would have been a much more difficult case if respondent had challenged, not merely certain aspects of the monitoring of the beeper installed in the chloroform container purchased by respondent's compatriot, but also its original installation. See *ante,* at 1084, n. **. *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), made quite clear that the Fourth Amendment protects against governmental invasions of a person's reasonable "expectation[s] of privacy," even when those invasions are not accompanied by physical intrusions. Cases such as *Silverman v. United States,* 365 U.S. 505, 509-512, 81 S.Ct. 679, 681-683, 5 L.Ed.2d 734 (1961), however, hold that, when the government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means. I do not believe that *Katz,* or its progeny, have eroded that principle. Cf. The Supreme Court, 1979 Term, 94 Harv.L.Rev. 75, 203-204 (1980).

I am also entirely unconvinced by the Court of Appeals's footnote disposing of the installation issue with the statement "we ****1088** hold that the consent of the owner [of the chloroform drum] at the time of installation meets the requirements of the Fourth Amendment, even if the consenting owner intends to soon sell the 'bugged' property to an unsuspecting buyer. *Caveat emptor.*" 662 F.2d 515, 517, n. 2 (1981) (citation omitted). The Government is not here defending against a claim for damages in an action for breach of a warranty; it is attempting to justify the legality of a search conducted in the course of a criminal investigation. I am not at all sure that, for purposes of the Fourth Amendment, there is a constitutionally significant difference between planting a beeper in an object in the possession of a criminal suspect and purposefully arranging that he be sold an object that, unknown to him, already has a beeper installed inside it. Cf. *Gouled v. United States,* 255 U.S. 298, 305-306, 41 S.Ct. 261, 263-264, 65 L.Ed. 647 (1921); *Lewis v. United States,* 385 U.S. 206, 211, 87 S.Ct. 424, 427, 17 L.Ed.2d 312 (1966).

***287** Respondent claimed at oral argument that, under this Court's cases, he would not have standing to challenge the original installation of the beeper in the chloroform drum because the drum was sold, not to him, but to one of his compatriots. See *ante,* at ----, n. *. If respondent is correct, that would only confirm for me the formalism and confusion in this Court's recent attempts to redefine Fourth Amendment standing. See *Rawlings v. Kentucky,* 448 U.S. 98, 114, 100 S.Ct. 2556, 2566, 65 L.Ed.2d 633 (1980) (MARSHALL, J., dissenting); *Rakas v. Illinois,* 439 U.S. 128, 156, 99 S.Ct. 421, 437, 58 L.Ed.2d 387 (1978) (WHITE, J., dissenting).

Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, concurring in the judgment.

The Court's opinion gratuitously refers to the "open fields" doctrine and twice cites *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924). *Ante,* at 1085 and 1087. For me, the

present case does not concern the open fields doctrine, and I regard these references and citations as unnecessary for the Court's decision. Furthermore, and most important, cases concerning the open fields doctrine have been accepted by the Court for argument and plenary consideration. *Florida v. Brady*, cert. granted, 459 U.S. ----, 102 S.Ct. 2266, 73 L.Ed.2d 1282 (1982); *Oliver v. United States*, cert. granted, 459 U.S. 1168, 103 S.Ct. 812, 74 L.Ed.2d 1012 (1983). See also *United States v. Dunn*, 674 F.2d 1093 (CA5 1982), cert. pending, No. 82-508.

It would be unfortunate to provide either side in these granted cases with support, directly or by implication, for its position, and I surely do not wish to decide those cases in this one. Although the Court does not indicate its view on how such cases should be decided, I would defer all comments about open fields to a case that concerns that subject and in which we have the benefit of briefs and oral argument.

I therefore do not join the Court's opinion. I concur only in the result it reaches.

Justice STEVENS, with whom Justice BRENNAN, and Justice MARSHALL join, concurring in the judgment.

Since the respondent in this case has never questioned the installation of the radio transmitter in the chloroform drum, see *ante*, at 3 n. *, I agree that it was entirely reasonable for the police officers to make use of the information received over the airwaves when they were trying to ascertain the ultimate destination of the chloroform. I do not join the Court's opinion, however, because it contains two unnecessarily broad dicta: one distorts the record in this case, and both may prove confusing to courts that must apply this decision in the future.

First, the Court implies that the chloroform drum was parading in "open fields" outside of the cabin, in a manner tantamount to its public display on the highways. See *ante*, at 1086. The record does not support that implication. As Justice BLACKMUN points out, this case does not pose any "open fields" issue.

****1089** Second, the Court suggests that the Fourth Amendment does not inhibit "the police from augmenting the sensory facilities bestowed upon them at birth with such enhancement as science and technology afforded them." *Ante*, at 1086. But the Court held to the contrary in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Although the augmentation in this case was unobjectionable, it by no means follows that the use of electronic detection techniques does not implicate especially sensitive concerns.

Accordingly, I concur in the judgment.

U.S.,1983.
U.S. v. Knotts
460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55

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Supreme Court of the United States
Charles KATZ, Petitioner,
v.
UNITED STATES.

No. 35.
Argued Oct. 17, 1967.
Decided Dec. 18, 1967.

Defendant was convicted in the United States District Court for the Southern District of California, Central Division, Jesse W. Curtis, J., of a violation of statute proscribing interstate transmission by wire communication of bets or wagers, and he appealed. The Court of Appeals, 369 F.2d 130, affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that government's activities in electronically listening to and recording defendant's words spoken into telephone receiver in public telephone booth violated the privacy upon which defendant justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within Fourth Amendment, and fact that electronic device employed to achieve that end did not happen to penetrate the wall of the booth could have no constitutional significance. The Court further held that the search and seizure, without prior judicial sanction and attendant safeguards, did not comply with constitutional standards, although, accepting account of government's actions as accurate, magistrate could constitutionally have authorized with appropriate safeguards the very limited search and seizure that government asserted in fact took place and although it was apparent that agents had acted with restraint.

Judgment reversed.

Mr. Justice Black dissented.

West Headnotes

[1] Criminal Law 110 ⚿42.6

110 Criminal Law
110II Defenses in General
110k42 Immunity to One Furnishing Information or Evidence
110k42.6 k. Effect of grant of immunity. Most Cited Cases
(Formerly 110k42)

Criminal Law 110 ⚿1433(1)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1433 Matters Already Adjudicated
110k1433(1) k. In general. Most Cited Cases
(Formerly 110k998(5))

Criminal Law 110 ⚿1477

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1477 k. Grand jury. Most Cited Cases
(Formerly 110k998(5))

Fruit of testimony of defendant before federal grand jury, given under compulsion pursuant to grant of immunity, and concerning charges of which defendant had been convicted, could not be used against defendant in any future trial, but defendant was not entitled to vacation of prior conviction and dismissal of charges on theory that he could not be subjected to penalty on account of matter concerning which he was compelled to testify. Communications Act of 1934, § 409(l), 47 U.S.C.A. § 409(l); 49 U.S.C.A. § 46; U.S.C.A.Const. Amend. 5.

[2] Criminal Law 110 ⚿42.1

110 Criminal Law
110II Defenses in General
110k42 Immunity to One Furnishing Information or Evidence

110k42.1 k. In general. Most Cited Cases
(Formerly 110k42)

Statute providing immunity concerning compelled testimony before federal grand jury was designed to provide protection from future prosecution or conviction, but not to confer immunity from punishment pursuant to a prior prosecution and adjudication of guilt. Communications Act of 1934, § 409(l), 47 U.S.C.A. § 409(l); 49 U.S.C.A. § 46; U.S.C.A.Const. Amend. 5.

[3] Searches and Seizures 349 ⚿23

349 Searches and Seizures
349I In General
349k23 k. Fourth Amendment and reasonableness in general. Most Cited Cases
(Formerly 349k7(1))

Fourth Amendment cannot be translated into a general constitutional "right to privacy". U.S.C.A.Const. Amend. 4.

[4] Searches and Seizures 349 ⚿23

349 Searches and Seizures
349I In General
349k23 k. Fourth Amendment and reasonableness in general. Most Cited Cases
(Formerly 349k7(1))

Fourth Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. U.S.C.A.Const. Amend. 4.

[5] Constitutional Law 92 ⚿1440

92 Constitutional Law
92XVI Freedom of Association
92k1440 k. In general. Most Cited Cases
(Formerly 92k91)

First Amendment imposes limitations upon governmental abridgment of freedom to associate and privacy in one's associations. U.S.C.A.Const. Amend. 1.

[6] Constitutional Law 92 ⚿1122

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1122 k. Quartering of soldiers. Most Cited Cases
(Formerly 92k82(7), 92k82)

Constitutional Law 92 ⚿1260

92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1259 Armed Services; National Guard
92k1260 k. In general. Most Cited Cases
(Formerly 92k82(7), 92k82)

Third Amendment prohibition against unconsented peacetime quartering of soldiers protects one aspect of privacy from governmental intrusion. U.S.C.A.Const. Amend. 3.

[7] Constitutional Law 92 ⚿1067

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1067 k. Bill of Rights or Declaration of Rights. Most Cited Cases
(Formerly 92k1065, 92k82(1), 92k82)

To some extent Fifth Amendment reflects Constitution's concern for right of each individual to a private enclave where he may lead a private life. U.S.C.A.Const. Amend. 5.

[8] Constitutional Law 92 ⚿1210

92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1210 k. In general. Most Cited Cases
(Formerly 92k82(7), 92k82)

The protection of a person's general right to privacy, that is, his right to be let alone by other people, is, like the protection of his property and of his very life, left largely to the law of the individual states.

[9] Searches and Seizures 349 25.1

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k25.1 k. In general. Most Cited Cases
(Formerly 349k25, 349k7(1))

Although court has occasionally described its conclusions in terms of "constitutionally protected areas", such concept cannot serve as a talismanic solution to every Fourth Amendment problem. U.S.C.A.Const. Amend. 4.

[10] Searches and Seizures 349 25.1

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k25.1 k. In general. Most Cited Cases
(Formerly 349k25, 349k7(1))

Fourth Amendment protects people, not places. U.S.C.A.Const. Amend. 4.

[11] Searches and Seizures 349 25.1

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k25.1 k. In general. Most Cited Cases
(Formerly 349k25, 349k7(1))

What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. U.S.C.A.Const. Amend. 4.

[12] Searches and Seizures 349 25.1

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k25.1 k. In general. Most Cited Cases
(Formerly 349k25, 349k7(10))

What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected under Fourth Amendment. U.S.C.A.Const. Amend. 4.

[13] Searches and Seizures 349 25.1

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k25.1 k. In general. Most Cited Cases
(Formerly 349k25, 349k7(10))

A person in a telephone booth may rely upon protection of Fourth Amendment, and is entitled to assume that words he utters into mouthpiece will not be broadcast to the world. U.S.C.A.Const. Amend. 4.

[14] Searches and Seizures 349 25.1

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k25.1 k. In general. Most Cited Cases
(Formerly 349k25, 349k7(1))

Fourth Amendment protects people, not simply areas, against unreasonable searches and seizures, and its reach cannot depend upon presence or absence of a physical intrusion into any given enclosure. U.S.C.A.Const. Amend. 4.

[15] Telecommunications 372 1437

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1437 k. Telephone communications. Most Cited Cases
(Formerly 372k494.1, 372k494, 349k7(10))

Government's activities in electronically listening to and recording defendant's words spoken into telephone receiver in public telephone booth violated the privacy upon which defendant justifiably relied while using the telephone booth and thus constituted a "search and seizure" within Fourth Amendment, and fact that electronic device employed to achieve that end did not happen to penetrate the wall of the booth could have no constitu-

tional significance. U.S.C.A.Const. Amend. 4.

[16] Searches and Seizures 349 54

349 Searches and Seizures
349I In General
349k53 Scope, Conduct, and Duration of Warrantless Search
349k54 k. Mode of entry; warning and announcement. Most Cited Cases
(Formerly 349k3.3)

Officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence.

[17] Searches and Seizures 349 54

349 Searches and Seizures
349I In General
349k53 Scope, Conduct, and Duration of Warrantless Search
349k54 k. Mode of entry; warning and announcement. Most Cited Cases
(Formerly 349k3.3)

Federal Rules of Criminal Procedure do not impose an inflexible requirement of prior notice of an authorized search. Fed.Rules Crim.Proc. rule 41(d), 18 U.S.C.A.

[18] Telecommunications 372 1462

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(B) Authorization by Courts or Public Officers
372k1462 k. Necessity for judicial approval; emergency interception. Most Cited Cases
(Formerly 372k511, 372k496, 349k3.3(8))

Court could not sustain search by way of electronic surveillance without prior judicial sanction on ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.

[19] Searches and Seizures 349 24

349 Searches and Seizures
349I In General
349k24 k. Necessity of and preference for warrant, and exceptions in general. Most Cited Cases
(Formerly 349k7(1))

Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under Fourth Amendment, subject only to a few specifically established and well delineated exceptions. U.S.C.A.Const. Amend. 4.

[20] Arrest 35 71.1(9)

35 Arrest
35II On Criminal Charges
35k71.1 Search
35k71.1(9) k. Mode of search or of observing grounds for arrest; force, trespass or consent. Most Cited Cases

Even electronic surveillance substantially contemporaneous with an individual's arrest cannot be deemed an “incident” of that arrest. U.S.C.A.Const. Amend. 4.

[21] Telecommunications 372 1462

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(B) Authorization by Courts or Public Officers
372k1462 k. Necessity for judicial approval; emergency interception. Most Cited Cases
(Formerly 372k511, 372k496, 349k3.3(8))

Use of electronic surveillance without prior authorization cannot be justified on grounds of “hot pursuit”. U.S.C.A.Const. Amend. 4.

[22] Searches and Seizures 349 183

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent

349k183 k. Knowledge of rights; warnings and advice. Most Cited Cases
(Formerly 349k7(27))

A search to which an individual consents meets Fourth Amendment requirements. U.S.C.A.Const. Amend. 4.

[23] Searches and Seizures 349 25.1

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k25.1 k. In general. Most Cited Cases
(Formerly 349k25, 349k7(1))

Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. U.S.C.A.Const. Amend. 4.

[24] Telecommunications 372 1463

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(B) Authorization by Courts or Public Officers
372k1463 k. Judicial authorization in general. Most Cited Cases
(Formerly 372k513, 349k7(10))

Search and seizure, without prior judicial sanction and attendant safeguards, conducted by electronic surveillance by way of an electronic listening and recording device attached to outside of public telephone booth from which defendant had placed calls did not comply with constitutional standards, although, accepting account of government's actions as accurate, magistrate could constitutionally have authorized with appropriate safeguards the very limited search and seizure that government asserted in fact took place and although it was apparent that agents had acted with restraint. U.S.C.A.Const. Amend. 4.

****509 *347** Harvey A. Schneider and Burton Marks, Beverly Hills, Cal., for petitioner.

***348** John S. Martin, Jr., Washington, D.C., for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

[1][2] The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston in violation of a federal statute.[FN1] At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone coversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment,***349** because '(t)here was no physical entrance into the area occupied by, (the petitioner).'[FN2] ****510** We granted certiorari in order to consider the constitutional questions thus presented.[FN3]

FN1. 18 U.S.C. s 1084. That statute provides in pertinent part:

'(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined no more than $10,000 or inprisoned not more than two years, or both.

'(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information

for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.'

FN2. 9 Cir., 369 F.2d 130, 134.

FN3. 386 U.S. 954, 87 S.Ct. 1021, 18 L.Ed.2d 102. The petition for certiorari also challenged the validity of a warrant authorizing the search of the petitioner's premises. In light of our disposition of this case, we do nto reach that issue.

We find no merit in the petitioner's further suggestion that his indictment must be dismissed. After his conviction was affirmed by the Court of Appeals, he testified before a federal grand jury concerning the charges involved here. Because he was compelled to testify pursuant to a grant of immunity, 48 Stat. 1096, as amended, 47 U.S.C. s 409(l), it is clear that the fruit of his testimony cannot be used against him in any future trial. But the petitioner asks for more. He contends that his conviction must be vacated and the charges against him dismissed lest he be 'subjected to (a) penalty * * * on account of (a) * * * matter * * * concerning which he (was) compelled * * * to testify * * *.' 47 U.S.C. s 409(l). Frank v. United States, 120 U.S.App.D.C. 392, 347 F.2d 486. We disagree. In relevant part, s 409(l) substantially repeats the language of the Compulsory Testimony Act of 1893, 27 Stat. 443, 49 U.S.C. s 46, which was Congress' response to this Court's statement that an immunity statute can supplant the Fifth Amendment privilege against self-incrimination only if it affords adequate protection from future prosecution or conviction. Counselman v. Hitchcock, 142 U.S. 547, 585-586, 12 S.Ct. 195, 206-207, 35 L.Ed. 1110. The statutory provision here involved was designed to provide such protection, see Brown v. United States, 359 U.S. 41, 45-46, 79 S.Ct. 539, 543-544, 3 L.Ed.2d 609, not to confer immunity from punishment pursuant to a prior prosecution and adjudication of guilt. Cf. Reina v. United States, 364 U.S. 507, 513-514, 81 S.Ct. 260, 264-265, 5 L.Ed.2d 249.

The petitioner had phrased those questions as follows:

'A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

***350** 'B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.'

[3][4][5][6][7][8] We decline to adopt this formulation of the issues. In the first place the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.' Secondly, the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.[FN4] Other provisions of the Constitution protect personal privacy from other forms of governmental invasion.[FN5] But the protection of a ****511** person's general right to privacy-his right to be let alone by other people[FN6]-is, like the ***351** protection of his property and of his very life, left largely to the law of the individual States.[FN7]

FN4. 'The average man would very likely not have his feelings soothed any more by

having his property seized openly than by having it seized privately and by stealth. * * * And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.' Griswold v. State of Connecticut, 381 U.S. 479, 509, 85 S.Ct. 1678, 1695, 14 L.Ed.2d 510 (dissenting opinion of MR. JUSTICE BLACK).

FN5. The First Amendment, for example, imposes limitations upon governmental abridgment of 'freedom to associate and privacy in one's associations.' NAACP v. State of Alabama, 357 U.S. 449, 462, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488. The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too 'reflects the Constitution's concern for * * * '* * * the right of each individual 'to a private enclave where he may lead a private life. "' Tehan v. United States ex rel. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.

FN6. See Warren & Brandeis, The Right to Privacy, 4 Harv.L.Rev. 193 (1890).

FN7. See, e.g., Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456. Cf. Breard v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233; Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513.

[9][10][11][12] Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a 'constitutionally protected area.' The Government has maintained with equal vigor that it was not.[FN8] But this effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case.[FN9] For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210, 87 S.Ct. 424, 427, 17 L.Ed.2d 312; United States v. Lee, 274 U.S. 559, 563, 47 S.Ct. 746, 748, 71 L.Ed. 1202. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.***352** See Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688; Ex parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877.

FN8. In support of their respective claims, the parties have compiled competing lists of 'protected areas' for our consideration. It appears to be common ground that a private home is such an area, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, but that an open field is not. Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898. Defending the inclusion of a telephone booth in his list the petitioner cites United States v. Stone, D.C., 232 F.Supp. 396, and United States v. Madison, 32 L.W. 2243 (D.C.Ct.Gen.Sess.). Urging that the telephone booth should be excluded, the Government finds support in United States v. Borgese, D.C., 235 F.Supp. 286.

FN9. It is true that this Court has occasionally described its conclusions in terms of 'constitutionally protected areas,' see, e.g., Silverman v. United States, 365 U.S. 505, 510, 512, 81 S.Ct. 679, 682, 683, 5

L.Ed.2d 734; Lopez v. United States, 373 U.S. 427, 438-439, 83 S.Ct. 1381, 1387-1388, 10 L.Ed.2d 462; Berger v. State of New York, 388 U.S. 41, 57, 59, 87 S.Ct. 1873, 1882, 1883, 18 L.Ed.2d 1040, but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.

[13] The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye-it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office,[FN10] in a friend's apartment,[FN11] or in a taxicab,[FN12] a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits ****512** him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

FN10. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319.

FN11. Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697.

FN12. Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688.

[14] The Government contends, however, tha the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, Olmstead v. United States, 277 U.S. 438, 457, 464, 466, 48 S.Ct. 564, 565, 567, 568, 72 L.Ed. 944; Goldman v. United States, 316 U.S. 129, 134-136, 62 S.Ct. 993, 995-997, 86 L.Ed. 1322, for that Amendment was thought to limit only searches and seizures of tangible ***353** property.[FN13] But '(t)he premise that property interests control the right of the Government to search and seize has been discredited.' Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648, 18 L.Ed.2d 782. Thus, although a closely divided Court supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass under * * * local property law.' Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 682, 5 L.Ed.2d 734. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people-and not simply 'areas'-against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

FN13. See Olmstead v. United States, 277 U.S. 438, 464-466, 48 S.Ct. 564, 567-569, 72 L.Ed. 944. We do not deal in this case with the law of detention r arrest under the Fourth Amendment.

[15] We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably re-

lied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

***354** The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth,[FN14] and ****513** they took great care to overhear only the conversations of the petitioner himself.[FN15]

FN14. Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at approximately the same time each morning. The petitioner was subjected to electronic surveillance only during this predetermined period. Six recordings, averaging some three minutes each, were obtained and admitted in evidence. They preserved the petitioner's end of conversations conversing the placing of bets and the receipt of wagering information.

FN15. On the single occasion when the statements of another person were inadvertently intercepted, the agents refrained from listening to them.

[16][17] Accepting this account of the Government's actions as acccurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained the validity of ***355** such an authorization, holding that, under sufficiently 'precise and discriminate circumstances,' a federal court may empower government agents to employ a concealed electronic device 'for the narrow and particularized purpose of ascertaining the truth of the * * * allegations' of a 'detailed factual affidavit alleging the commission of a specific criminal offense.' Osborn v. United States, 385 U.S. 323, 329-330, 87 S.Ct. 429, 433, 17 L.Ed.2d 394. Discussing that holding, the Court in Berger v. State of New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040, said that 'the order authorizing the use of the electronic device' in Osborn 'afforded similar protections to those * * * of conventional warrants authorizing the seizure of tangible evidence.' Through those protections, 'no greater invasion of privacy was permitted than was necessary under the circumstances.' Id., at 57, 87 S.Ct. at 1882.[FN16] Here, too, ****514** a similar ***356** judicial order could have accommodated 'the legitimate needs of law enforcement'[FN17] by authorizing the carefully limited use of electronic surveillance.

FN16. Although the protections afforded the petitioner in Osborn were 'similar * * * to those * * * of conventional warrants,' they were not identical. A conventional warrant ordinarily serves to notify the suspect of an intended search. But if Osborn had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained. In omitting any requirement of advance no-

tice, the federal court that authorized electronic surveillance in Osborn simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence. See, Ker v. State of California, 374 U.S. 23, 37-41, 83 S.Ct. 1623, 1631-1634, 10 L.Ed.2d 726.

Although some have thought that this 'exception to the notice requirement where exigent circumstances are present,' id., at 39, 83 S.Ct. at 1633, should be deemed inapplicable where police enter a home before its occupants are aware that officers are present, id., at 55-58, 83 S.Ct. at 1640-1642 (opinion of MR. JUSTICE BRENNAN), the reasons for such a limitation have no bearing here. However true it may be that '(i)nnocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion,' id., at 57, 83 S.Ct. at 1642, and that 'the requirement of awareness * * * serves to minimize the hazards of the officers' dangerous calling,' id., at 57-58, 83 S.Ct. at 1642, these considerations are not relevant to the problems presented by judicially authorized electronic surveillance.

Nor do the Federal Rules of Criminal Procedure impose an inflexible requirement of prior notice. Rule 41(d) does require federal officers to serve upon the person searched a copy of the warrant and a receipt describing the material obtained, but it does not invariably require that this be done before the search takes place. Nordelli v. United States, 9 Cir., 24 F.2d 665, 666-667.

Thus the fact that the petitioner in Osborn was unaware that his words were being electronically transcribed did not prevent this Court from sustaining his conviction, and did not prevent the Court in Berger from reaching the conclusion that the use of the recording device sanctioned in Osborn was entirely lawful. 388 U.S. 41, 57, 87 S.Ct. 1873, 1882.

FN17. Lopez v. United States, 373 U.S. 427, 464, 83 S.Ct. 1381, 1401, 10 L.Ed.2d 462 (dissenting opinion of MR. JUSTICE BRENNAN).

[18][19] The Government urges that, because its agents relied upon the decisions in Olmstead and Goldman, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive ***357** means consistent with that end. Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' Agnello v. United States, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed. 145, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *.' Wong Sun v. United States, 371 U.S. 471, 481-482, 83 S.Ct. 407, 414, 9 L.Ed.2d 441. 'Over and again this Court has emphasized that the mandate of the

(Fourth) Amendment requires adherence to judicial processes,' United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment [FN18] - subject only to a few specifically established and well-delineated exceptions.[FN19]

FN18. See, e.g., Jones v. United States, 357 U.S. 493, 497-499, 78 S.Ct. 1253, 1256-1257, 2 L.Ed.2d 1514; Rios v. United States, 364 U.S. 253, 261, 80 S.Ct. 1431, 1436, 4 L.Ed.2d 1688; Chapman v. United States, 365 U.S. 610, 613-615, 81 S.Ct. 776, 778, 779, 5 L.Ed.2d 828; Stoner v. State of California, 376 U.S. 483, 486-487, 84 S.Ct. 889, 891-892, 11 L.Ed.2d 856.

FN19. See, e.g., Carroll v. United States, 267 U.S. 132, 153, 156, 45 S.Ct. 280, 285, 286, 69 L.Ed. 543; McDonald v. United States, 335 U.S. 451, 454-456, 69 S.Ct. 191, 192-194, 93 L.Ed. 153; Brinegar v. United States, 338 U.S. 160, 174-177, 69 S.Ct. 1302, 1310-1312, 93 L.Ed. 1879; Cooper v. State of California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730; Warden Md. Penitentiary v. Hayden, 387 U.S. 294, 298-300, 87 S.Ct. 1642, 1645-1647, 18 L.Ed.2d 782.

[20][21][22] It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an 'incident' of that arrest. [FN20] ****515 *358** Nor could the use of electronic surveillance without prior autorization be justified on grounds of 'hot pursuit.'[FN21] And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.[FN22]

FN20. In Agnello v. United States, 269 U.S. 20, 30, 46 S.Ct. 4, 5, 70 L.Ed. 145, the Court stated:

'The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits ar as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted.'

Whatever one's view of 'the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest,' United States v. Rabinowitz, 339 U.S. 56, 61, 70 S.Ct. 430, 433, 94 L.Ed. 653; cf. id., at 71-79, 70 S.Ct. at 437-441 (dissenting opinion of Mr. Justice Frankfurter), the concept of an 'incidental' search cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest.

FN21. Although '(t)he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others,' Warden Md. Penitentiary v. Hayden, 387 U.S. 294, 298-299, 87 S.Ct. 1642, 1646, 18 L.Ed.2d 782, there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency.

FN22. A search to which an individual consents meets Fourth Amendment requirements, Zap v. United States, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477, but of course 'the usefulness of electronic surveillance depends on lack of notice to the suspect.' Lopez v. United States, 373 U.S. 427, 463, 83 S.Ct. 1381, 1401, 10 L.Ed.2d 462 (dissenting opinion of MR. JUSTICE BRENNAN).

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case.[FN23] It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization

> FN23. Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

'bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the * * * search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.' Beck v. State of Ohio, 379 U.S. 89, 96, 85S.Ct. 223, 228, 13 L.Ed.2d 142.

And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment***359** violations 'only in the discretion of the police.' Id., at 97, 85 S.Ct. at 229.

[23][24] These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored 'the procedure of antecedent justification * * * that is central to the Fourth Amendment,'[FN24] a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

> FN24. See Osborn v. United States, 385 U.S. 323, 330, 87 S.Ct. 429, 433, 17 L.Ed.2d 394.

It is so ordered.

Judgment reversed.

Mr. Justice MARSHALL took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS, with whom Mr. Justice BRENNAN joins, concurring.

While I join the opinion of the Court, I feel compelled to reply to the separate concurring opinion of my Brother ****516** WHITE, which I view as a wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels 'national security' matters.

Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate***360** and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.

There is, so far as I understand constitutional history, no distinction under the Fourth Amendment between types of crimes. Article III, s 3, gives 'treason' a very narrow definition and puts restrictions on its proof. But the Fourth Amendment draws no lines between various substantive offenses. The arrests on cases of 'hot pursuit' and the

arrests on visible or other evidence of probable cause cut across the board and are not peculiar to any kind of crime.

I would respect the present lines of distinction and not improvise because a particular crime seems particularly heinous. When the Framers took that step, as they did with treason, the worst crime of all, they made their purpose manifest.

Mr. Justice HARLAN, concurring.

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, and unlike a field, Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; ***361** and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. Hester v. United States, supra.

The critical fact in this case is that '(o)ne who occupies it, (a telephone ****517** booth) shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume' that his conversation is not being intercepted. Ante, at 511. The point is not that the booth is 'accessible to the public' at other times, ante, at 511, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. Cf. Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688.

In Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734, we held that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the Fourth Amendment. ***362** That case established that interception of conversations reasonably intended to be private could constitute a 'search and seizure,' and that the examination or taking of physical property was not required. This view of the Fourth Amendment was followed in Wong Sun v.United States, 371 U.S. 471, at 485, 83 S.Ct. 407, at 416, 9 L.Ed.2d 441, and Berger v. State of New York, 388 U.S. 41, at 51, 87 S.Ct. 1873, at 1879, 18 L.Ed.2d 1040. Also compare Osborne v. United States, 385 U.S. 323, at 327, 87 S.Ct. 429, at 431, 17 L.Ed.2d 394. In Silverman we found it unnecessary to re-examine Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322, which had held that electronic surveillance accomplished without the physical penetration of petitioner's premises by a tangible object did not violate the Fourth Amendment. This case requires us to reconsider Goldman, and I agree that it should now be overruled. FN* Its limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.

FN* I also think that the course of development evinced by Silverman, supra, Wong Sun, supra, Berger, supra, and today's decision must be recognized as

overruling Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, which essentially rested on the ground that coversations were not subject to the protection of the Fourth Amendment.

Finally, I do not read the Court's opinion to declare that no interception of a conversation one-half of which occurs in a public telephone booth can be reasonable in the absence of a warrant. As elsewhere under the Fourth Amendment, warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptios. It will be time enough to consider any such exceptions when an appropriate occasion presents itself, and I agree with the Court that this is not one.

Mr. Justice WHITE, concurring.

I agree that the official surveillance of petitioner's telephone conversations in a public booth must be subjected***363** to the test of reasonableness under the Fourth Amendment and that on the record now before us the particular surveillance undertaken was unreasonable absent a warrant properly authorizing it. This application of the Fourth Amendment need not interfere with legitimate needs of law enforcement.FN**

FN** In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police, Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); (2) by a recording device hidden on the person of such an informant, Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); Osborn v. United States, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966); and (3) by a policeman listening to the secret micro-wave transmissions of an agent coversing with the defendant in another location, On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952). When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. Hoffa v. United States, supra. It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the petitioner 'sought to exclude * * * the uninvited ear,' and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.

****518** In joining the Court's opinion, I note the Court's asknowledgment that there are circumstance in which it is reasonable to search without a warrant. In this connection, in footnote 23 the Court points out that today's decision does not reach national security cases. Wiretapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping. See Berger v. State of New York, 388 U.S. 41, 112-118, 87 S.Ct. 1873, 1911-1914, 18 L.Ed.2d 1040 (1967) (White, J., ***364** dissenting). We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

Mr. Justice BLACK, dissenting.

If I could agree with the Court that eavesdropping carried on by electronic means (equivalent to wiretapping) constitutes a 'search' or 'seizure,' I would be happy to join the Court's opinion. For on

that premise my Brother STEWART sets out methods in accord with the Fourth Amendment to guide States in the enactment and enforcement of laws passed to regulate wiretapping by government. In this respect today's opinion differs sharply from Berger v.State of New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040, decided last Term, which held void on its face a New York statute authorizing wiretapping on warrants issued by magistrates on showings of probable cause. The Berger case also set up what appeared to be insuperable obstacles to the valid passage of such wiretapping laws by States. The Court's opinion in this case, however, removes the doubts about state power in this field and abates to a large extent the confusion and near-paralyzing effect of the Berger holding. Notwithstanding these good efforts of the Court, I am still unable to agree with its interpretation of the Fourth Amendment.

My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order 'to bring it into harmony with the times' and thus reach a result that many people believe to be desirable.

***365** While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution. The Fourth Amendment says that

'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

The first clause protects 'persons, houses, papers, and effects, against unreasonable searches and seizures * * *.' ****519** These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those 'particularly describing the place to be searched, and the persons or things to be seized.' A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court's interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one 'describe' a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future? It is argued that information showing what ***366** is expected to be said is sufficient to limit the boundaries of what later can be admitted into evidence; but does such general information really meet the specific language of the Amendment which says 'particularly describing'? Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was, as even the majority opinion in Berger, supra, recognized, 'an ancient practice which at common law was condemned as a nuisance. IV Blackstone, Commentaries s 168. In those days the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse.' 388 U.S., at 45, 87 S.Ct., at 1876. There can be no doubt that the

Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges. No one, it seems to me, can read the debates on the Bill of Rights without reaching the conclusion that its Framers and critics well knew the meaning of the words they used, what they would be understood to mean by others, their scope and their limitations. Under these circumstances it strikes me as a charge against their scholarship, their common sense and their candor to give to the Fourth Amendment's language the eavesdropping meaning the Court imputes to it today.

I do not deny that common sense requires and that this Court often has said that the Bill of Rights' safeguards should be given a liberal construction. This ***367** principle, however, does not justify construing the search and seizure amendment as applying to eavesdropping or the 'seizure' of conversations. The Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates. The Amendment deserves, and this Court has given it, a liberal construction in order to protect against warrantless searches of buildings and seizures of tangible personal effects. But until today this Court has refused to say that eavesdropping comes within the ambit of Fourth Amendment restrictions. See, e.g., Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), and Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942).

****520** So far I have attempted to state why I think the words of the Fourth Amendment prevent its application to eavesdropping. It is important now to show that this has been the traditional view of the Amendment's scope since its adoption and that the Court's decision in this case, along with its amorphous holding in Berger last Term, marks the first real departure from that view.

The first case to reach this Court which actually involved a clear-cut test of the Fourth Amendment's applicability to eavesdropping through a wiretap was, of course, Olmstead, supra. In holding tha the interception of private telephone conversations by means of wiretapping was not a violation of the Fourth Amendment, this Court, speaking through Mr. Chief Justice Taft, examined the language of the Amendment and found, just as I do now, that the words could not be stretched to encompass overheard conversations:

'The amendment itself shows that the search is to be of material things-the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is ***368** that it must specify the place to be searched and the person or things to be seized. * * *

'Justice Bradley in the Boyd case (Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746), and Justice Clarke in the Gouled case (Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647), said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.' 277 U.S., at 464-465, 48 S.Ct., at 568.

Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322, is an even clearer example of this Court's traditional refusal to consider eavesdropping as being covered by the Fourth Amendment. There federal agents used a detectaphone, which was placed on the wall of an adjoining room, to listen to the conversation of a defendant carried on in his private office and intended to be confined within the four walls of the room. This Court, referring to Olmstead, found no Fourth Amendment violation.

It should be noted that the Court in Olmstead based its decision squarely on the fact that wiretapping or eavesdropping does not violate the Fourth Amendment. As shown, supra, in the cited quotation from the case, theCourt went to great pains to examine the actual language of the Amendment and found that the words used simply could not be stretched to cover eavesdropping. That there was no trespass was not the determinative factor, and indeed the Court in citing Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898, indicated that even where there was a trespass the Fourth Amendment does not automatically apply to evidence obtained by 'hearing or ***369** sight.' The Olmstead majority characterized Hester as holding 'that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves 100 yards away from his house, and saw him come out and hand a bottle of whiskey to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers, or effects.' 277 U.S., at 465, 48 S.Ct., at 568. Thus the clear holding of the Olmstead and Goldman cases, undiluted by any question of trespass, is that eavesdropping, in both its original and modern forms, is not violative of the Fourth Amendment.

While my reading of the Olmstead and Goldman cases convinces me that they were decided on the basis of the inapplicability****521** of the wording of the Fourth Amendment to eavesdropping, and not on any trespass basis, this is not to say that unauthorized intrusion has not played an important role in search and seizure cases. This Court has adopted an exclusionary rule to bar evidence obtained by means of such intrusions. As I made clear in my dissenting opinion in Berger v. State of New York, 388 U.S. 41, 76, 87 S.Ct. 1873, 1892, 18 L.Ed.2d 1040, I continue to believe that this exclusionary rule formulated in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, rests on the 'supervisory power' of this Court over other federal courts and is not rooted in the Fourth Amendment. See Wolf v. People of State of Colorado, concurring opinion, 338 U.S. 25, 39, at 40, 69 S.Ct. 1359, 1367, at 1368, 93 L.Ed. 1782. See also Mapp v. Ohio, concurring opinion, 367 U.S. 643, 661-666, 81 S.Ct. 1684, 1694-1698, 6 L.Ed.2d 1081. This rule has caused the Court to refuse to accept evidence where there has been such an intrusion regardless of whether there has been a search or seizure in violation of the Fourth Amendment. As this Court said in Lopez v. United States, 373 U.S. 427, 438-439, 83 S.Ct. 1381, 1387, 10 L.Ed.2d 462, 'The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear (citing ***370** Olmstead and Goldman). It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. Silverman v. United States.'

To support its new interpretation of the Fourth Amendment, which in effect amounts to a rewriting of the language, the Court's opinion concludes that 'the underpinnings of Olmstead and Goldman have been * * * eroded by our subsequent decisions * * *.' But the only cases cited as accomplishing this 'eroding' are Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734, and Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782. Neither of these cases 'eroded' Olmstead or Goldman. Silverman is an interestng choice since there the Court expressly refused to re-examine the rationale of Olmstead or Goldman although such a re-examination was strenuously urged upon the Court by the petitioners' counsel. Also it is significant that in Silverman, as the Court described it, 'the eavesdropping was accomplished by means on an unauthorized physical penetration into the premises occupied by the petitioners,' 365 U.S., at 509, 81 S.Ct., at 681, thus calling into play the supervisory exclusionary rule of evidence. As I have pointed out above, where there is an unauthorized intrusion, this Court has rejected admission of evidence obtained regardless of whether there has been an unconstitutional search

and seizure. The majority's decision here relies heavily on the statement in the opinion that the Court 'need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls.' (At 511, 81 S.Ct., at 682.) Yet this statement should not becloud the fact that time and again the opinion emphasizes that there has been an unauthorized intrusion: 'For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners.' (365 U.S., at 509, 81 S.Ct., at 682 emphasis added.) 'Eavesdropping ***371** accomplished by means of such a physical intrusion is beyond the pale of even those decisions * * *.' (At 509, 81 S.Ct., at 682, emphasis added.) 'Here * * * the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office * * *.' (At 511, 81 S.Ct., at 682, emphasis added.) '(D)ecision here * * * is based upon the reality of an actual intrusion * * *.' (At 512, 81 S.Ct., at 683, emphasis added.) 'We find no occasion to re-examine Goldman****522** here, but we decline to go beyond it, by even a fraction of an inch.' (At 512, 81 S.Ct., at 683, emphasis added.) As if this were not enough, Justices Clark and Whittaker concurred with the following statement: 'In view of the determination by the majority that the unauthorized physical penetration into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions, we feel obliged to join in the Court's opinion.' (At 513, 81 S.Ct., at 684, emphasis added.) As I made clear in my dissent in Berger, the Court in Silverman held the evidence should be excluded by virtue of the exclusionary rule and 'I would not have agreed with the Court's opinion in Silverman * * * had I thought that the result depended on finding a violation of the Fourth Amendment * * *.' 388 U.S., at 79-80, 87 S.Ct., at 1894. In light of this and the fact that the Court expressly refused to reexamine Olmstead and Goldman, I cannot read Silverman as overturning the interpretation stated very plainly in Olmstead and followed in Goldman that eavesdropping is not covered by the Fourth Amendment.

The other 'eroding' case cited in the Court's opinion is Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782. It appears that this case is cited for the proposition that the Fourth Amendment applies to 'intangibles,' such as conversation, and the following ambiguous statement is quoted from the opinion: 'The premise that property interests control the right of the Government to search and seize has been discredited.' 387 U.S., at 304, 87 S.Ct., at 1648. But far from being concerned***372** with eavesdropping, Warden, Md. Penitentiary v. Hayden upholds the seizure of clothes, certainly tangibles by any definition. The discussion of property interests was involved only with the common-law rule that the right to seize property depended upon proof of a superior property interest.

Thus, I think that although the Court attempts to convey the impression that for some reason today Olmstead and Goldman are no longer good law, it must face up to the fact that these cases have never been overruled or even 'eroded.' It is the Court's opinions in this case and Berger which for the first time since 1791, when the Fourth Amendment was adopted, have declared that eavesdropping is subject to Fourth Amendment restrictions and that conversation can be 'seized.'[FN*] I must align myself with all those judges who up to this year have never been able to impute such a meaning to the words of the Amendment.

> FN* The first paragraph of my Brother HARLAN's concurring opinion is susceptible of the interpretation, although probably not intended, that this Court 'has long held' eavesdropping to be a violation of the Fourth Amendment and therefore 'presumptively unreasonable in the absence of a search warrant.' There is no reference to any long line of cases, but simply a citation to Silverman, and several cases following it, to establish this historical proposition. In the first place, as I have indic-

> ated in this opinion, I do not read Silverman as holding any such thing; and in the second place, Silverman was decided in 1961. Thus, whatever it held, it cannot be said it 'has (been) long held.' I think by Brother HARLAN recognizes this later in his opinion when he admits that the Court must now overrule Olmstead and Goldman. In having to overrule these cases in order to establish the holding the Court adopts today, it becomes clear that the Court is promulgating new doctrine instead of merely following what it 'has long held.' This is emphasized by my Brother HARLAN's claim that it is 'bad physics' to adhere to Goldman. Such an assertion simply illustrates the propensity of some members of the Court to rely on their limited understanding of modern scientific subjects in order to fit the Constitution to the times and give its language a meaning that it will not tolerate.

***373** Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far ****523** as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to 'keep the Constitution up to date' or 'to bring it into harmony with the times.' It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against unreasonable searches and seizures as one to protect an individual's privacy. By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy. As I said in Griswold v. State of Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, 'The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' ***374** of individuals. But there is not.' (Dissenting opinion, at 508, 85 S.Ct. at 1695.) I made clear in that dissent my fear of the dangers involved when this Court uses the 'broad, abstract and ambiguous concept' of 'privacy' as a 'comprehensive substitute for the Fourth Amendment's guarantee against 'unreasonable searches and seizures.'' (See generally dissenting opinion, at 507-527, 85 S.Ct., at 1694-1705.)

The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of 'persons, houses, papers, and effects.' No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

For these reasons I respectfully dissent.

U.S.Cal. 1967.

Katz v. U.S.
389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576

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--- F.Supp.2d ----, 2011 WL 3423370 (D.Md.)
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Only the Westlaw citation is currently available.

United States District Court,
D. Maryland.
In the Matter of an APPLICATION OF the UNITED STATES of America FOR AN ORDER AUTHORIZING DISCLOSURE OF LOCATION INFORMATION OF A SPECIFIED WIRELESS TELEPHONE.

Case No. 10–2188–SKG.
Aug. 3, 2011.

Background: Following denial of its first application, under the Fourth Amendment and pursuant to the Federal Rules of Criminal Procedure and the Stored Communications Act (SCA), for authority to prospectively acquire precise information on the location of a cellular telephone, allegedly belonging to the subject of an arrest warrant, through use of cellular network and Global Positioning System (GPS) technology, Government submitted a second such application, seeking the same information, citing the All Writs Act as authority.

Holding: The District Court, Susan K. Gauvey, United States Magistrate Judge, held that as a matter of first impression in the Circuit, Fourth Amendment prohibited using electronic means to locate defendant's cell phone, absent an appropriate showing of probable cause.

Applications denied.

West Headnotes

[1] Arrest 35 71.1(5)

35 Arrest
35II On Criminal Charges
35k71.1 Search
35k71.1(4) Scope of Search
35k71.1(5) k. Particular Places or Objects. Most Cited Cases

Searches and Seizures 349 125

349 Searches and Seizures
349II Warrants
349k123 Form and Contents of Warrant; Signature
349k125 k. Objects or Information Sought. Most Cited Cases

Fourth Amendment neither sanctions access to cell phone location data on the basis of an arrest warrant alone, nor authorizes use of a search warrant to obtain information to aid in the apprehension of the subject of an arrest warrant where there is no evidence of flight to avoid prosecution and the requested information does not otherwise constitute evidence of a crime. U.S.C.A. Const.Amend. 4.

[2] Telecommunications 372 1487

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(C) Tracking Devices
372k1487 k. Warrants or Judicial Authorization. Most Cited Cases

Use of a particular cellular telephone as a tracking device to aid in execution of an arrest warrant requires obtaining a tracking device warrant, which in turn requires a showing of probable cause. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. §§ 1073, 3117; Fed.Rules Cr.Proc.Rule 41(b), 18 U.S.C.A.

[3] Telecommunications 372 1487

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(C) Tracking Devices
372k1487 k. Warrants or Judicial Authorization. Most Cited Cases

In order to demonstrate the probable cause required to obtain a warrant to use a particular cellular telephone as a tracking device to aid in execution of an arrest warrant, Government must show that (1) a valid

arrest warrant has issued for the user of the subject cell phone, (2) the cell phone is in the possession of the subject of the arrest warrant, and (3) the subject of the warrant is a fugitive and is or could be charged with flight to avoid prosecution. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. §§ 1073, 3117; Fed.Rules Cr.Proc.Rule 41(b), 18 U.S.C.A.

[4] Telecommunications 372 1487

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(C) Tracking Devices
372k1487 k. Warrants or Judicial Authorization. Most Cited Cases

In order to prevent inappropriate use as an investigative tool of a warrant to use a particular cellular telephone as a tracking device, under the Fourth Amendment, time period of the warrant must be measured by its purpose, that is, only until the subject is located. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 3117; Fed.Rules Cr.Proc.Rule 41(b), 18 U.S.C.A.

[5] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases

Fourth Amendment protects individual privacy by establishing a right to be secure against unreasonable searches and seizures by the government. U.S.C.A. Const.Amend. 4.

[6] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases

Test for determining whether a defendant has a reasonable expectation of privacy within meaning of the Fourth Amendment requires determination (1) whether the defendant has exhibited an actual, subjective, expectation of privacy, and (2) whether such subjective expectation is one which society is willing to recognize as objectively reasonable. U.S.C.A. Const.Amend. 4.

[7] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases

Telecommunications 372 1485

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(C) Tracking Devices
372k1485 k. In General. Most Cited Cases

Under the Fourth Amendment, defendant had reasonable expectation of privacy both in his location as revealed by real-time cell phone location data, and in his movement, where his location was subject to continuous tracking over an extended period of time. U.S.C.A. Const.Amend. 4.

[8] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases

Under the Fourth Amendment, a person has no reasonable expectation of privacy in his movements on public highways during a discrete journey. U.S.C.A. Const.Amend. 4.

[9] Searches and Seizures 349 21

349 Searches and Seizures
349I In General
349k13 What Constitutes Search or Seizure
349k21 k. Use of Electronic Devices; Tracking Devices or "Beepers.". Most Cited Cases

--- F.Supp.2d ----, 2011 WL 3423370 (D.Md.)
(Cite as: 2011 WL 3423370 (D.Md.))

Fact that Government chooses to use electronic means, rather than traditional visual surveillance, to observe a person's movements in public areas does not render such electronic surveillance illegal under the Fourth Amendment, but Government runs afoul of the Fourth Amendment when it uses enhanced surveillance techniques not available to the public to "see" into private areas. U.S.C.A. Const.Amend. 4.

[10] Telecommunications 372 1487

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(C) Tracking Devices
372k1487 k. Warrants or Judicial Authorization. Most Cited Cases

Fourth Amendment requires that Government show probable cause prior to accessing cell phone tracking data. U.S.C.A. Const.Amend. 4.

[11] Searches and Seizures 349 13.1

349 Searches and Seizures
349I In General
349k13 What Constitutes Search or Seizure
349k13.1 k. In General. Most Cited Cases

Given that under the Fourth Amendment, defendant had a reasonable expectation of privacy in his aggregate movement over a prolonged period of time, Government's request to ping his cell phone on unlimited occasions during a thirty-day period constituted a Fourth Amendment search. U.S.C.A. Const.Amend. 4.

[12] Arrest 35 68.2(10)

35 Arrest
35II On Criminal Charges
35k68.2 Intrusion or Entry to Arrest
35k68.2(10) k. Entry with Warrant. Most Cited Cases

Under the Fourth Amendment, an arrest warrant alone does not justify entry of a residence to apprehend the subject of the warrant. U.S.C.A. Const.Amend. 4.

[13] Arrest 35 68.2(10)

35 Arrest
35II On Criminal Charges
35k68.2 Intrusion or Entry to Arrest
35k68.2(10) k. Entry with Warrant. Most Cited Cases

Under the Fourth Amendment, no prior judicial approval in the form of a search warrant is necessary for entry, pursuant to an arrest warrant, into a defendant's home or premises of third parties, where law enforcement has a reasonable belief that the defendant is there. U.S.C.A. Const.Amend. 4.

[14] Searches and Seizures 349 113.1

349 Searches and Seizures
349II Warrants
349k113 Probable or Reasonable Cause
349k113.1 k. In General. Most Cited Cases

Under the Fourth Amendment, a search, whether based on the authority of an arrest warrant or a separately obtained search warrant, must be supported by reasonable belief that the subject of the search is in a particular place. U.S.C.A. Const.Amend. 4.

[15] Searches and Seizures 349 24

349 Searches and Seizures
349I In General
349k24 k. Necessity of and Preference for Warrant, and Exceptions in General. Most Cited Cases

Fourth Amendment does not require that a warrant be obtained for all searches. U.S.C.A. Const.Amend. 4.

[16] Searches and Seizures 349 24

349 Searches and Seizures
349I In General
349k24 k. Necessity of and Preference for Warrant, and Exceptions in General. Most Cited Cases

Unless an exception applies, under the Fourth Amendment, the government must obtain advance judicial approval of searches and seizures through a

warrant procedure. U.S.C.A. Const.Amend. 4.

[17] Searches and Seizures 349 42.1

349 Searches and Seizures
349I In General
349k42 Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant
349k42.1 k. In General. Most Cited Cases

Under the Fourth Amendment, while the special needs doctrine, which relieves law enforcement of the obligation to seek prospective judicial approval before a search, applies in some law enforcement-related circumstances, its applicability requires the existence of circumstances beyond the normal needs for law enforcement. U.S.C.A. Const.Amend. 4.

[18] Telecommunications 372 1487

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(C) Tracking Devices
372k1487 k. Warrants or Judicial Authorization. Most Cited Cases

Fourth Amendment requires Government to meet the probable cause standard to obtain a search warrant for cell phone location data. U.S.C.A. Const.Amend. 4.

[19] Searches and Seizures 349 113.1

349 Searches and Seizures
349II Warrants
349k113 Probable or Reasonable Cause
349k113.1 k. In General. Most Cited Cases

A warrant can be issued to search for the subject of an arrest warrant if Government has probable cause to believe he is in a particular place, but if that probable cause is lacking, then under the second clause of the Fourth Amendment, a search warrant for information regarding his location can only issue if there is probable cause to believe he has fled prosecution, that is, that his location is evidence of a crime. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 1073.

[20] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases

Telecommunications 372 1485

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(C) Tracking Devices
372k1485 k. In General. Most Cited Cases

Given the existence of legitimate privacy concerns and the lack of any emergency or extraordinary considerations, and in the absence of probable cause to believe that defendant was attempting to flee or that his location otherwise constituted evidence of a crime, Fourth Amendment prohibited using prospective and real time location information for defendant's cell phone to locate him, regardless of fact that a warrant was out for his arrest. U.S.C.A. Const.Amend. 4.

[21] Searches and Seizures 349 126

349 Searches and Seizures
349II Warrants
349k123 Form and Contents of Warrant; Signature
349k126 k. Places, Objects, or Persons to Be Searched. Most Cited Cases

Under the Fourth Amendment, a search warrant for information relating to the location of a defendant's cell phone may properly issue where there is a clear nexus between the location data sought and the crime, but an unsupported allegation of fugitive status does not alone constitute justification for a warrant. U.S.C.A. Const.Amend. 4; Fed.Rules Cr.Proc.Rule 41(c)(1), 18 U.S.C.A.

[22] Searches and Seizures 349 126

349 Searches and Seizures
349II Warrants
349k123 Form and Contents of Warrant; Signature
349k126 k. Places, Objects, or Persons to Be

Searched. Most Cited Cases

Under the Fourth Amendment, absent evidence that defendant was charged with a discrete crime that was not continuing in nature and that would not result in his likely possession of tangible or intangible items related to his commission of that crime, Federal Rules of Criminal Procedure did not authorize issuance of a search warrant for prospective cell site information relating to the location of his cell phone. .U.S.C.A. Const.Amend. 4; Fed.Rules Cr.Proc.Rule 41(c)(1), (f), 18 U.S.C.A.

[23] Telecommunications 372 1485

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(C) Tracking Devices
372k1485 k. In General. Most Cited Cases

Data on precise location of defendant's cell phone could not be considered "records" subject to search within meaning of the Stored Communications Act (SCA); data was neither ancillary information collected by service providers in the course of business nor information automatically generated or stored incidental to calls. 18 U.S.C.A. § 2703.

[24] Telecommunications 372 1485

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(C) Tracking Devices
372k1485 k. In General. Most Cited Cases

Data on precise location of defendant's cell phone fell within statutory definition of "communications from a tracking device" and thus was excluded from coverage under the Wiretap Act and the Electronic Communications Privacy Act (ECPA). 18 U.S.C.A. §§ 2510(12)(C), 3117(b).

[25] Telecommunications 372 1485

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(C) Tracking Devices
372k1485 k. In General. Most Cited Cases

Regardless of its specificity, a cell phone's prospective, real time location data, whether obtained from a cell site of Global Positioning System (GPS), is a communication from a tracking device that is excluded from coverage under the Wiretap Act and the Electronic Communications Privacy Act (ECPA), since cell phones, to extent they provide such information, are tracking devices. 18 U.S.C.A. §§ 2510(12)(C), 3117(b).

[26] Federal Courts 170B 10.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk10 Issuance of Writs
170Bk10.1 k. In General. Most Cited Cases

All Writs Act is intended to provide courts with the instruments needed to perform their duty, as prescribed by the Congress and the Constitution, so as to process litigation to a just and equitable conclusion; this specifically includes the authority to use the Court's equitable powers to resolve any issues in a case properly before it. 28 U.S.C.A. § 1651(a).

[27] Federal Courts 170B 10.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk10 Issuance of Writs
170Bk10.1 k. In General. Most Cited Cases

Fact that a party may be assisted in its discharge of its rights or duties by the issuance of a writ is not, under the All Writs Act, a sufficient basis for the writ. 28 U.S.C.A. § 1651(a).

[28] Federal Courts 170B 10.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk10 Issuance of Writs
170Bk10.1 k. In General. Most Cited

Cases

All Writs Act cannot be used to circumvent the safeguards set in place by existing law anywhere those safeguards prevent the requesting party's result. 28 U.S.C.A. § 1651(a).

[29] Federal Courts 170B 10.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk10 Issuance of Writs
170Bk10.1 k. In General. Most Cited Cases

Courts analyze four elements when determining whether to invoke the All Writs Act: (1) whether any applicable federal law governs the request, (2) if no federal law governs the requested authorization, whether there is any constitutional issue implicated by the proposed authorization, (3) whether a prior order of the Court exists that a further order will aid, and (4) whether exceptional circumstances justify invocation of the Act. 28 U.S.C.A. § 1651(a).

[30] Federal Courts 170B 10.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk10 Issuance of Writs
170Bk10.1 k. In General. Most Cited Cases

Where other federal law controls, the All Writs Act is inapplicable. 28 U.S.C.A. § 1651(a).

[31] Federal Courts 170B 10.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk10 Issuance of Writs
170Bk10.1 k. In General. Most Cited Cases

Searches and Seizures 349 114

349 Searches and Seizures
349II Warrants
349k113 Probable or Reasonable Cause
349k114 k. Particular Concrete Applications. Most Cited Cases

All Writs Act does not excuse Government from its burden of establishing probable cause where constitutionally protected information is requested. U.S.C.A. Const.Amend. 4; 28 U.S.C.A. § 1651(a).

[32] Federal Courts 170B 10.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk10 Issuance of Writs
170Bk10.1 k. In General. Most Cited Cases

All Writs Act may authorize a search in furtherance of a prior order only where no other law applies, no Fourth Amendment right to privacy is implicated, and exceptional circumstances are present. U.S.C.A. Const.Amend. 4; 28 U.S.C.A. § 1651(a).

[33] Federal Courts 170B 10.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk10 Issuance of Writs
170Bk10.1 k. In General. Most Cited Cases

Searches and Seizures 349 126

349 Searches and Seizures
349II Warrants
349k123 Form and Contents of Warrant; Signature
349k126 k. Places, Objects, or Persons to Be Searched. Most Cited Cases

Neither All Writs Act nor inherent powers of the Court supported issuance of search warrant for prospective, real time location data for defendant's cell phone, where requested information implicated defendant's reasonable expectation of privacy under the Fourth Amendment and there was no showing of

probable cause to believe that his location constituted evidence of a crime; Government's request was covered by existing law—namely, the Fourth Amendment's probable cause requirement, the Federal Rules of Criminal Procedure, and the Electronic Communications Privacy Act (ECPA)—and there was no allegation of extraordinary circumstances justifying deviation from that existing law. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 3117(b); Fed.Rules Cr.Proc.Rule 41, 18 U.S.C.A.

Gregory Welsh, Office of the United States Attorney, Baltimore, MD, for Plaintiff.

James Wyda, Martin G. Bahl, Office of the Federal Public Defender, Baltimore, MD, for Defendant.

MEMORANDUM OPINION AND ORDER

SUSAN K. GAUVEY, United States Magistrate Judge.

***1** The issue before the Court is the government's authority to prospectively acquire precise location information derived from cellular and Global Positioning System ("GPS") technology (collectively "location data") to aid in the apprehension of the subject of an arrest warrant. The government has reported no attempts of the subject to flee and the requested location data does not otherwise constitute evidence of any crime. The government argues its entitlement to prospective location data under these circumstances pursuant to the Fourth Amendment, Rule 41 of the Federal Rules of Criminal Procedure, the Stored Communications Act, the All Writs Act, and the inherent authority of the court. In so doing, the government asks to use location data in a new way—not to collect evidence of a crime, but solely to locate a charged defendant. To some, this use would appear reasonable, even commendable and efficient. To others, this use of location data by law enforcement would appear chillingly invasive and unnecessary in the apprehension of defendants. In any event, there is no precedent for use of location data solely to apprehend a defendant in the absence of evidence of flight to avoid prosecution. The government did not submit, and the court did not find, any sufficient authority for this use of location technology. In light of legitimate privacy concerns and the absence of any emergency or extraordinary considerations here, the Court concludes that approval of use of location data for this purpose is best considered deliberately in the legislature, or in the appellate courts. Accordingly, the Court DENIES the underlying warrant applications, but sets forth its guidance on the showing necessary for law enforcement access to prospective location data to aid in the execution of an arrest warrant.

I. BACKGROUND

A. Procedural History

On June 3, 2010, pursuant to Federal Rule of Criminal Procedure 41 ("Rule 41") and the Stored Communications Act, 18 U.S.C. § 2703(c)(1)(A), the United States ("government") applied for "authoriz[ation] ... to ascertain the physical location of the [subject] cellular phone ..., including but not limited to E911 Phase II data (or other precise location information) ... for a period of thirty (30) days." (ECF No. 1, ¶ 2). The government also asked for "records reflecting the tower and antenna face ("cell site") used by the target phone at start and end of any call" where precise location information was not available. (*Id.* at n. 1). The government asked that the Court order the wireless service provider to send a signal to defendant's cell phone ("ping") that would direct the phone to compute its current GPS coordinates and communicate that data back to the provider, which would in turn forward the coordinates immediately to government agents. (*Id.* at ¶ 16). The government based its request on "probable cause to believe that the Requested Information w[ould] lead to evidence regarding certain activities described above." (*Id.* at ¶ 12). The government has asked that the particulars of the application not be disclosed, but has stipulated that defendant's location was *not* evidence of a crime. The government also stated that the "requested information [was] necessary to determine the location of [the subject] so that law enforcement officers may execute the arrest warrant [on him]." (*Id.*). The Court denied the government's application.

***2** On June 4, 2010, the government submitted another application seeking identical information as its first application, but further stated that the subject cell phone was pre-equipped with a GPS enabled chip and that the subject's wireless service provider maintains a "Precision Locate Service" [FN1] capable of approximating the location of any telephone so equipped. (ECF No. 2, ¶ 2). The government explained that, in order to use the Precision Locate Service, the cellular service provider "sends a signal to a telephone directing it to immediately transmit its current GPS reading, then processes the reading to compute the telephone's current GPS Coordinates."

(*Id.*). The government elaborated that the Precision Locate Service can be used "without disclosing to a telephone's user the existence of either the Carrier's signal requesting the telephone to send a current GPS reading or that telephone's response." (*Id.*). The government asked for an order directing the wireless service provider "on oral request ... at any times specified by the agents [to] use its Precision Locate Service ... to acquire the GPS Coordinates." (ECF No. 2, 7).

Although the government in its first application invoked Rule 41 and the Stored Communications Act, the government's second application cited as authority the All Writs Act, 28 U.S.C. § 1651(a). (*Id.* at ¶ 4). Specifically, the government noted:

> The Court has authority pursuant to the All Writs Act, 28 U.S.C. § 1651, to order disclosure of GPS Coordinates on a showing of **probable cause to believe that a federal fugitive is using a specified wireless telephone.** Under 28 U.S.C. § 1651(a), such disclosure is of appropriate aid to the Court's extant jurisdiction over an open arrest warrant because it assists agents to find the fugitive so that the warrant can be executed and he can be brought before the Court.

(*Id.*) (emphasis added). In support of its application, the government stated that:

> On [XXXX], Special Agent [XXXX] of [XXX] called [defendant] on cellular telephone number [XXXXXX–XXXX], which he answered and indicated he was on the "west coast." She asked if he was in [XXXX] and he said, "Yes." [Defendant] had previously given this cellular telephone number to SA [XXXX] as a means to contact him.

(*Id.*). The government referred to defendant as a "federal fugitive" and "the subject fugitive," but alleged no facts to support defendant's fugitive status. (*Id.*). There was no indication that defendant was aware of the charge or arrest warrant, and the government did not so allege. (ECF No. 15, 17–18). Other than the government's applications under review here, there were no reported efforts on the part of law enforcement to apprehend and arrest the defendant. *See* (ECF No. 6, 1). The Court again denied the government's application.

Notwithstanding the Court's denial of location data, the government arrested the defendant a few days thereafter. (*Id.*). While the government is correct that apprehension of defendant moots its applications, the issues presented will certainly arise again, most likely in urgent situations that do not allow an opportunity for deliberate consideration. Because of the importance of these largely-unexplored issues, the Court writes this opinion. Although the government's applications have been sealed, this opinion will not be sealed as it concerns matters of constitutional and statutory interpretation which do not hinge on the particulars of the underlying investigation and charge. The issues explored herein involve the balance between privacy rights and law enforcement interests, and the role of judicial oversight. These particular issues present a matter of first impression in the Fourth Circuit, as well as many others. [FN2]

B. Technological Background

***3** At the outset, a basic review of GPS and cellular location technology is essential to understanding the nature of the government's request—highly-precise, real-time GPS and cell-site location information, on demand at any time during a 30–day period and the privacy interests it implicates. Given that the Court did not take evidence on the relevant technology, this background discussion relies primarily on uncontroverted government and industry publications.[FN3] Moreover, there is no dispute as to two key technical points, namely the minimum precision of the location data requested (within 300 meters or less) (ECF No. 15, 22) and the fact that the GPS data requested is not collected as part of the routine provision of cellular telephone service (*Id.* at 26–31).

The government's request for "E911 Phase II data" is a reference to location information that meets accuracy requirements mandated by the Federal Communication Commission's Enhanced 9–1–1 ("E–911") regulations, which require cellular service providers to upgrade their systems to identify more precisely the longitude and latitude of mobile units making emergency 911 calls. E–911 Phase II regulations mandate that cellular telephone carriers have the ability to provide, within six minutes of a valid request from a public safety answering point, the latitude and longitude of a cellular telephone caller to within 50 to 300 meters depending on the type of technology used. *See* 47 C.F.R. 20.18(h) (2011) (establishing accuracy and reliability standards of 100 meters for 67 percent of calls and 300 meters for 95 percent of calls for

network-based (non-GPS) technologies, and 50 meters for 67 percent of calls and 150 meters for 95 percent of calls for handset-based (GPS) technologies). The government at the hearing conceded that, due to the requirements of the E–911 regulations, its request would necessarily locate the subject cellular telephone within 300 meters. (ECF No. 15, 22). As set forth below, however, current GPS technology would almost certainly enable law enforcement to locate the subject cellular telephone with a significantly greater degree of accuracy—possibly within ten meters or less.

The Global Positioning System or "GPS" is a space-based radionavigation utility owned and operated by the United States that provides highly-accurate positioning, navigation, and timing services worldwide to any device equipped with a GPS satellite receiver. *See* GPS.GOV, THE GLOBAL POSITIONING SYSTEM, http://www.gps.gov/systems/gps/ (last visited Jul. 5, 2011). To determine the location of a cellular telephone using GPS, special hardware in the user's handset calculates the longitude and latitude of the cellular telephone in real time based upon the relative strength of signals from multiple satellites. *ECPA Reform and the Revolution in Location Based Technologies and Services: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 20, 21 (2010) (statement of Matt Blaze, Associate Professor, University of Pennsylvania) ("Blaze Testimony").

***4** Current GPS technology typically achieves spatial resolution within ten meters, or approximately 33 feet. *Id.* at 21; *see also The Collection and Use of Location Information for Commercial Purposes: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection and Subcomm. on Communications, Technology, and the Internet of the H. Comm. on Energy and Commerce*, 111th Cong. 4 (2010) (statement of John B. Morris, General Counsel and Director of CDT's Internet Standards, Technology & Policy Project, Center for Democracy and Technology) (stating that GPS produces high-precision locations on the order of meters or tens of meters). High-quality GPS receivers, however, are capable of achieving horizontal accuracy of 3 meters or better and vertical accuracy of 5 meters or better 95 percent of the time. U.S. DEPT. OF DEFENSE, GLOBAL POSITIONING SYSTEM STANDARD POSITIONING SERVICE PERFORMANCE STANDARD V (4th ed. Sept. 2008). Use of GPS in combination with augmentation systems enables real-time positioning within a few centimeters. *See* GPS.GOV, AUGMENTATION SYSTEMS, http://www.gps.gov/systems/augmentations/ (last visited Apr. 21, 2011) (explaining that a GPS augmentation is any system that aids GPS by providing accuracy, integrity, availability, or any other improvement to positioning, navigation, and timing that is not inherently part of GPS itself).

Despite the superior accuracy of GPS location technology, however, it is not without limitations. Cellular telephone users may be able to disable GPS functionality and GPS may not work reliably in the event that the receiver's view of satellites is obstructed. Blaze Testimony at 22; *see also ECPA Reform and the Revolution in Location Based Technologies and Services: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 41 (2010) (statement of Michael Amarosa, Senior Vice President for Public Affairs, TruePosition) ("GPS devices can be deactivated—that is, the ability to locate them disabled—by the user").

In the event that GPS location data is not available, the government's request also sought access to cell-site location data. *See* (ECF No. 1, n. 1) (requesting access to "records reflecting the tower and antenna face ("cell site") used by the target phone at the start and end of any call"). While GPS location technology locates a user by triangulating satellite signals, "cellular identification locates a user by triangulating their position based on the cell towers within signal range of their mobile phone." *The Collection and Use of Location Information for Commercial Purposes: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection and Subcomm. on Communications, Technology, and the Internet of the H. Comm. on Energy and Commerce*, 111th Cong. 3 (2010) (statement of Lori Faith Cranor, Professor of Computer Science and of Engineering & Public Policy, Carnegie Mellon University). Cellular providers can obtain cell-site location information even when no call is in progress. *Id.* This data is routinely collected and tracked by cellular service providers, at various time intervals depending on the provider. Blaze Testimony at 23; See also CTIA–The Wireless Association, Wireless Glossary of Terms,

http://www.ctia.org/media/industry_ info/index.cfm/AID/10321 (last visited Jul. 28, 2011) (explaining that each "registration," or cell phone-initiated contact with a cell tower, is automatically logged by the cell and stored temporarily by the phone's unique Electronic Serial Number (ESN)). While retention practices vary by carrier, many retain registration data only for about 10 minutes, unless the cell phone has registered again at the same or another cell tower. *See* FTC Workshop, "Introduction to Privacy and Security Issues Panel" (Dec. 12, 2000), *available at* http://www.ftc.gov/bcp/workshops/wireless/001212.htm. However, when a user makes a call, the carrier records the cell tower that originated that call, and this information is retained, *and* often appears on the user's bill. *Id.* Unlike GPS, network-based location technology cannot be affirmatively disabled by the user. Blaze Testimony at 22.

***5** Due to advances in technology and the proliferation of cellular infrastructure, cell-site location data can place a particular cellular telephone within a range approaching the accuracy of GPS. *Id.* at 23–27 (explaining that depending upon a variety of factors the accuracy of cell-site location data may range from miles in diameter to individual floors and rooms within buildings); *see also In re Application of the United States for Historical Cell Site Data*, 747 F.Supp.2d 827, 834 (S.D.Tex.2010) ("As cellular network technology evolves, the traditional distinction between "high accuracy" GPS tracking and "low accuracy" cell site tracking is increasingly obsolete, and will soon be effectively meaningless."). Cellular service providers can also employ a hybrid method or combination of methods to locate phones with considerable precision even where GPS or cell-site technology alone would be inadequate. One example of many hybrid location techniques currently in use is Assisted GPS (A–GPS), an enhanced version of GPS that uses advanced techniques and hardware to allow reception of GPS signals indoors. FED. COMMUNIC'NS COMM'N., FCC REPORT TO CONGRESS ON THE DEPLOYMENT OF E–911 PHASE II SERVICES BY TIER III SERVICE PROVIDERS, 7 n. 29 (2005).

Cellular service providers typically do not maintain records of the GPS coordinates of cellular telephones operating on their network, but the provider may generate such location data at any time by sending a signal directing the built-in satellite receiver in a particular cellular telephone to calculate its location and transmit the location data back to the service provider. This process, known as "pinging," is undetectable to the cellular telephone user. In the underlying applications, the government seeks an order directing Sprint Nextel to "ping" the subject cellular telephone and use its Precision Locator Service[SM] to provide the resulting location data to the government. *See* GPSREVIEW.NET, SPRINT OFFERS GPS FLEETING TRACKING THROUGH PRECISION LOCATOR WIRELESS DEVICES (Aug. 24, 2005), http://www.gpsreview.net/sprint-offers-gps-fleet-tracking-through-precisionlocator-wireless-devices/ (last visited Apr. 21, 2011) (describing the Precision Locator Service [SM] as an interactive location and mapping application marketed to business as a way to communicate with and monitor a mobile and decentralized staff). To use the Precision Locator Service [SM], subscribers or other authorized parties log onto a website hosted by Sprint to locate and track a particular cellular telephone in real time [FN4], to map or export its location information, and to determine whether GPS-capabilities are powered on or off. *Id.* The government noted in its application that, "the Carrier has advised that the [sic] Precision Locate Service can be used unobtrusively, i.e., without disclosing to a telephone user the existence either of the Carrier's signal requesting the telephone to send a current GPS reading or that telephone's response." (ECF No. 2, ¶ 2).

***6** Here, the government seeks more than the records generated in the ordinary course of provision of cellular service, *i.e.*, the cell site used by a target phone at the beginning and end of a call and the cell site detected at routine, intermittent registration. Rather, the government requested an order requiring the carrier "at any times specified by the agents" to acquire the GPS coordinates of the subject cellular telephone, thus asking for the creation of a record that would not otherwise be generated in the ordinary provision of service. Moreover, the government asked for an order for a period not to exceed 30 days, which would allow essentially continuous monitoring of the precise location of the user for a month. Thus, the issue is whether the request for highly-accurate, prospective and real-time location data of the cell phone of a non-fugitive defendant for as long as 30 days on an essentially continuous basis is permissible under the Fourth Amendment, Rule 41, the Stored Communications Act, the All Writs Act, or the inherent authority of the Court.

--- F.Supp.2d ----, 2011 WL 3423370 (D.Md.)
(Cite as: 2011 WL 3423370 (D.Md.))

II. ANALYSIS

A. Government's Arguments and Defense Response

The government bases its entitlement to prospective location data under the Fourth Amendment on essentially two, alternative arguments. First, the government argues that the underlying arrest warrant provides the necessary authority for access to the location data under the Fourth Amendment and interpretive Supreme Court decisions, particularly *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). The government apparently posits that the existence of the arrest warrant supplants or satisfies the probable cause requirement of a search warrant as defined by Fourth Amendment jurisprudence. Alternatively, the government argues that *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), permits the use of a search warrant to obtain evidence in aid of apprehension of a defendant, such as the location data at issue here, even where there is no evidence of flight, that is, where the location data would not be evidence of a crime.

Having taken the stance that its request does not offend, and indeed is consistent with, the Fourth Amendment, the government presents various statutory grounds for access to this prospective location data. In its first application, the government argues that the requested warrant is authorized under Rule 41 and the Stored Communications Act. In its second application, the government, apparently recognizing the absence of clear statutory authority, argues that issuance of a search warrant for prospective location data under the circumstances presented is proper under the Court's inherent power and the All Writs Act.

The Federal Public Defender argues that an arrest warrant does not authorize access to location data for the subject of the arrest warrant and that the Fourth Amendment prohibits use of a search warrant to access prospective location data where the information does not constitute evidence of a crime. Thus, the argument goes, governmental assertions of authority under the Stored Communications Act, Rule 41, the All Writs Act, or the Court's inherent authority are futile, as the warrant does not comport with the Fourth Amendment.

***7** [1] This case presents an issue at the intersection of the law on arrests and searches: whether this "search" should be considered under the second clause of the Fourth Amendment (the "warrant" clause) or as a "reasonable" search in execution of an arrest warrant under the first clause of the Fourth Amendment—an exception to the procedures and requirements of the warrant clause. This case also reveals the dearth of analysis and authority on this issue. The Court has concluded that current Fourth Amendment jurisprudence neither sanctions access to location data on the basis of an arrest warrant alone, nor authorizes use of a search warrant to obtain information to aid in the apprehension of the subject of an arrest warrant where there is no evidence of flight to avoid prosecution and the requested information does not otherwise constitute evidence of a crime. Additionally, the Stored Communications Act (also, of course, subject to the Fourth Amendment) does not authorize use of a warrant for that purpose. While Rule 41(c)(4) authorizes use of a warrant to search for a "person to be arrested," that rule (and Fourth Amendment principles) requires probable cause that the defendant will be found in a specifically identified location. Fed.R.Crim.P. 41(c)(4). Thus, Rule 41 does not authorize use of a warrant for the purpose sought. Finally, exercise of judicial authority under the All Writs Act or the Court's inherent authority is likewise subject to Fourth Amendment constraints. Review of pertinent case law demonstrates that the courts have not sanctioned use of a warrant or other order for location data or other extraordinary information to aid in the apprehension of the subject of a warrant in the absence of evidence of flight.

This ruling does not, of course, foreclose use of a search warrant to obtain prospective location data in circumstances where the Fourth Amendment is satisfied. While the Court disagrees that the Stored Communications Act provides independent authority for access to prospective location data under these circumstances, the Court finds that the government may obtain prospective location data where that data constitutes evidence of a crime under the Fourth Amendment. Had the government's request included demonstration of the fugitive status of the subject of the arrest warrant, the request would have been fairly routine. Courts grant warrants for location data where presented with facts demonstrating flight to avoid prosecution, most frequently in conjunction with a complaint charging this new, criminal violation against a defendant already charged with a serious crime. *See* 18 U.S.C. § 1073 (2011).

[2][3][4] However, if the government seeks to use a particular cellular telephone as a tracking device to aid in execution of an arrest warrant, the government must obtain a tracking device warrant pursuant to Rule 41(b) and in accord with 18 U.S.C. § 3117. As set forth more fully below, this Court requires a showing of probable cause that: 1) a valid arrest warrant has issued for the user of the subject cellular telephone; 2) the subject cellular telephone is in the possession of the subject of the arrest warrant; and 3) the subject of the arrest warrant is a fugitive, that is, is or could be charged with violation of 18 U.S.C. § 1073. Moreover, the time period of the warrant must be measured by its purpose, that is, only until the defendant is located, to prevent inappropriate use of the warrant as an investigative tool.

***8** Having summarized its conclusions, the Court discusses each of the government's asserted bases for entitlement in turn.

B. Asserted Sources of the Government's Entitlement to Location Data

1. Fourth Amendment

a. Protected Status of Information Sought Under the Fourth Amendment

[5] The government and Federal Public Defender agree that this matter is at heart a question of Fourth Amendment interpretation. (ECF No. 8, 1–2; ECF No. 10, 2). Specifically, the Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Rooted in early British constitutionalism and the American colonial experience of unchecked monarchic power, the Fourth Amendment protects individual privacy by establishing a right to be secure against unreasonable searches and seizures by the government. *See* *Chimel v. California*, 395 U.S. 752, 760–61, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) (citing *United States v. Rabinowitz*, 339 U.S. 56, 69, 70 S.Ct. 430, 94 L.Ed. 653 (1950) (Frankfurter, J., dissenting)). Accordingly, the threshold issue in every Fourth Amendment analysis is whether a particular government action constitutes a "search" or "seizure" within the meaning of the Amendment. *See* *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) (stating that the Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.' "); *see also* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.1 (2010) (explaining that the words "searches and seizures" are terms of limitation; law enforcement practices do not fall within the ambit of the Fourth Amendment unless they are either "searches" or "seizures."). Historically, courts resolved this inquiry using a property trespass theory. *See* *Olmstead v. United States*, 277 U.S. 438, 457, 48 S.Ct. 564, 72 L.Ed. 944 (1928). More recently, the Supreme Court has moved beyond this paradigm to broaden the range of privacy interests protected under the Fourth Amendment. *See*, *Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

[6] In *Katz v. United States*, the Court famously noted that the Fourth Amendment "protects people, not places," 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), and developed an analytical framework under which the Amendment's protection of privacy interests is implicated wherever there is a "reasonable expectation of privacy," *id.* at 360–61, 88 S.Ct. 507 (Harlan, J. concurring). The modern test for analyzing the expectation question is two-part: first, whether the defendant has exhibited an actual, subjective, expectation of privacy; and second, whether such subjective expectation is one which society is willing to recognize as objectively reasonable. *Id.*; *see*, *California v. Greenwood*, 486 U.S. 35, 40–41, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988); *United States v. Karo*, 468 U.S. 705, 715, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984).

b. An Individual Has a Reasonable Expectation of Privacy in His Location and Movement

***9** The government's request for real-time location data implicates at least two distinct privacy interests: the subject's right to privacy in his location and his right to privacy in his movement.[FN5]

[7] The government conceded at the hearing that

the subject has a reasonable expectation of privacy while physically present within a non-public place, and that the government would infringe upon that privacy interest by asking the wireless carrier to "ping" the subject's cell phone essentially on a continuous basis while he is in a constitutionally-protected location. [FN6] (ECF No. 15, 4). At the same time, the government suggested, but could not satisfactorily support, that the subject of an arrest warrant has a diminished expectation of privacy in his location. (ECF No. 15, 5) (It is "less clear that someone [who is the subject of an arrest warrant] has an expectation of privacy in their location."). The Court finds that the subject here has a reasonable expectation of privacy both in his location as revealed by real-time location data and in his movement where his location is subject to continuous tracking over an extended period of time, here thirty days.

i. An Individual Has a Reasonable Expectation of Privacy in His Location

[8][9] The Supreme Court has maintained a distinction between areas where a person can be publicly viewed and areas that could not be observed "from the outside" using traditional investigatory techniques. For example, a person has no reasonable expectation of privacy in his movements on public highways during a discrete journey. *United States v. Knotts*, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). Because traditional, visual surveillance allows the government to observe a person's movements in public areas, the fact that the government chooses to do so electronically does "not alter the situation." *Id.* However, the government does run afoul of the Fourth Amendment when it uses enhanced surveillance techniques not available to the public to "see" into private areas. *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (holding that warrantless use of a thermal imaging device that allowed surveillance into a private home violated the Fourth Amendment because it allowed the government to "obtain[ ] by sense-enhancing technology [ ] information regarding the interior of the home that could not otherwise have been obtained without a physical 'intrusion into a constitutionally protected area' "); *United States v. Karo*, 468 U.S. 705, 715, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984).

While location data has been described as "a proxy for [the suspect's] physical location" because the cell phone provides similar information as that traditionally generated by physical surveillance or tracking techniques, *United States v. Forest*, 355 F.3d 942, 951 (6th Cir.2004), *abrogated by United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (on other grounds), that is not entirely correct. Location data from a cell phone is distinguishable from traditional physical surveillance because it enables law enforcement to locate a person entirely divorced from all visual observation. Indeed, this is ostensibly the very characteristic that makes obtaining location data a desirable method of locating the subject of an arrest warrant. This also means, however, that there is no way to know before receipt of location data whether the phone is physically located in a constitutionally-protected place. In other words, it is impossible for law enforcement agents to determine prior to obtaining real-time location data whether doing so infringes upon the subject's reasonable expectation of privacy and therefore constitutes a Fourth Amendment search. However, the precision of GPS and cell site location technology considered in combination with other factors demonstrates that pinging a particular cellular telephone will in many instances place the user within a home, or even a particular room of a home, and thus, the requested location data falls squarely within the protected precinct of *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) and *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). Consider, for instance, the import of the following.

***10** Coordinates expressed in longitude and latitude allow us to locate places on the Earth quite precisely—to within inches. NATIONALATLAS.GOV, ARTICLE: LATITUDE AND LONGITUDE, http://www.nationalatlas.gov/articles/mapping/a_latlong.html (last visited Jul. 19, 2011). GPS technology typically generates location data accurate within a range of approximately ten meters, Blaze Testimony at 21, or within a few centimeters when used in combination with augmentation systems, GPS.GOV, AUGMENTATION SYSTEMS, http://www.gps.gov/systems/augmentations/ (last visited Jul. 19, 2011). Thus, location data generated by GPS and expressed as longitude and latitude coordinates will identify a point on a map that, in many cases, represents the location of a particular GPS-enabled cellular telephone within a radius of ten meters or significantly less.

Given that the average home size in the United

States in 2009 was approximately 743 square meters, it is clear that GPS location data with the high degree of accuracy described above would likely place a cellular telephone inside a residence, at least where law enforcement have information regarding the coordinates of the home. U.S. CENSUS BUREAU, MEDIAN AND AVERAGE SQUARE FEET OF FLOOR AREA IN NEW SINGLE–FAMILY HOUSES COMPARED BY LOCATION, *available at* http://www.census.gov/const/C25Ann/sftotalmedavgsqft.pdf (statistics include houses built for rent). Such information about the coordinates of various physical structures would almost certainly be available to law enforcement. For example, publicly-available interactive mapping programs such as Google Earth display satellite images of the Earth's surface, allowing users to view the latitude and longitude of physical structures. *See* GOOGLE EARTH, ABOUT GOOGLE EARTH: WHAT IS GOOGLE EARTH?, http://earth.google.com/support/bin/answer.py?hl=en&answer=176145 (last visited Jul. 19, 2011). In addition, the U.S. Census Bureau began using handheld computers in 2010 to collect the GPS coordinates of every residence in the United States and Puerto Rico as part of its address canvassing efforts. U.S. CENSUS BUREAU, ADDRESS CANVASSING FACTS/STATISTICS, *available at* http://2010.census.gov/news/press-kits/one-year-out/addresscanvasing/address-canvassing-facts-statistics.html.

Because cellular telephone users tend to keep their phone on their person or very close by, placing a particular cellular telephone within a home is essentially the corollary of locating the user within the home. *See* PEW RESEARCH CENTER, CELL PHONES AND AMERICAN ADULTS, *available at* http://pewinternet.org/Reports/2010/Cell-Phones-and-American-Adults.aspx (reporting that 65 percent of adults with cell phones report sleeping with their cell phone on or right next to their bed). In addition, cell phone users typically carry their phone on their person when conducting daily activities. *See* *In re United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 534 F.Supp.2d 585, 597 (W.D.Pa.2008) ("Our individual cell phones now come with us everywhere: not only on the streets, but in (a) a business, financial, medical, or other offices; (b) restaurants, theaters, and other venues of leisure activity; (c) churches, synagogues, and other places of religious affiliation; and (d) the homes of our family members, friends, and personal and professional associates.").

***11** The Court recognizes that a determination that, based on GPS location data, a cellular telephone user is within a particular physical place may require some inference, but notes the Supreme Court's admonition in *Kyllo v. United States* that "the novel proposition that inference insulates a search is blatantly contrary to *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), where the police 'inferred' from the activation of a beeper that a certain can of ether was in the home. The police activity was held to be a search, and the search was held unlawful." 533 U.S. 27, 36–37, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). Indeed, as the Court of Appeals for the Third Circuit recently noted, "the Government has asserted in other cases that a jury should rely on the accuracy of [ ] cell tower records to infer that an individual, or at least her cell phone, was at home." *In re Application of the United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F.3d 304, 311–12 (3d Cir.2010) (citing Brief for Electronic Frontier Foundation, et al. as Amici Curiae Supporting Affirmance of the District Court, *In re Application of the United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F.3d 304 (3d Cir.2010)). Of course, the location information derived from cell tower records is considered less precise than the GPS data at issue here.

[10] Thus, as the majority of other courts that have examined this issue have found, the Fourth Amendment requires that the government must show probable cause prior to accessing such data. *See, e.g.*, *In re the Application of the United States for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device*, 396 F.Supp.2d 294, 323 (E.D.N.Y.2005) ("Because the government cannot demonstrate that cell site tracking could never under any circumstance implicate Fourth Amendment privacy rights, there is no reason to treat cell phone tracking differently from other forms of tracking ... which routinely require probable cause."); *In re the Application of the United States for an Order Authorizing (1) Installation and Use of a Pen Register and Trap and Trace Device or Process, (2) Access to Customer Records, and (3) Cell Phone Tracking*, 441

F.Supp.2d 816, 837 (S.D.Tex.2006) ("[D]etailed location information, such as triangulation and GPS data, [ ] unquestionably implicate Fourth Amendment privacy rights."); *In re Application the of the United States for an Order Authorizing Installation and Use of a Pen Register and a Caller Identification System on Telephone Numbers (Sealed)*, 402 F.Supp.2d 597, 604–05 (D.Md.2005) (recognizing that monitoring of cell phone location information is likely to violate a reasonable expectation of privacy).

ii. An Individual Has a Reasonable Expectation of Privacy in His Movements

The scope of the government's request here—unlimited location data at any time on demand during a thirty-day period—also implicates the subject's reasonable expectation of privacy in his movement. *See United States v. Maynard*, 615 F.3d 544, 562 (D.C.Cir.2010) (holding that "the whole of a person's movements over the course of a month is not actually exposed to the public" and is therefore protected by the Fourth Amendment). *See also U.S. v. Bailey*, 628 F.2d 938, 949 (6th Cir.1980) (holding that "privacy of movement itself is deserving of Fourth Amendment protections"); *United States v. Moore*, 562 F.2d 106, 110 (1st Cir.1977) (agreeing that "citizens have a reasonable expectation of privacy in their movements, and that the possibility of being followed about in public by governmental agents does not mean that they anticipate that their every movement will be continuously monitored by a secret transmitter").

***12** While *Knotts* held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," 460 U.S. at 281, 103 S.Ct. 1081, it expressly reserved the issue of 24–hour surveillance, *id.* at 283–84, 103 S.Ct. 1081. Addressing this issue, the United States Court of Appeals for the District of Columbia held that "prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble." *Maynard*, 615 F.3d at 562. [FN7] *But cf. United States v. Pineda–Moreno*, 591 F.3d 1212 (9th Cir.2010) (holding that GPS tracking of defendant's car did not invade defendant's reasonable expectation of privacy and did not constitute a Fourth Amendment search because it revealed only information the agents could have obtained by physically following the car). Although the Ninth Circuit denied rehearing *en banc* in *Pineda–Moreno*, five judges dissented from the denial by published opinion. *United States v. Pineda–Moreno, reh'g en banc denied*, 617 F.3d 1120 (9th Cir.2010). In the lead dissent, Chief Judge Alex Kozinski argued that GPS tracking is much more invasive than the use of beepers discussed in *Knotts*, which merely augmented visual surveillance actually being conducted by the police; the combination of GPS tracking with other technologies in common use by law enforcement amounts to a virtual dragnet in dire need of regulation by the courts; and such "creepy and un-American" behavior should be checked by the Fourth Amendment. *Id.* at 1126 (Kozinski, C.J., dissenting from the denial of *reh'g en banc*).

Several district courts have since declined to adopt the D.C. Circuit's reasoning in *Maynard*. *See United States v. Sparks*, 750 F.Supp.2d 384, 391–392 (D.Mass.2010) (finding that warrantless installation and monitoring of a GPS device attached to defendant's vehicle did not violate the Fourth Amendment where law enforcement did not invade any constitutionally-protected area within defendant's dwelling or curtilage to attach the device, and used it to locate the vehicle only on public streets and highways); *United States v. Walker*, 771 F.Supp.2d 803, 809 (W.D.Mich.2011) (warrantless installation and use of a GPS device to track a vehicle as part of a drug trafficking investigation did not violate the Fourth Amendment where defendant's vehicle was parked in a public lot when police attached the device and there was no evidence that law enforcement used the device to monitor defendant's location anywhere other than on public thoroughfares). These cases are distinguishable from the instant matter, however, because they clearly deal with movement in a largely, if not entirely, public setting, that is, vehicle tracking. Here, of course, the tracking is of a cell phone, which is ordinarily on a person. While a vehicle may as a matter of fact remain within public spaces during a tracking period (not go into a private garage or other private property), it is highly unlikely—indeed almost unimaginable—that a cell phone would remain within public spaces.

***13** [11] Given that a person has a reasonable expectation of privacy in his aggregate movement over a prolonged period of time, the government's request to ping the subject's cell phone on unlimited occasions during a thirty-day period constitutes a Fourth Amendment search.

Having established that the defendant has a reasonable expectation of privacy in his location and his movement, the Court considers the government's argument that a search warrant for real-time location data is not necessary, as a matter of law, where an arrest warrant based upon probable cause has issued.

c. The Subject of an Arrest Warrant Maintains a Reasonable Expectation of Privacy in His Location and Movements

The government contends that where a valid arrest warrant has been issued for the cell phone user, government officials are entitled to "do what it takes to find and arrest the person." (ECF No. 15, 8).[FN8] Specifically, the government asserts that the arrest warrant authorizes acquisition of location data, even without further court warrant or order. "[T]he warrant for the arrest of the subject itself gives law enforcement sufficient authority to obtain location information for his phone without a further search warrant." (ECF No. 6, 8).

For support, the government relies upon the Supreme Court's decision in *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), and an unreported Southern District of Indiana case, *United States v. Bermudez*, IP–05–43–CR, 2006 WL 3197181 (S.D.Ind. Jun. 30, 2006). (ECF No. 10, 7); (ECF No. 15, 6) ("If we [the government] hold the ability to [ping defendant's phone] without involving any third party, I think *Payton* establishes that it is okay."). The government notes that *Payton* establishes *inter alia* that it is constitutionally reasonable to require the subject of an arrest warrant to "open his doors" to law enforcement officers seeking to execute the warrant. *See* (ECF No. 15, 9–10). On this basis, the government concludes that its possession of a valid arrest warrant in this case authorizes the "lesser" infringement of accessing location information pertaining to the suspect. *Id.* The government reasons that,

> Going into the home is one of the most protected areas in the Fourth Amendment—... And yet in *Payton*, the Supreme Court says an arrest warrant is good enough to go into the target's home.
>
> I think it follows that other lesser interests are also going to be subject or appropriate under an arrest warrant for the Government to get the information it needs to effectuate the arrest warrant.
>
> *Id.*

Payton and its progeny *may* be read as affording less procedural protection to the privacy rights of an un-apprehended defendant in his location—that is, that law enforcement is not required to obtain prospective judicial approval through a search warrant. However, the case law does not clearly establish that there is a lesser burden than demonstration of reasonable belief that the defendant is in the premises as a prerequisite for entry. Moreover, *Payton* does not support the government's bold declaration that the arrest warrant authorizes law enforcement "to do what it takes to find and arrest the person and determine the location of the person." (ECF No. 15, 8). To state the obvious: the arrest warrant demonstrates probable cause to arrest a person; the arrest warrant does not demonstrate probable cause that the person is in any particular place. *Payton* cannot be read to absolve the government from having a reasonable belief that the suspect is in a particular location before it may enter to effectuate an arrest warrant. Finally, the Court does not agree with the government's characterization of access to location data as necessarily a lesser infringement of privacy than *Payton's* limited access to a person's home, in the wired and watched era of the 21st century.

***14** In *Payton*, the Supreme Court held that a routine felony arrest made during a warrantless and nonconsensual entry into a suspect's home violates the Fourth Amendment. 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). In addition, the *Payton* Court announced, "... for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the *limited authority* to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Id.* at 602–03, 100 S.Ct. 1371 (emphasis added). The Court concluded that a search warrant was unnecessary (or would be redundant) under these circumstances. The Court reasoned that, "[i]f there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *Id.* [FN9]

[12] Thus, *Payton* does not deny that an entry into the home of the subject of an arrest warrant is a

"search" (or an invasion of a reasonable expectation of privacy), but merely concludes that it is a constitutionally reasonable one. However, this narrow exception to the Fourth Amendment search warrant requirement does not negate the subject's expectation of privacy in his own home, much less in any other location. Rather than granting police unlimited authority to enter a suspect's home when armed with a valid arrest warrant, as would presumably be appropriate if the arrest warrant deprived the suspect of any reasonable expectation of privacy, the *Payton* Court mandated that police have a "reasonable belief" that the suspect both lives at the place to be searched and is present within the place to be searched at the time of arrest. *Id.* at 602–03, 100 S.Ct. 1371. Thus, it is clear that an arrest warrant alone does not justify entry of a residence to apprehend the subject of the warrant. *See United States v. Gorman*, 314 F.3d 1105 (9th Cir.2002) ("An arrest warrant forms only the necessary, rather than sufficient, basis for entry into a home, and, in addition to an arrest warrant, there must be reason to believe the suspect is within the residence.").

One year after its decision in *Payton*, the Supreme Court delineated additional limitations on law enforcement's authority in execution of an arrest warrant in *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981). In *Steagald*, police entered the home of the defendant to apprehend a third-person who was the subject of an arrest warrant. *Id.* at 205, 101 S.Ct. 1642. At trial, the defendant sought to suppress the evidence against him on the grounds that the police officers did not possess a search warrant when they entered his home. *Id.* at 205–07, 101 S.Ct. 1642 (1981). Addressing the narrow, unresolved issue of "whether an arrest warrant—as opposed to a search warrant—is adequate to protect the Fourth Amendment interests of persons not named in the warrant when their homes are searched without their consent and in the absence of exigent circumstances," *id.* at 212, 101 S.Ct. 1642, the *Steagald* Court held that the Fourth Amendment does not permit police to enter a third person's home to serve an arrest warrant on a suspect. *Id.* at 205–06, 101 S.Ct. 1642. The Court determined that an arrest warrant does not sufficiently protect the Fourth Amendment rights of parties not named in the warrant. *Id.* at 212–13, 101 S.Ct. 1642. Based upon this reasoning, the Court held that law enforcement must obtain a search warrant before entering a third-party residence to apprehend the subject of an arrest warrant. *Id.* at 205–06, 101 S.Ct. 1642.

***15** Although *Steagald* focused on the privacy interests of third-party residents rather than persons for whom an arrest warrant has issued, the Court made clear that an arrest warrant does not give law enforcement officers authority to enter any dwelling where they believe a suspect may be found. The *Steagald* Court recognized that "[a] contrary conclusion—that the police, acting alone and in the absence of exigent circumstances, may decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant—would create a significant potential for abuse." *Id.* at 215, 101 S.Ct. 1642. The Court also expressed concern that an arrest warrant "may serve as a pretext for entering a home in which police have suspicion, but not probable cause to believe, that illegal activity is taking place." *Id.* In other words, the *Steagald* Court declined to find that an arrest warrant represents an exception to the search warrant requirement of probable cause allowing law enforcement unfettered authority to pursue the subject of an arrest warrant.

Finally, the Supreme Court in *Steagald* did not share the government's view of the expansive meaning of *Payton*. The Supreme Court in *Steagald* characterized its ruling in *Payton* as "authoriz[ing] a *limited* invasion of that person's privacy interest *when it is necessary to arrest him in his home*." *Id.* at 214, 101 S.Ct. 1642 (emphasis added). Thus *Payton* and *Steagald* are scant authority for the government's bold assertion that the arrest warrant here allows the sweeping invasion of the defendant's privacy rights—24/7 tracking of his movements for as long as 30 days to effect the arrest—without any demonstration of necessity such as fugitive status.

In addition to *Steagald*, the Supreme Court has cited *Payton* 78 times since rendering its decision in 1980. None of these cases involves a remotely similar fact situation as here and none expand the *Payton* holding as a doctrinal matter. The government can point to no subsequent, supportive Supreme Court decision but clings to its view of the *Payton* concept of plenary authority to effect an arrest warrant. Significantly, the Supreme Court has cited *Payton* most frequently not as an exception to the warrant clause in the arrest situation, but as standing for the cardinal principle that absent consent or exigent circumstances, law enforcement may not enter a private home to effectuate an arrest without a warrant. *See, e.g.*,

Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); *Georgia v. Randolph*, 547 U.S. 103, 109, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006); *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004); *Kaupp v. Texas*, 538 U.S. 626, 630, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003); *Kirk v. Louisiana*, 536 U.S. 635, 635–636, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002); *Kyllo v. United States*, 533 U.S. 27, 31, 40, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).[FN10]

The Supreme Court has cited *Payton* only occasionally for the proposition that an arrest warrant provides authority to infringe upon the expectation of the privacy of the subject in his home or elsewhere, and, in none of those cases can be viewed as a significant expansion of *Payton*. *See, e.g.*, *Maryland v. Buie*, 494 U.S. 325, 330, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) ("It is not disputed that until the point of Buie's arrest the police had the right, based on the authority of the arrest warrant, to search anywhere in the house that Buie *might have been found*, including the basement.") (emphasis added); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 488, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (Powell, J., dissenting) (noting that "In *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), the Court rejected the suggestion that a separate search warrant was required before police could execute an arrest warrant by entering the home of the subject of the warrant."); *Michigan v. Summers*, 452 U.S. 692, 704, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) (same); *Steagald v. United States*, 451 U.S. 204, 221, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) (same). None of these citations even suggest the radical expansion of government authority urged here.

***16** Finally, several cases clearly demonstrate the Supreme Court's reluctance to approve police conduct unnecessary to the execution of an arrest warrant. *See Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999); *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987); *Maryland v. Garrison*, 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987).

In *Wilson v. Layne*, the Court found that media presence during the execution of an arrest warrant in a private home violated the Fourth Amendment. 526 U.S. 603, 606–608, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). While the government argued that the *Payton* Court's finding that homeowners are required to open their "doors to officers of the law" seeking to effectuate an arrest warrant authorized the conduct in question, Brief for Respondents at 12 *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (quoting *Payton*, 445 U.S. at 602–603, 100 S.Ct. 1371), the Court rejected this argument, finding media presence unrelated to the purposes of the warrant. The Court signaled judicial vigilance against an unnecessarily broad view of police arrest authority under *Payton*—even in the face of purported law enforcement benefits: "[w]ere such generalized 'law enforcement objectives' themselves sufficient to trump the Fourth Amendment, the protections guaranteed by that Amendment's text would be significantly watered down." *Id.* at 612, 100 S.Ct. 1371.[FN11] *See also*, *Arizona v. Hicks*, 480 U.S. 321, 324–325, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) (explaining that the Fourth Amendment requires police action undertaken in execution of a warrant must relate to the objectives of the authorized intrusion); *Maryland v. Garrison*, 480 U.S. 79, 86–87, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987) (observing that the purposes justifying a warrant "strictly limit" the manner in which the warrant is executed).

Since the Supreme Court's decisions in *Payton* and *Steagald*, five courts of appeals, not including the Court of Appeals for the Fourth Circuit, have concluded that law enforcement officers do not need a search warrant to effectuate an arrest in a third-party residence where they have a valid arrest warrant coupled with a reasonable belief that the suspect is inside. *See United States v. Jackson*, 576 F.3d 465 (7th Cir.2009); *United States v. Agnew*, 407 F.3d 193 (3d Cir.2005); *United States v. Kaylor*, 877 F.2d 658 (8th Cir.1989); *United States v. Buckner*, 717 F.2d 297 (6th Cir.1983); *United States v. Underwood*, 717 F.2d 482 (9th Cir.1983). Notably, these decisions do not require prior judicial approval for entrance by the government; ex-post justification is sufficient if a defendant challenges the search or seizure. Although this rule appears to contradict the rule articulated by the Supreme Court in *Steagald*, the apparent inconsistency can be explained by the posture of the cases—all involving the rights of the subjects of the arrest warrant, not third parties. Distinguishably, each of the defendants in the courts of appeals cases cited *supra* were suspects named in a valid arrest warrant, but apprehended without a search warrant in the residence of a third party. As the Sixth Circuit explained when discussing this factual scenario in *United States v.*

Buckner, "the *Payton* rule does not directly apply because the defendant was not arrested in his own home" and " *Steagald* is also not on point because the person prosecuted in this case was the person named in the arrest warrant." 717 F.2d 297, 299 (6th Cir.1983). Despite this observation, however, the *Buckner* Court ultimately determined that, "[t]he fact that the defendant was the person named in the arrest warrant mandates application of *Payton* rather than *Steagald*." *Id.* at 300. Other courts of appeals have similarly applied *Payton* when considering Fourth Amendment challenges made by defendants named in arrest warrants, but apprehended in the residence of a third party without a search warrant. Accordingly, these courts have found that no search warrant was constitutionally required; the arrest warrant was sufficient to protect the Fourth Amendment rights of the suspect, so long as there was reasonable belief that he was there. *See* *United States v. Jackson*, 576 F.3d 465, 467–68 (7th Cir.2009) (under the Fourth Amendment, police were not required to have a search warrant as well as an arrest warrant in order to enter the apartment of an acquaintance of defendant to arrest defendant, where they had reason to suspect that defendant was inside); *United States v. Agnew*, 407 F.3d 193 (3d Cir.2005) ("[E]ven if Agnew was a non-resident with a privacy interest, the Fourth Amendment would not protect him from arrest by police armed with an arrest warrant."); *United States v. Kaylor*, 877 F.2d 658, 663 (8th Cir.1989) (the possession of a warrant for the defendant's arrest and the officers' reasonable belief of his presence in a third party's home justified entry without a search warrant); *United States v. Underwood*, 717 F.2d 482, 484 (9th Cir.1983) ("If an arrest warrant and reason to believe the person named in the warrant is sufficient to protect that person's fourth amendment rights in his own home, they necessarily suffice to protect his privacy rights in the home of another. The right of a third party not named in the arrest warrant to the privacy of his home may not be invaded without a search warrant. But this right is personal to the home owner and cannot be asserted vicariously by the person named in the arrest warrant.").

***17** [13][14] These cases advance the notion that the *subject* of an arrest warrant has lesser procedural rights, that is, a search warrant need not be obtained on probable cause prior to entry, whether to his own home or to that of a third party. *Steagald* and subsequent case law also advance the notion that even where law enforcement officers apprehend the subject of an arrest warrant in a third-party residence without first obtaining a search warrant, "a suspect retains a sufficient expectation of privacy to challenge a search where the police lack a reasonable belief that the person to be arrested may be found in the place to be searched." *United States v. Jackson*, 576 F.3d 465, 468 n. 1 (7th Cir.2009) (citing *United States v. Boyd*, 180 F.3d 967, 977–78 (8th Cir.1999); *Valdez v. McPheters*, 172 F.3d 1220, 1225–26 (10th Cir.1999); *United States v. Edmonds*, 52 F.3d 1236, 1247–48 (3d Cir.1995)); *see also* *United States v. Cantrell*, 530 F.3d 684, 689–90 (8th Cir.2008); 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.3 (2008) (asserting that, if the arrestee himself lacks standing to challenge an illegal search, then this would "render the *Steagald* rule a virtual nullity"). While *Payton* Fourth Amendment analysis arguably supports the view that the subject of an arrest warrant is accorded lesser procedural protection in his location than third parties, post- *Payton* case law still demands that there be reasonable belief that the subject of an arrest warrant is in a particular place to be searched. Thus, the substantive privacy right of the subject of the arrest warrant is undiminished.[FN12] Accordingly, case development since Payton affirms that no prior judicial approval in the form of a search warrant is necessary for entry into a defendant's home or premises of third parties where law enforcement has a reasonable belief that the defendant is there. However, nothing in post- *Payton* jurisprudence undermines the requirement that a search—whether based on the authority of an arrest warrant or a separately obtained search warrant—be supported by reasonable belief that the subject of the search is in a particular place. Thus, this jurisprudence does not illuminate the issue here: whether the arrest warrant alone authorizes a search for location data for the subject of an arrest warrant. While such a search does not implicate the privacy rights of third parties, and thus *Payton*, not *Steagald*, would apply, the government's request here is still without firm foundation. *Payton* involved permission to go into a specifically defined place; it did not address the nature of what is sought here—permission to find and track a subject of an arrest warrant wherever he is. On first blush, it may seem reasonable to obtain location data under the authority of an arrest warrant for the sole purpose of apprehending the subject of that warrant. However, the government has provided no doctrinal bridge from the "limited authority" granted to it under *Payton*, to the much broader and different power it seeks in this case, which is to obtain essentially continuous location

and movement data pertaining to a subject of an arrest warrant over a thirty day period. Even if the Court were to limit the time period of the warrant to 30 days or a reasonable period of time after location of the cell phone and its user to allow a safe arrest, whichever is shorter, that would not address the fact that a tracking warrant provides different and arguably more information than a traditional place-based warrant would. While the government in this case has declared that its acquisition of location data represents a lesser infringement of privacy than the entry into the home permitted by *Payton*, the government has failed to support that proposition with either rigorous intellectual argument or legal precedent.

***18** The constitutionality of a search under either the authority of an arrest warrant under *Payton*, or a search warrant under Fourth Amendment jurisprudence, is predicated on a probable cause demonstration that the subject of the arrest is in a *particular* place. While the government has adopted the reasonable belief or probable cause standard, that is, that there is "probable cause to believe that a federal fugitive is using a specified wireless telephone," (ECF No. 2, 3), it has not asked the Court for authority to go into a particular place. Instead, the government essentially seeks to "look" with technology into every place where the subject of the warrant might be found in order to locate him and then to track him up to 30 days.

The fact that a person is in his or her home at any particular time would usually not be especially revelatory. While the fact of a person's location at random times in other locations might be highly revelatory of private matters, location data over a prolonged period of time has the potential of revealing intimate details of a person's life. As Chief Judge Kozinski observed in his dissent from the denial of rehearing *en banc* in *Pineda–Moreno*,

> By tracking and recording the movements of millions of individuals the government can use computers to detect patterns and develop suspicions. It can also learn a great deal about us because where we go says much about who we are. Are Winston and Julia's cell phones together near a hotel a bit too often? Was Syme's OnStar near an STD clinic? Were Jones, Aaronson and Rutherford at that protest outside the White House? The FBI need no longer deploy agents to infiltrate groups it considers subversive; it can figure out where the groups hold meetings and ask the phone company for a list of cell phones near those locations.

Pineda–Moreno, 617 F.3d at 1125 (Kozinski, C.J., dissenting from the denial of reh'g *en banc*).

What difference, if any, is there, in terms of a citizen's rights to privacy against his government, between a warrant allowing the search of a *particular* place for the subject of an arrest warrant and allowing the search of *everywhere* to locate the particular place where the subject of a search warrant is? If the order is narrowly drawn and faithfully executed, there would arguably be no greater intrusion of third parties' privacy than a search of the suspect's home or other locations under *Payton* and its progeny, in the furtherance of the legitimate government interest in expeditiously bringing a charged defendant before the Court. An order for location data at one point in time does not appear to invade the privacy of others any more than a search warrant for a third party's home. That is, execution of a traditional search warrant may invade the privacy of persons living in or present at the searched premises at the time of the search. However, a search warrant for location data may invade the privacy of persons not as readily identifiable as persons in a traditional search in the suspect's home, such as persons on the lease of the apartment or employees working at an office where the subject has been located.

***19** By contrast, the search sought here does arguably infringe upon the privacy rights of the subject of the arrest warrant more than a *Payton* search would and certainly does provide more information. A *Payton* search informs the government as to whether the subject of the arrest warrant is in his home or in another place that the government had probable cause to believe he is. However, the search anticipated here informs the government on an almost continuous basis where the subject is, at places where the government *lacked* probable cause to believe he was, and with persons about whom the government may have no knowledge.

A warrant such as the government requested here only superficially bears the indicia of the colonial writs, which were the impetus for the Fourth Amendment. The Fourth Amendment was a reaction in part to the colonial experience with primarily two English writs: the general writ of assistance and the

general warrant. "[It] was primarily designed to end the abuse of general exploratory searches." PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK, 21–49 (2005). The general writ of assistance "granted the named customs official general exploratory search powers based on no proof of wrongdoing." *Id.* at 30. Similarly, the general warrant "was not based on any sworn proof of wrongdoing, did not particularly describe the place to be searched or things [or people] to be seized, and authorized the messengers to search and seize as their whims dictated." *Id.* at 40. "The general objectionable feature of both warrants [general warrant and writ of assistance] was that they provided no judicial check on the determination of the executing officials that the evidence justified an intrusion in any particular home." *Steagald*, 451 U.S. at 220, 101 S.Ct. 1642.

The odious nature of these writs, of course, was due in main part to the disruption and intrusiveness of searches unjustified by any probable cause as to a particular place as to innocent citizens. By comparison, this virtual search of all locations to identify the actual location of the arrest warrant subject does not affect the privacy of third parties, any differently than a traditional search warrant. It may affect more, or different, third parties than a traditional search, however. But, law enforcement does not physically enter and disrupt all homes-only those places where the location data indicates an arrest warrant subject's presence and only on further warrant or under exigent circumstances if in a nonpublic place. Of course, the virtual search does not impact those persons at locations "searched" which do not reveal his presence. On the other hand, the government's acquisition of location data on an essentially continuous basis might be seen as a kind of general "exploratory rummaging in a person's belongings" prohibited by the Fourth Amendment. *See Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (plurality).

***20** Certainly, the Supreme Court's approval of a "limited" intrusion into the home of a subject of an arrest warrant (and lower courts' approval of intrusion into third party residences on probable cause or reasonable belief) without a prior warrant cannot reasonably be interpreted to endorse other infringements of privacy, that is, the constitutional right to location and movement privacy. The government's arguments, if credited, would allow law enforcement to obtain location data on any subject of an arrest warrant, whether charged with a misdemeanor or a felony, without any demonstration of any attempt on the part of the subject to avoid prosecution.

Ultimately, the Supreme Court may expand *Payton* and endorse a variant of the government's view, that is, that armed with an arrest warrant, law enforcement can take certain reasonable actions to execute the arrest warrant, such as access to location data for a short period of time, without obtaining a search warrant subject only to challenge after the fact. Indeed, this judge has concluded that it is likely that the Supreme Court would sanction this search under *Payton*, but perhaps with prior judicial approval in light of the powerful nature of the electronic surveillance tool. However, it is premature—indeed reckless—to forecast and effect such an expansion of law enforcement authority given the evolving nature and complexity of both Fourth Amendment law and technology.

This judge will not take that leap in the absence of any direct precedent or sufficient doctrinal foundation, especially in the face of considerable legislative and public concern and discussion about the invasion of privacy that this new and evolving location technology permits. Congress has repeatedly expressed concern about the privacy of location data. When Congress passed the Wireless Communication and Public Safety Act of 1999, *inter alia*, for the purpose of facilitating nationwide deployment of the enhanced 9–1–1 technology the government seeks to use in its investigation, the legislature expressly provided for privacy of customer information. *See* P.L. No. 106–81(2), § 5, 113 Stat. 1288 (Oct. 26, 1999) (codified at 47 U.S.C. § 222) (stating that "[t]he purpose of [the Wireless Safety Act of 1999] is to encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure for communications, including wireless communications, to meet the Nation's public safety and other communications needs"). In doing so, Congress specifically included protection for the privacy of location information pertaining to cell phone users:

> (f) Authority to Use Location Information. For purposes of subsection (c)(1) of this section, without the express prior authorization of the customer,

> a customer shall not be considered to have approved the use or disclosure of or access to—
>
> (1) Call location information concerning the user of the commercial mobile service ...

***21** 47 U.S.C. § 222(f). *Accord In re Application for Pen Register & Trap/Trace Device with Cell Site Location Authority*, 396 F.Supp.2d 747, 756–57 (2005). (The Court interpreted section 222(f) to indicate that "... location information is a special class of customer information, which can only be used or disclosed in an emergency situation, absent express prior consent by the customer."). *Id.*

Earlier, in 1994 when Congress passed the "Communications Assistance for Law Enforcement Act" ("CALEA"), it declared that orders for pen register and trap and trace devices shall not include "any information that may disclose the physical location of the subscriber ..." 47 U.S.C. § 1002(a)(2)(B).

Indeed, Sprint Nextel—the cellular service provider for the subject of the government's applications here—provides in its standard privacy policy that, although it routinely collects personal information pertaining to customers, including the location of their devices on the network, it only shares this information with third parties under certain limited circumstances. SPRINT, SPRINT NEXTEL PRIVACY POLICY, http://www.sprint.com/legal/privacy.html (last visited Feb. 1, 2011).[FN13]

In addition, there has been an explosion of articles in the press on GPS and cell site tracking by law enforcement. Chief Judge Kozinski's recent dissent in *Pineda–Moreno* highlights the controversy and concerns about "the tidal wave of technological assaults on our privacy." *Pineda–Moreno*, 617 F.3d at 1125 (Kozinski, C.J., dissenting from the denial of reh'g *en banc*). He cites articles in the mainstream media and blogs sounding the alarm about the volume and intrusiveness of law enforcement access to cell phone users' location data. *See id.* Various foundations and advocacy groups have also weighed in, expressing reservation about unbridled and unsupervised law enforcement use of evolving technologies, especially for cell phone location tracking. *See, e.g.*, ELECTRONIC FRONTIER FOUNDATION, http://www.eff.org/issues/cell-tracking (last visited May 6, 2011) (describing advocacy efforts with regard to warrantless cell phone location tracking); CENTER FOR DEMOCRACY AND TECHNOLOGY, http://www.cdt.org/issue/location-privacy (last visited May 6, 2011) (gathering resources on location privacy); DIGITAL DUE PROCESS COALITION, http:// digitalduepro-
cess.org/index.cfm?objectid=99629E40–2551–11DF–8E02000C296BA163 (last visited May 6, 2011) (stating that the overarching goal of the coalition is "to simplify, clarify, and unify the ECPA standards, providing stronger privacy protections for communications and associated data in response to changes in technology and new services and usage patterns, while preserving the legal tools necessary for government agencies to enforce the laws, respond to emergency circumstances and protect the public").

In the last year there has been considerable congressional investigation regarding the privacy of location data and other electronic information and, in particular, in response to media coverage of law enforcement use of electronic surveillance and calls for examination and reform of the Electronic Communications Privacy Act ("ECPA"). Written when communication was mostly done over land-line phones, it is generally agreed that ECPA has not kept pace with rapidly evolving technology. Steve Titch, *TITCH: Block Big Brother's Internet Snoops*, THE WASHINGTON TIMES (May 26, 2011, 7: 20 PM), http://www.washingtontimes.com/news/2011/may/26/block-bigbrothers-internet-snoops/ (last visited July 21, 2011). Because ECPA was not enacted with this specific technology in mind, it has been criticized as providing only confusing guidelines, with the situation exacerbated by federal courts' conflicting decisions on the constitutionality of these and other related requests. Gina Stevens, Alison M. Smith, & Jordan Segall, *Legal Standard for Disclosure of Cell–Site Information (CSI) and Geolocation Information*, CONGRESSIONAL RESEARCH SERVICE (Jun. 29, 2010).

***22** Congress has held six hearings since 2010 on the technology and law of electronic surveillance, including several with a particular focus on ECPA.[FN14] These hearings demonstrate congressional concern about the privacy implications of increased access to location information and other rapidly evolving technologies, while recognizing the legitimate needs of law enforcement. *See, e.g., Electronic Communications Privacy Act Reform: Hearing Before*

the Subcomm. on the Constitution, Civil Rights, and Civil Liberties, of the H. Comm. on the Judiciary, 11th Cong. (May 5, 2010). In his opening remarks at one of these congressional hearings on ECPA reform, Representative Nadler, Chair of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, queried:

> How do current advances in location technology test traditional standards of the ECPA of 1986? More generally, in what ways have these and other technologies potentially subverted one of the original and central goals of ECPA, which was to preserve a fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement?

Id. at 2 (internal quotations omitted).

In apparent response to this very issue, three bills that would amend ECPA have been introduced in Congress during a onemonth interval between May and June of 2011.[FN15] On May 17, 2011, Senator Patrick Leahy (D–VT), Judiciary Committee Chairman and original author of EPCA, introduced the Electronic Communications Privacy Act Amendments Act of 2011 ("Leahy Bill"), a comprehensive bill that would require, *inter alia*, that the government obtain a search warrant in order to access real-time geolocation information, and a search warrant or order to obtain historical geolocation information, from an electronic communications, remote computing, or geolocation information service provider. S. 1011, 112th Cong. (2011); *Summary of Electronic Communications Privacy Act Amendments Act of 2011 and Press Release*, SENATOR LEAHY'S WEBSITE (May 17, 2011), http://leahy.senate.gov/press/press_releases/release/?id=b6d1f687–f2f7–48a4–80bc–29e3c5f758f2# Summary.

On June 15, 2011, Senators Al Franken (D–MN) and Richard Blumenthal (D–CT) introduced the Location Privacy Act of 2011 ("Franken Bill"), seeking to close perceived loopholes in federal law by requiring any company that may obtain a customer's location information from a mobile device to get that customer's express consent before collecting his or her location data or sharing his or her location data with third parties. S. 1223, 112th Cong. (2011); *The Location Privacy Protection Act of 2011 Bill Summary*, SENATOR FRANKEN'S WEBSITE (Jun. 15, 2011), http://franken.senate.gov/files/docs/110614_The_Location_Privacy_ Protection _Act_of_2011_One_pager.pdf. While this bill notably applies only to non-governmental entities, it underscores the shortcomings of ECPA as well as congressional concern about the privacy implications of location data.

***23** Also on June 15, 2011, Senator Ron Wyden (D–OR) and Representative Jason Chaffetz (R–UT) introduced the Geolocational Privacy and Surveillance or "GPS" Act ("Wyden Bill"), a bill seeking to address the growing concern that there are no clear rules governing how law enforcement, commercial entities and private citizens can access, use and sell location data. H.R. 2168, 112th Cong. (2011); *Wyden, Chaffetz Introduce Geolocation Privacy and Surveillance ("GPS") Act,* SENATOR WYDEN'S WEBSITE (Jun. 15, 2011), http:// wyden.senate.gov/issues/issue/?id=b29a3450–f722–4571–96f0–83c8ededc332 # sections. The Wyden Bill specifically requires a warrant for the acquisition of geolocation information, subject to a list of exceptions, namely emergency situations. *Id.* The bill covers both real-time tracking and access to records of individuals' past movements in the same way and establishes guidelines for both law enforcement agencies and private entities that have access to geolocation information. *Id.*

These bills do not establish a different proof for location data depending on law enforcement purpose in acquisition. The bills clearly do not recognize any *Payton* exception to the warrant requirement where location data is sought to effect an arrest.

In opposition to the bill, the DOJ has argued that using electronic data to track a person's movements is akin to human surveillance (*i.e.*, following a person walking down the street), which is legal, and should be treated the same. *Id.* Senator Wyden wrote that "tracking an individual's movements on [a] twenty-four hour basis for an extended period of time [as made possible by electronic tracking] is qualitatively different than visually observing that person during a single trip, and can reveal significantly more information about their activities and pattern of life." *Id.* In addition, "tracking an individual with a GPS device or by tracking their cell phone is much cheaper and easier than tracking them with a surveillance team, so the

resource barriers that act as a check against abuse of visual surveillance techniques do not always apply to geolocation tracking and other electronic surveillance methods." *Id.*[FN16]

This legislation, both proposed and enacted, demonstrates recognition of the dangerously intrusive nature of cell phones as tracking devices and confines them to use in the most basic, core function of government: to ferret out crime and provide a safe society for its citizens. *See id.* (opining that "[a]lthough perhaps not conclusive evidence of nationwide "societal understandings," *Jacobsen*, 466 U.S. at 123 n. 22, 104 S.Ct. 1652, this legislation is indicative that prolonged GPS monitoring defeats an expectation of privacy that our society recognizes as reasonable."); *see also* Michael Isikoff, *The Snitch in Your Pocket*, NEWSWEEK (Mar. 1, 2010), *available at* http://www.newsweek.com/id/233916 (discussing controversy over U.S. government surveillance of cellular telephone conversations and records and considering concerns about civil liberties and the individual right to privacy); Christopher Soghoian, *8 Million Reasons for Real Surveillance Oversight*, SLIGHT PARANOIA (Dec. 1, 2009), http:// paranoia.dubfire.net/2009/12/8–million–reasonsfor–real–surveillance.html (last visited Jul. 21, 2011) (reporting that Sprint Nextel provided law enforcement agencies with its customers' GPS location information over 8 million times between September 2008 and October 2009, and that this massive disclosure of sensitive customer information was made possible due to the roll-out by Sprint of a new, special web portal for law enforcement officers); Justin Scheck, *Stalkers Exploit Cellphone GPS*, WALL ST. J. (Aug. 5, 2010), at A1, A14 (reporting that identifying AT & T and Verizon as providing "lawenforcement [ ] easy access to such data"); Spencer Ackerman, *Bill Would Keep Big Brother's Mitts Off Your GPS Data*, WIRED.COM, http:// www.wired.com/dangerroom/2011/05/bill-would-keep-bigbrothers-mitts-off-your-GPS-Data 6/23/2011 (last visited Jul. 21, 2011) (reporting on Wyden/Chaffetz bill and quoting Rep. Chaffetz as stating that "We [do not] want law enforcement to be able to follow everyone all the time.").

***24** Against this backdrop of intense congressional inquiry and public concern, it is especially inappropriate to sanction an expansion of law enforcement acquisition of location data on a wishful but unsupported view of *Payton.*

So, having found neither precedential nor doctrinal support for the government's reliance on the arrest warrant alone as authority for its location data request, the Court considers whether this is a permissible search under the Fourth Amendment and Rule 41.

d. There is no Clear Authority Under the Fourth Amendment for a Search Warrant for Location Data to Aid in Apprehension of a Subject of an Arrest Warrant Absent Flight

At the outset, it should be clear what the government is seeking (and not seeking) under the Fourth Amendment and Rule 41. The government is *not* seeking a warrant to search for the defendant in a particular place. As discussed *infra*, that, of course, would be permissible on probable cause. Nor is the government seeking a warrant to seize the defendant; the arrest warrant already authorizes the government to do that. The government is seeking a warrant for location data from the defendant's cell phone for as long as 30 days on a showing of reasonable belief that the cell phone belongs to him and is in his possession. (ECF No. 15, 20).

Having found that the government's request constitutes an invasion into a constitutionally-protected area of privacy and that under current law the arrest warrant alone does not authorize acquisition of location data, the Court now examines whether the government has satisfied the constitutional requirements to conduct such a search for location data under the Fourth Amendment.

[15][16] In all areas in which a person has a reasonable expectation of privacy, he is protected from "unreasonable searches and seizures." U.S. CONST. amend. IV. The Fourth Amendment does not require that a warrant be obtained for all searches, however. *United States v. Rabinowitz*, 339 U.S. 56, 66, 70 S.Ct. 430, 94 L.Ed. 653 (1950). What constitutes a "reasonable" search and seizure derives content and meaning through reference to the warrant clause and, unless an exception applies, the government must "obtain advance judicial approval of searches and seizures through a warrant procedure." *United States v. U.S. District Court*, 407 U.S. 297, 315, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443, 473–84, 91 S.Ct. 2022, 29

L.Ed.2d 564 (1971); *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The government does not contend explicitly that the search for and seizure of location information is "reasonable" under the first clause of the amendment, or that it falls within any exception to the warrant requirement. *See Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); LAURIE LEVENSON, FED.CRIM. RULES HANDBOOK FCRP 41 n. 21 (2009 ed.) (listing recognized exceptions to the Fourth Amendment warrant requirement). Indeed, the government has presented no grounds for such an exception, and it clearly does not fall within a recognized exception. This is not to say that the Supreme Court might not determine that this search should be analyzed under the "reasonableness standards of Clause 1," and that location data may be obtained on a showing less than or different than probable cause that the search will reveal evidence of a crime and that "advance judicial approval" is not required. However, the government has not argued, and the Court cannot discern, the precedential basis for such a ruling aside from an unsupported expansion of *Payton*, which the Court has already rejected. As the Supreme Court stated in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.' In most criminal cases, we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment." (internal citations omitted).

***25** [17] The Court as a rule examines "criminal" searches under the Warrant Clause and "civil" searches under the Reasonableness Clause. Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 10 (2007); CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 108–17 at 1286 (2d Sess.2004) ("ANALYSIS AND INTERPRETATION"). While the "special needs" doctrine applies in some law enforcement-related circumstances, its applicability requires the existence of circumstances "beyond the normal needs for law enforcement." *Chandler v. Miller*, 520 U.S. 305, 313–14, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). *Compare Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) (holding that sobriety checkpoints constitute permissible warrantless searches), *with City of Indianapolis v. Edmond*, 531 U.S. 32, 35, 40–41, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) (holding that roadside checkpoints aimed at enforcing drug laws are not permissible warrantless searches). The government alleges no facts that take it outside of the context of normal law enforcement investigation and within any recognized exception, including the special needs doctrine. The government's argument under *Payton*, if accepted, would create another "special exception," relieving law enforcement of the obligation to seek prospective judicial approval before the search under the second clause of the Fourth Amendment subject to challenge as "unreasonable" under the first clause if law enforcement did not have probable cause to believe that the defendant was the subject of an arrest warrant, that he had a cell phone and was in possession of that cell phone. The circumstances here do not come within any recognized exception, nor do they meet the articulated test for such an exception. *See Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (Blackmun, J., concurring in judgment)) ("[W]e have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' ").[FN17] Or as Justice Blackmun articulated the "special needs" trigger: "[O]nly when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based on probable cause without sacrificing the ultimate goals to which the search would contribute, does the Court turn to a 'balancing' test to formulate a standard of reasonableness for this context." *O'Connor v. Ortega*, 480 U.S. 709, 741, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (Blackmun, J., dissenting). The government did not argue that the warrant and probable cause requirement was "impracticable." Rather, the government argued under *Payton* that the warrant and probable cause requirement was constitutionally unnecessary. There was no demonstrated impracticability—inconvenience perhaps—but no more.

***26** [18] It may well be that the Supreme Court will extend *Payton* to find that a search warrant is unnecessary under these circumstances and that the privacy rights of the subject of the arrest warrant may

be adequately assured after-the-fact by application of the exclusionary rule or civil remedies, where available.[FN18] However, the Court does not see any clear doctrinal path to the relief the government seeks. Therefore, the Fourth Amendment requires the government to meet the probable cause standard of the second clause of the Fourth Amendment to obtain a search warrant for location data. In any event, the government sought a warrant herein, though it did so only because the telecommunications carrier required a warrant to execute the search for the location data.

Where a warrant is required for a search, as it is here, the Court may issue one only upon the government's showing of "probable cause." The parties vehemently disagree as to the requisite nature of the "probable cause" showing under the Fourth Amendment. The government largely acknowledges that it must meet the probable cause (or reasonable belief) standard but asserts that, there is probable cause here that the evidence sought will aid in a particular apprehension and that is sufficient. (ECF No. 6, 3; ECF No. 10, 2).

Interestingly, testimony in the May 5, 2010 congressional hearing framed the exact issue faced here. In responding to a proposal that the law clearly establishes that "location information regarding a mobile communications device [can be obtained] only with a warrant issued based on a showing of probable cause," Professor Orin Kerr asked:

> ... **[P]robable cause of what?** Is that probable cause to believe the person tracked is guilty of a crime? Or is it probable cause to believe the evidence of location information obtained would *itself* be evidence of a crime?
>
> The difference is important. **In the case of a search warrant, "probable cause" generally refers to probable cause to believe that the information to be obtained is itself evidence of a crime.** But cell phone location information will itself be evidence of crime only in specific kinds of cases. For example, **such information normally will not be evidence of a crime if investigators want to obtain the present location of someone who committed a past crime.**
>
> To see this, imagine the police have probable cause to arrest a criminal for a crime committed last week. The police want to locate the suspect in order to arrest him. In that case, the police will not have probable cause to believe that the location of the criminal's cell phone is itself evidence of a crime. The suspect's location a week after the crime occurred does not give the police any information indicating that the suspect did or did not commit the crime. But if the police have probable cause to arrest someone, and they know his cell-phone number, I would think the law should allow the government some way of locating the suspect pursuant to an appropriate court order. A requirement that location information be obtainable only based on probable cause to believe that the location information is itself evidence of a crime would not seem to allow that.

***27** *Electronic Communication Privacy Act Reform: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 39–40 (2010) (statement of Orin Kerr, Professor, George Washington Univ. Law School) ("Kerr Testimony") (emphasis in original; bolding added). While Professor Kerr appears to believe that law enforcement should be able to use location data in aid of the apprehension of a defendant, he acknowledged that "probable cause" under current Fourth Amendment jurisprudence "generally refers to probable cause to believe that the information to be obtained is itself evidence of a crime." *Id.* As discussed below, this Court agrees.

[19] The government's contrary definition of probable cause relies almost exclusively on its reading of *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967): no nexus between the subject of a search warrant and criminal behavior is necessary; a search warrant can be issued to aid in the apprehension of a criminal defendant. (ECF No. 6, 3; ECF No. 10, 2). The Federal Public Defender interprets *Warden v. Hayden* entirely differently, arguing that the government, "when applying for a search warrant, must establish a reasonable probability that the information it seeks to obtain constitutes proof of a crime." (ECF No. 8, 3). The Court agrees with the Federal Public Defender's reading of the holding in *Warden v. Hayden.* However, other authorities convince the Court that a warrant can be issued to search for the subject of an arrest warrant, if the government has probable cause to believe that he is in a particular place. But if the government does not have probable cause to believe that

the subject of an arrest is in a particular place, a warrant can only issue under the second clause of the Fourth Amendment if there is probable cause he has fled prosecution, that is, that his location is evidence of a crime. *See* 18 U.S.C. § 1073.

As both parties correctly recognize, *Hayden* is a landmark case that rejects, for purposes of the warrant requirement, any distinction between "mere evidence" and instrumentalities, fruits, or contraband of crime. (ECF No. 8; ECF No. 10, 2). Specifically, *Hayden* held that the Fourth Amendment equally governs searches for "mere evidence" and searches for instrumentalities, fruits, or contraband of crime. *Hayden*, 387 U.S. at 306–07, 87 S.Ct. 1642. However, the government focuses on particular language in *Hayden:* "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Id.* at 307, 87 S.Ct. 1642. The Federal Public Defender trumpets other language in the opinion: "there must be a nexus ... between the items to be seized and criminal behavior." *Id.* However, a close examination of the facts of *Hayden* demonstrates the correctness of the Federal Public Defender's interpretation. The language upon which the government relies, is properly viewed as dicta-intriguing dicta—but dicta. In *Hayden*, the issue was the admissibility of articles of clothing to connect the defendant to the criminal activity and thus convict him. Police were notified that an armed robber wearing a light cap and dark jacket had entered a house. Police, on entering, found the defendant and in the search of the house, found a light cap and dark jacket in a washing machine in the house. While the opinion does indeed state that "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction," *id.* at 307, 87 S.Ct. 1642, the facts of the case involve use of these items to convict the man in the house where the clothes were found, not to apprehend him.

***28** Moreover, the government admitted at the hearing it was unable to provide any explicit substantive support for its reading of *Hayden* in factually apposite cases, treatises or law reviews.[FN19] Rather, the government cites to language in *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), and *Dalia v. United States*, 441 U.S. 238, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979), in an attempt to establish that *Hayden* did not advance an absolute nexus requirement, alleging that these two cases "did not even bother to repeat *Hayden's* nexus language." (ECF No. 10, 2 n. 1). However, it is not use of the precise word "nexus" that embodies the requirement—it is the principle that the object of the search must relate to the crime. Indeed, in both of these cases there was a factual nexus between criminal activity and the searched-for items. *Andresen* applied the nexus standard, interpreting a warrant to authorize seizure of evidence only to the extent that it established probable cause that the documents were related to the suspect crime. *Andresen*, 427 U.S. at 481–83, 96 S.Ct. 2737. Similarly, *Dalia* approved issuance of a warrant that allowed the government to plant a "bug" in a suspect's office where the magistrate judge found probable cause to believe that the suspect was committing specific federal crimes, that he was using his office in connection with those crimes, and that bugging his office would lead to interception of oral communications concerning those crimes. *Dalia*, 441 U.S. at 241–42, 256, 99 S.Ct. 1682. Legal pronouncements do not live isolated from the facts; they can only be understood in the context of the facts presented. The Court could find no case where a search warrant was issued to obtain information to aid in the apprehension of a criminal where the sought-for information would not be evidence of a crime.

In short, the government has not overcome this longstanding principle of law. The Fourth Amendment's standard of probable cause for searches and seizures has a firmly embedded nexus component. *See Dumbra v. United States*, 268 U.S. 435, 441, 45 S.Ct. 546, 69 L.Ed. 1032 (1925) ("In determining what is probable cause ... [w]e are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit ... for the belief that the law was being violated on the premises to be searched."). While warrants are no longer limited to only contraband and the fruits and instrumentalities of crime, they must still be specifically tailored to permit search or seizure only of things and places that have a connection to the alleged criminal activity. *See, e.g., Zurcher v. The Stanford Daily*, 436 U.S. 547, 557 n. 6, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) (quoting Comment, 28 U. Chi. L.Rev. 664, 687 (1961) (footnotes omitted in original) (noting that valid warrants must be supported by " 'substantial evidence[ ] that the items sought are in fact sizeable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched.' ")). *See also Doe v. Broderick*, 225 F.3d 440 (4th Cir.2000) (*citing Warden*,

387 U.S. at 307, 87 S.Ct. 1642) (invalidating a search warrant where an officer's declaration failed to establish a "nexus between the items to be seized and the criminal activity being investigated"); *see also* WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS, § 2:8 (2d ed.2010) (noting that nexus requirement is the only requirement for seizure of an article of mere evidence over and above constitutional requirements); JOHN M. BURKOFF, SEARCH WARRANT LAW DESKBOOK, § 18:1 (Dec.2009) ("[e]videntiary items, including papers and documents, that are specified in a search warrant or inadvertently discovered in plain view during the execution of a search warrant lawfully may be seized, provided that it is immediately apparent to the seizing officers that the items are those described in the warrant or that they otherwise possess a nexus with criminal activity").

***29** While the government could point to no specific case approving the use of a warrant to search for the subject of an arrest warrant, there can be little question that a warrant can be obtained to search for and seize such a person. Moreover, *Payton* and *Steagald* have delineated some of the circumstances when a warrant *must* be obtained to search for and seize such a person. In a 1974 law review article, Professor Daniel Rotenberg brilliantly and incisively identified the incongruence between the development of the law on search warrants and arrest warrants:

> Generally, arrest warrants require designation or description of the person to be arrested with no reference to the places that may be searched in effecting the arrest. Search warrants, on the other hand, require a specific description of the place to be searched as well as the property sought with no reference to persons sought. This means that if the object of the search is a person, neither arrest nor search warrant rules fit. There is thus no established procedure that complies with the constitutional mandate that "no Warrants shall issue, but upon probable cause ... and particularly describing the place to be searched, and the persons ... to be seized."

Daniel L. Rotenberg & Lois B. Tanzer, *Searching for the Person to Be Seized*, 35 OHIO ST. L.J. 56, 57–58 (1974).

Shortly thereafter, the Criminal Rules were amended to add clause (4) to then Rule 41(b) allowing a warrant to search for and seize a person for whose arrest there is probable cause. As noted in WRIGHT, KING, & KLEIN, "At the time the 1979 amendment was being formulated, there was uncertainty whether a warrant was needed to enter private premises to make an arrest." 3A FEDERAL PRAC. & PROC.CRIM. § 664.1 (3d ed.2009). After *Steagald*, the treatise continued "it may be that there will be few circumstances in which this holding will be applicable but it was wise that the amendment did provide a procedure for those circumstances." *Id.* Statutory law at the time also suggested plenary authority of law enforcement to search private dwellings, solely on the basis of an arrest warrant. *See* 18 U.S.C. § 2236 (1970).

> [W]hoever, being an officer, agent or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States searches any private dwelling used and occupied as such dwelling without a warrant directing such search ... shall be fined ... or imprisoned .... This section shall not apply to any person a) serving a warrant of arrest; or b) arresting or attempting to arrest a person ...

Thus, the use of a search warrant to apprehend a person for whose arrest there was probable cause was codified. *See* Orders of the Supreme Court of the United States Adopting and Amending Rules, Order of April 30, 1979 (approving amendments to Rule 41 and transmitting them to Congress in accordance with 18 U.S.C. §§ 3771, 3772).

***30** [20] To be clear, no one is questioning the use of a search warrant to apprehend a criminal defendant where the government can present probable cause that the defendant is in a particular place. Rather, the government's request here is for broad information concerning defendant's ongoing location. Unlike in investigations of ongoing crimes, the government here alleges no relationship whatsoever between defendant's ongoing movements and his crime. *Cf. United States v. Garcia–Villalba*, 585 F.3d 1223, 1234 (9th Cir.2009) (recognizing that a defendant's physical movements from place to place satisfied sufficient nexus where defendant was suspected of ongoing drug trafficking); *United States v. Rojas*, 671 F.2d 159, 165 n. 8 (5th Cir.1982) ("[W]arrants are issued for surveillance or tracking devices on probable cause that the 'search' (the surveillance or tracking) will uncover

evidence of a crime"). Because the government has not established the requisite nexus between the information sought and an alleged crime, no search warrant may issue for this location data. Additionally, the government has not provided any authority for its probable cause definition in this circumstance—probable cause that the subject of an arrest warrant is using a specified wireless telephone. While that would seem to be a reasonable showing, aimed at a laudable societal goal of bringing a charged individual to justice, it is an exercise of police power neither clearly envisioned in the Fourth Amendment nor approved by the courts, in an area of quickly shifting, complex technology. Moreover, it is akin to general investigatory activity, for which search warrants are not issued.

As Professor Kerr queried in his congressional testimony:

> But if the police have probable cause to arrest someone, and they know his cell-phone number, **I would think the law should allow the government some way of locating the suspect pursuant to an appropriate court order.** A requirement that location information be obtainable only based on probable cause to believe that the location information is itself evidence of a crime **would not seem to allow that.**

Kerr Testimony at 39–40 (emphasis added). While Professor Kerr identified this issue, he did not provide any solution in constitutional jurisprudence. Nor has any lawmaker in any of the pending legislative proposals discussed earlier suggested a constitutional or statutory clarification or fix to allow this use of location data; the "Wyden Bill" and the "Leahy Bill" establish unequivocally that prospective, real time location data can only be acquired through a warrant.[FN20]

In any event, case law does not provide a way forward—a firm constitutional basis for issuance of a warrant here. Thus, a warrant is unavailable where there is no evidence of flight.

Our analysis could, of course, stop here. The government's other authorities—Rule 41, the Stored Communications Act, the inherent authority of the Court, and the All Writs Act—are subservient to the Fourth Amendment. However, the Court will discuss the government's other arguments for its entitlement to a warrant and provide guidance as to the circumstances under which a warrant may issue for the subject of an arrest warrant.

2. Rule 41

***31** Recognizing that Rule 41 governs all search warrants, the government makes several, alternative arguments as to how its request squares with the terms of the rule, and more generally contends that its request is "consistent with Rule 41." (ECF No. 6, 5; ECF No. 10, 4–5). The government argues that the four categories of warrants provided for in Rule 41(c) are not intended to be exclusive, and that law enforcement may conduct searches or seizures that do not fall within the itemized categories without violating the Fourth Amendment. (ECF No. 6, 5). The government therefore urges the Court to read the Rule 41(c) categories "broadly" and "flexibly." (*Id.* at 5–6; ECF No. 10, 4–5). In its last submission to the Court, the government asserts without supporting authority that Rule 41(c)(4) "authorizes a search for a person to be arrested" and "[a]lthough the location information sought in this case is not itself a person to be arrested, it properly falls within the scope of a search warrant for a person to be arrested ..." (ECF No. 10, 5). Alternatively, the government contends, because Rule 41 does not "specifically address" a warrant for the requested information, the Court has inherent authority to issue the search warrant and the All Writs Act vests the Court with adequate authority to take steps to "effectuate an arrest warrant." (ECF No. 6, 4–5; ECF No. 10, 6–8).[FN21] Finally, the government argues that "[n]o procedural rule prevents this Court from issuing as warrant for evidence that will aid in an apprehension." (ECF No. 6, 3). That position is wrong-headed. Rule 41 sets out the procedures required in implementation of the Fourth Amendment, and the government has failed to bring its request within the Fourth Amendment and within the rule's provisions. The Court finds all of the government's arguments under Rule 41 unavailing.

The search warrant standard codified in the Federal Rules of Criminal Procedure is rooted in the Fourth Amendment, and is intended to articulate and implement Fourth Amendment principles, not to expand or change the Fourth Amendment parameters. The Rules were adopted in 1944 to collect and streamline existing practices and procedures that were fundamentally sound, but haphazard, located in many

cases and not set out in one written document, and confusing in form. *See* James J. Robinson, *The Proposed Federal Rules of Criminal Procedure*, 27 J. AM. J. SOC. 38, 39 (1943); Lester B. Orfield, *The Preliminary Draft of the Federal Rules of Criminal Procedure*, 22 TEX. L.REV. 37, 42 (1943). The Federal Rules of Criminal Procedure established uniform procedures to which all federal courts were thereafter required to adhere. FED. R.CRIM. P. 1(a)(1).

Like the rules of criminal procedure generally, Rule 41 was incepted to codify and clarify search and seizure practice and procedure as it existed in 1944 and before. Thus, the rule adopted the existing statutory warrant procedure which, in turn, had been based on existing law. *See* ADVISORY COMM. ON RULES OF CRIMINAL PROCEDURE, MINUTES OF MEETINGS OF ADVISORY COMMITTEE ON RULES ON CRIMINAL PROCEDURE 883 (Feb. 23, 1943) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR02–1943–min-Part3.pdf.pdf; ADVISORY COMM. ON RULES OF CRIMINAL PROCEDURE, FED. RULES OF CRIMINAL PROCEDURE FINAL REPORT 4 (Nov.1943), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR11–1943.pdf; H.R.Rep. No. 65–291, at 20 (1917). Substantively, Rule 41 mirrors, and in no way alters or expands, the Fourth Amendment. Rule 41 is not the font of Fourth Amendment law; it is the codified expression of Fourth Amendment law.

***32** Rule 41 generally governs all searches and seizures, but by its terms does not override other statutes that govern searches and seizures related to specific government investigation schemes, such as searches and seizures related to customs duties. FED. R.CRIM. P. 41(a)(1) (noting that Rule 41 "does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances"); FED. R.CRIM. P. 41 Advisory Committee's Note, 1944 Adoption, Note to Subdivision (g) ("While Rule 41 supersedes the general provisions of 18 U.S.C. ... relating to search warrants, it does not supersede, but preserves, all other statutory provisions permitting searches and seizures in specific situations.").

Thus, where another statute specifically governs a search, seizure, or issuance and execution of a search warrant in special circumstances, Rule 41 yields to all substantive provisions of that statute. *See, e.g.*, *United States v. Berkos*, 543 F.3d 392, 398 n. 6 (7th Cir.2008) (holding that Rule 41(a)(1) excuses from compliance with Rule 41 all other statutes that govern warrants, including 18 U.S.C. § 2703(a), which creates a statutory "special circumstance" under Rule 41(a)(1) since "warrants pursuant to § 2703(a) do not directly infringe upon the personal privacy of an individual, but instead compel a service provider to divulge records maintained by the provider for the subscriber."); *United States v. Kernell*, Crim. No. 08–142, 2010 WL 1408437, at *2–3 (E.D.Tenn. Apr. 2, 2010) (holding that § 2703(a)'s regulation of the search and seizure of electronic evidence rendered the substance of Rule 41 inapplicable); *In the Matter of the Search of Yahoo, Inc.*, Crim. No. 07–3194, 2007 WL 1539971, at *7 (D.Ariz. May 21, 2007) (same). However, the government wisely does not argue that any applicable statute removes this matter from the purview of Rule 41. Moreover, the Court has been presented with no argument that Rule 41(c)(2) or (3) applies, and will therefore discuss only the provisions that are relevant to this case; namely, Rule 41(c)(1) and (4). The government does not argue entitlement to the warrant under Rule 41(f) (warrant for tracking device). As discussed *infra*, the Court rules that the procedures of Rule 41(f) govern any request for prospective or real-time location data. However, Rule 41(f) could not and does not authorize issuance of a warrant beyond the constitutionally permissible categories or purposes set forth in Rule 41(c)(1)-(4).

a. Rule 41(c)(1)

[21] Rule 41(c)(1) requires, as does the Fourth Amendment, that the government establish probable cause that its search for information be narrowly tailored to reveal "evidence of a crime." *See* FED. R.CRIM. P. 41(c)(1). A defendant's ongoing location or his pattern of travel can constitute "evidence of a crime" sufficient to meet Rule 41(c)(1) when, for example, he is suspected of involvement in a drug trafficking crime. *See, e.g.*, *Garcia–Villalba*, 585 F.3d at 1234 (recognizing that a defendant's physical movements from place to place established sufficient nexus); *Rojas*, 671 F.2d at 165 n. 8 ("[W]arrants are issued for surveillance or tracking devices on probable cause that the 'search' (the surveillance or tracking) will uncover evidence of a crime ..."); *In re Application of the United States for an Order Authorizing Monitoring of Geolocation and Cell Site Data for a Sprint Spectrum Cell Phone Number*, Misc. No. 06–186, 187, 188, 2006 WL 6217584, at *4 n. 6

(D.D.C. Aug. 25, 2006) ("Cell site and geolocation information may be evidence of a crime because, for example, a subject's location can be used to rebut an alibi or place him at the scene of a crime. Here, the location of a suspect known to be purchasing narcotics, or of one known to be guarding and selling a large quantity of narcotics, is likely to reveal the location of the drug stash house."). Thus, a Rule 41(c)(1) search warrant for location information may properly issue where there is a clear nexus between the location data sought and the crime.

***33** The government initially alleged, without any supporting facts, that the defendant was a "fugitive," but withdrew that assertion at the hearing. (ECF No. 15, 17–18). Although the government no longer contends the subject was a "fugitive," it is important to note that an unsupported allegation of fugitive status does not alone constitute justification for a warrant. *See In re Application for the Installation and Use of a Pen Register*, 439 F.Supp.2d 456 (D.Md.2006) (rejecting the Government's application for cell site information under the Pen/Trap Statute and 18 U.S.C. § 2703(d) in connection with the criminal investigation of a fugitive from justice wanted for unlawful flight to avoid prosecution under 18 U.S.C. § 1073, but stating that the Court "would immediately issue a warrant under Rule 41, Fed.R.Crim.P., if the government provided a sworn affidavit attesting to the facts of the application," including that defendant had placed calls from the subject cellular telephone since becoming a fugitive). Rather, the government must demonstrate that the defendant fled the state with the intent of avoiding prosecution, thus engaging in action that would constitute a chargeable crime that would provide the requisite predicate for a search warrant under Rule 41(c)(1). *See* 18 U.S.C. § 1073 ("[W]hoever moves or travels in interstate or foreign commerce with intent to either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees ..."). Importantly, the defendant must first meet the definition of "fugitive," which the Fourth Circuit has carefully articulated as a "person who has fled to avoid prosecution for [a] crime." *United States v. Spillane*, 913 F.2d 1079, 1083–84 (4th Cir.1990).

Although some courts have declined to apply the seldom-prosecuted § 1073 to fugitive federal defendants, *see, e.g.*, *United States v. Noone*, 938 F.2d 334, 334–37 (1st Cir.1991), few have had occasion to interpret the statute, *United States v. McKinney*, 785 F.Supp. 1214, 1218 (D.Md.1992). This Court and the Fourth Circuit have, however, read § 1073 to cover federal defendants. *See, e.g.*, *United States v. Rohn*, 964 F.2d 310, 312–13 (4th Cir.1992) (recognizing without criticism the district court's jury instruction that a defendant's unauthorized flight with intent to avoid prosecution constituted a violation of federal law under 18 U.S.C. § 1073 where defendant was charged with document fraud under federal statutes); *United States v. Davis*, 233 Fed.Appx. 292, 294 (4th Cir.2007) (upholding as reasonable a defendant's sentence for multiple federal crimes including violation of 18 U.S.C. § 1073 for conspiracy to commit flight to avoid prosecution); *United States v. X*, 601 F.Supp. 1039, 1041 (D.Md.1984) (discussing the option of a § 1073 charge against a federal defendant); *United States v. Y*, 601 F.Supp. 1038, 1039 (D.Md.1983) (same); *United States v. Walters*, 558 F.Supp. 726, 730 (D.Md.1980) (same). Thus, where there is evidence of flight from prosecution, the government can obtain the type of location data sought here, as his location would then be evidence of a crime. As discussed below, courts have granted orders for location data or other extraordinary surveillance under the All Writs Act to aid in the apprehension of a defendant where flight is shown. This avenue would assist law enforcement in its apprehension of criminal defendants while assuring the detached review of a judicial officer in the salutary procedural framework of the Federal Rules of Criminal Procedure.

***34** [22] However, where, as here, a defendant is charged with a discrete crime that is not continuing in nature and that would not result in the defendant's likely possession of tangible or intangible items related to his commission of that crime, Rule 41(c)(1) does not authorize a search warrant. *See, e.g.*, *Walters*, 558 F.Supp. at 730 (finding that, "[u]nless the government can, pursuant to some criminal statute such as 18 U.S.C. § 1073 (Flight to Avoid Prosecution or Giving Testimony), show probable cause to believe that defendant used or is using [his] phones in furtherance of a federal offense, such as flight to avoid apprehension, it does not appear that this Court has the authority under Rule 41(b)(3) to order the production of the telephone records" requested under the Wiretap Act); *United States v. X*, 601 F.Supp. 1039, 1041 (D.Md.1984) (same). Therefore, just as the government failed to meet its burden under the Fourth Amendment, its request does not satisfy Rule 41(c)(1).

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b. Rule 41(c)(4)

Rule 41(c)(4) permits issuance of a warrant supported by probable cause that the search will reveal "a person to be arrested or a person who is unlawfully restrained." FED. R.CRIM. P. 41(c)(4). Although the government admits that its search in this case would not reveal a literal person, it nonetheless suggests that its request for location data "properly falls within the scope of a search for a person to be arrested," if the Court accepts a broad construction of the Rule. (ECF No. 10, 5). The Court acknowledges the at least superficial logic of this expanded reading. However, having found that the Fourth Amendment does not sanction issuance of a warrant under these circumstances and having further concluded that Rule 41 must be read consistently with the Fourth Amendment, reliance on Rule 41(c)(4) does not advance the government's case. Moreover, the government has not identified any language in the rule, its legislative history, or case law that aids its position. Thus, the Court declines to adopt the government's expansive reading of Rule 41(c)(4) in the context of the warrant application at issue in this matter.

As discussed earlier in section (1)(d), the rule was changed because in 1979 "there was uncertainty whether a warrant was needed to enter a private premises to make an arrest." 3A FEDERAL PRACTICE & PROCEDURE, CRIM. § 664.1 (3d ed.2009).

The notes of the Advisory Committee on the Federal Rules of Criminal Procedure's rationale for amending Rule 41 to include subsection (c)(4) in 1979 are additionally informative:

> "This amendment to Rule 41 is intended to make it possible for a search warrant to issue to search for a person under two circumstances: (i) when there is probable cause to arrest that person; or (ii) when that person is being unlawfully restrained. There may be instances in which a search warrant would be required to conduct a search in either of these circumstances. Even when a search warrant would not be required to enter a place to search for a person, a procedure for obtaining a warrant should be available so that law enforcement officers will be encouraged to resort to the preferred alternative of acquiring "an objective predetermination of probable cause," *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), in this instance, that the person sought is at the place to be searched."

***35** FED. R.CRIM. P. 41(c)(4), Advisory Committee's Note, 1979 Adoption.

Thus, this amendment to Rule 41 was clearly not intended to be a break from the requirement of probable cause to believe that the subject of the search is in a particular place. Rather, the amendment provided a procedure for law enforcement to present its case to a "neutral magistrate" for search of a particular location while protecting the privacy rights of third parties.

The Fifth Circuit, interpreting the Advisory Committee Notes, found that

> [T]he provision was intended to cover two distinct situations not applicable to the case at hand: (1) where an individual for whom probable cause for arrest exists, but is "hiding out" with someone else; and (2) in searching for a kidnap victim believed to be held captive in a given place.
>
> Given the narrow intent behind this rule, and the coverage of arrest warrants in Fed.R.Crim.P. 4 and 9, we do not read Rule 41 to extend to arrest situations.

United States v. Hultgren, 713 F.2d 79, 85 n. 9 (5th Cir.1983). Although the 1979 Amendments to Rule 41 took effect prior to the Supreme Court's ruling in *Steagald v. United States*, the rationale for Rule 41(c)(4) is consistent with the *Steagald* Court's holding just two years later that law enforcement must obtain a search warrant before entering a third-party residence to apprehend the subject of an arrest warrant to protect third party privacy interests. *See* 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981). [FN22]

Based on the foregoing analysis, the Court agrees that Rule 41(c)(4) authorizes the Court to issue a warrant to search for a person where there is probable cause to arrest the person and there is probable cause to believe that he is hiding in a particular place. *Walters*, 558 F.Supp. at 730; FED. R.CRIM. P. 41(c)(4), Advisory Committee's Note, 1979 Adoption. There is no suggestion that this rule change was intended to empower the government to obtain the type of location data requested here, on the type of showing proffered here. The Court finds that Rule 41(c)(4) simply does

not encompass a broad search for *information* as to the ongoing location of the subject of an arrest warrant (as opposed to a search of specific places for the defendant), where supported by nothing more than an arrest warrant and a belief that the subject of the arrest warrant possesses a cell phone.

In sum, under the federal rules it is proper for the government to get a search warrant for evidence of a crime including, for example, location data pertaining to a suspected drug dealer. *See* FED. R.CRIM. P. 41(c)(1). In addition, it is proper for the government to get a warrant to search for the subject of an arrest warrant where it can demonstrate probable cause to believe that the subject of the arrest warrant is in a particular place. *See* FED. R. CIV. P. 41(c)(4). Notwithstanding, there seems to be no authority supporting the issuance of a search warrant to obtain information about the location of the subject of an arrest warrant solely to aid in that person's apprehension under the rubric of Rule 41(c)(1)-(4). However, as discussed below, the government's application is, in fact, a request for a tracking device, which necessarily must be considered under Fed. R. Cr. P. 41(f)(2). This rule quite obviously does not indicate that the showing necessary for issuance of a tracking device warrant is any different than required under Fed. R. Cr. P. 41(c)(1)-(4); however, it does establish distinct and definite procedures for tracking warrants. Accordingly, neither 41(c) nor 41(f) provides any support for the government's view of the permissibility of a warrant for tracking or location data on the showing it proffers.

3. Inherent Authority

***36** The government also argues that a federal court retains inherent authority to issue warrants consistent with the Fourth Amendment, without regard to the terms of Rule 41. (ECF No. 6, 4).[FN23]

The Federal Public Defender does not deny that the federal court has inherent authority to issue search warrants. (ECF No. 8, 1–2). However, the Court can only issue warrants which comply with the Fourth Amendment and, as discussed above, warrant authority has historically been jealously limited to use in connection with criminal conduct. None of the government's authorities in support of the exercise of inherent authority here represent a deviation from this overwhelming, historical and precedential view of the permissible use of a search warrant. *See* (ECF No. 6, 4–6).

The government relies heavily on *United States v. N.Y. Telephone Co.*, 434 U.S. 159, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977), for its position. Although *N.Y. Telephone Co.* interpreted Rule 41(c) broadly to include electronic intrusions, namely pen registers, the decision provides no support on the pivotal issue here. In that case, the Supreme Court held that the district court had the power to order the installation of the pen registers to search property that was being used as the means to commit a criminal offense, that is, a "telephone suspected of being employed as a means of facilitating a criminal venture." *Id.* at 169, 98 S.Ct. 364. Thus, *N.Y. Telephone Co.* expands the *type* of evidence of a crime for which a warrant may issue; it does not endorse issuance of a search warrant for the new and different purpose of obtaining information to aid in the apprehension of a criminal defendant. *Accord United States v. Southwestern Bell Telephone Co.*, 546 F.2d 243, 245 (8th Cir.1976) (same).

The government's other authorities are similarly distinguishable. The courts in *United States v. Torres*, 751 F.2d 875 (7th Cir.1984), *United States v. Villegas*, 899 F.2d 1324 (2nd Cir.1990), and *United States v. Falls*, 34 F.3d 674, 678 (8th Cir.1994), approved, respectively, video surveillance in a terrorism investigation, photographs without seizure of any tangible items in the course of an investigation of drug conspiracy, and silent video in a drug trafficking investigation. This Court agrees with the Eighth Circuit in *Southwestern Bell Telephone Co.* that "[t]he unusual character and technological advances of electronic communications have occasioned the surfacing of this inherent authority [outside of Rule 41]." 546 F.2d at 245 n. 5. However, while that proposition is certainly true insofar as law enforcement must be able to use evolving and up-to-date technology in evidence gathering of criminal conduct, it does not follow that new technology can be used for a purpose not sanctioned in the Fourth Amendment warrant clause. None of the government's authority supports its view of the Fourth Amendment.

4. The Stored Communications Act, (18 U.S.C. § 2703(c)(1)(A))

The government's first application sought a search warrant under the combined authority of Rule 41 and 18 U.S.C. § 2703(c)(1)(A). Specifically, the government alleges that 18 U.S.C. § 2703(c)(1)(A), a

provision enacted as part of the Electronic Communications Privacy Act of 1986, entitles it to a warrant for the requested information. (ECF No. 10, 5–6). Section 2703(c)(1)(A) of Title 18 provides that "[a] governmental entity may require a provider of electronic communication ... to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) when it obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure." 18 U.S.C. § 2703(c)(1)(A). The government argues based upon this statutory language that this Court has

> ***37** "jurisdiction to issue a search warrant here ... because (1) the telecommunications service provider is a provider of electronic communication service; (2) the location information sought pertains to a customer of the service; and (3) the location information sought is not the contents of communications. Section 2703(c)(1)(A) thus constitutes an explicit statutory authorization for the United States to obtain the location information it sought in this case"

(ECF No. 10, 5–6) (internal citations omitted). The government's argument fails as a matter of constitutional law and a matter of statutory interpretation. A brief review of the legislation on electronic communications and records is helpful to understanding the fallacy of the government's argument here.

In 1968, Congress enacted the Omnibus Crime Control and Safe Streets Act to provide comprehensive authorization for government interception, under carefully subscribed circumstances, of wire or oral conversations. S.Rep. No. 99–541, *reprinted in* 1986 U.S.C.C.A.N. 3555, 3556 (Oct. 17, 1986) (*citing* the Omnibus Crime Control and Safe Streets Act of 1968). This Act, which included Title III's wiretap provisions, quickly became "hopelessly out of date." *Id.* In 1986, Congress enacted the Electronic Communications Privacy Act ("ECPA") which amended Title 18 of the United States Code to "protect against unauthorized interception of electronic communications," and to "update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies." Pub.L. No. 99–508, 100 Stat. 1848 (99th Cong.1986); S.Rep. No. 99–541, *reprinted in* 1986 U.S.C.C.A.N. 3555, 3555 (Oct. 17, 1986). Of particular note, ECPA amended Title III to "bring it in line with technological developments and changes in the structure of the telecommunications industry," and added sections to address access to stored wire and electronic communications and transactional records, as well as pen registers and trap and trace devices. *Id.*[FN24]

Following adoption of the ECPA, courts have recognized that,

> there are four broad categories of electronic surveillance, each with its own well-established standard for obtaining court ordered disclosure or monitoring. Those categories (arranged from highest to lowest order of legal process) are: **(1) wiretaps,** which are authorized pursuant to 18 U.S.C. §§ 2510–2522, upon what could be called a "probable cause plus" showing; **(2) tracking devices,** which are authorized pursuant to 18 U.S.C. § 3117, upon a standard probable cause showing; **(3) stored communications and subscriber records,** which are authorized pursuant to the Stored Communications Act upon a showing of specific and articulable facts showing that there are reasonable grounds to believe that the data sought is relevant and material to an ongoing criminal investigation; [FN25] and **(4) pen registers and trap and trace devices,** which are authorized pursuant to 18 U.S.C. §§ 3121–3127 ... upon the Government's certification that the data sought is relevant to an ongoing criminal investigation.[FN26]

***38** *In re Application of the United States for an Order Authorizing Monitoring of Geolocation and Cell Site Data for a Sprint Spectrum Cell Phone Number*, Misc. No. 06–186, 187, 188, 2006 WL 6217584, at *2 (D.D.C. Aug. 25, 2006) (citing *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Authority*, 396 F.Supp.2d at 753). ECPA defined "tracking devices," which it then explicitly excluded from coverage under the Act. 18 U.S.C. §§ 2510, 3117.

The Wiretap Act and ECPA apply only to the extent information is transferred via wire, oral, or electronic communication. Thus, these Acts now go beyond protecting only wire or oral communication to also cover any electronic communication, which includes "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted

in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12). Thus, the electronic communications category covers cellular telephone service. *In re Application of the United States for an Order For Disclosure of Telecommunications Records and Authorizing the Use of a Pen Register and Trap and Trace*, 405 F.Supp.2d at 445.[FN27]

The government contends that the information it seeks constitutes "records or other information pertaining to a subscriber" that it may request from a carrier by obtaining a warrant under § 2703(c)(1)(A). The statute offers no definition nor explanation of what constitutes "records" or "information pertaining to a subscriber."

The kind of location information that is most commonly sought under § 2703 is cell site data—information that is automatically collected by cell sites as a user's handset "checks in" or "registers" with the network.[FN28] In the least invasive of this type of search, the government will request historic cell site information that was routinely recorded by a single cell site and retained by the carrier when a handset user placed or received calls prior to the issuance of an order or warrant. In a more invasive search, the government will request that the carrier retain records for all of a handset's automatic registrations, which occur approximately every seven to ten minutes. Such a request is prospective, as it asks for data generated after the court's order or warrant and involves data being generated and turned over to law enforcement in real time, or close to it. As discussed above, this data is available only when a handset is powered on and is able to access its network. And, importantly, these requests involve data that is automatically generated by use of any cell phone and is "intermediat[ly] stor[ed] ... incidental to the electronic transmission thereof." 18 U.S.C. §§ 2703, 2711(1), 2510(17). However, it is not only routinely recorded cell site data that is requested here, but rather precise location information that the government wishes to have generated in real time, at its request any time, for as long as 30 days.

[23] At the hearing, the government admitted that the precise location data sought here is neither ancillary information collected by service providers in the course of business nor information that is automatically generated or stored "incidental" to calls. Therefore, the requested information cannot logically be considered "records" and is nothing like the information courts have found to fall under the purview of § 2703. (ECF No. 10, 5). Regardless of the Court's view of this argument, the argument is at best merely semantic. To the extent § 2703 applies to a search of an area or thing that is entitled to a reasonable expectation of privacy, the Fourth Amendment protects. To the extent Rule 41 contains substantive provisions, that substance is rooted directly in the Fourth Amendment, with which any search that would violate a reasonable expectation of privacy must comply. As the Federal Public Defender noted, "[t]he government's reference to § 2703(c)(1)(A) adds nothing to the analysis of this issue." (ECF No. 8, 11). The Court agrees.

***39** [24] Rather than being a "stored record or other information," the precise location information sought falls squarely within the definition of communications from a tracking device, despite the government's denial of the same in this case. 18 U.S.C. § 3117 defines a tracking device as "an electronic or mechanical device which permits the tracking of the movement of a person or thing." As such, the information is specifically excluded from coverage under the Wiretap Act and ECPA, including § 2703.[FN29] 18 U.S.C. §§ 2510(12)(C), 3117(b). Thus, the government's argument fails as a matter of straightforward statutory interpretation.[FN30]

a. Tracking Devices

The government's position, as articulated during the hearing, is that a cell phone is not a tracking device. Rather, the government contends that the tracking devices contemplated by ECPA and Rule 41 include only the legacy "bumper beepers" that existed at the time Congress enacted ECPA. The Court disagrees.

When Congress enacted ECPA in 1986, it had no reason to anticipate that cell phones would soon become capable of performing all the functions of a tracking device. Nonetheless, instead of limiting its statutory definition of tracking device to the beeper-type devices then in existence, it defined a tracking device broadly as "an electronic or mechanical device which permits the tracking of the movement of a person or object." 18 U.S.C. § 3117(b). In the Senate Report that accompanied ECPA, the only reference to

tracking devices defined "electronic tracking devices" as:

> one-way radio communication devices that emit a signal on a specific radio frequency. This signal can be received by special tracking equipment, and allows the user to trace the geographical location of the transponder. Such "homing" devices are used by law enforcement personnel to keep track of the physical whereabouts of the sending unit, which might be placed in an automobile, on a person, or in some other item.

S.Rep. No. 99–541, *reprinted in* 1986 U.S.C.C.A.N. at 3564.

Only a single court, in an unreported opinion, has agreed with the government's position that Congress intended to limit "tracking devices" to include only traditional beeper-type tracking devices. *In re Application for an Order Authorizing The Extension and Use of a Pen Register Device*, 2007 WL 397129, at *2 (E.D.Cal. Feb. 1, 2007) (commenting that "it would prove far too much to find that Congress contemplated legislating about cell phones as tracking devices"). The more prevalent view among courts is that the statute is not so limited. This Court agrees with the Southern District of Texas's thoughtfully articulated conclusion that the broad definition of tracking devices adopted by Congress was intended to encompass not only the limited beeper-type device that existed at the time, but also future technological permutations of tracking devices. *See In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority*, 396 F.Supp.2d at 754–55.

***40** Other arguments that cell phones are not tracking devices when used to effectively track a subject are similarly unavailing. For instance, some suggest that tracking devices covered by the statute should be limited only to devices which are "installed" or "planted" without the subject's consent or knowledge. *In re Application for Pen Register Device*, 2007 WL 397129, at *2; *In re Application of the United States For an Order: (1) Authorizing the Installation and Use of a Pen Register and Trap and Trace Device, and (2) Authorizing Release of Subscriber Information a/o Cell Site Information*, 411 F.Supp.2d 678, 681 (W.D.La.2006). However, the statute contains no such requirement. The suggestion that "[i]f the owner of a cell phone does not wish to convey [his location data], he can simply not make a call or he can turn his cell phone off," is similarly inaccurate. *Id.* When a cell phone is turned on and located within its network, it is constantly registering its current location with the nearest cell tower. *See* CTIA–The Wireless Association, Wireless Glossary of Terms, *available at* http://www.ctia.org/media/industry-info/index.cfm/AID/10321. While the government can limit its request to cell site data recorded only at the origination and termination of calls, *e.g.*, while the phone is actively being used, it can also request that the carrier collect this registration information at any time while the phone is powered on without the user's knowledge or consent. Precise location data can also be generated independently of calls, at the request of the carrier, and without the user's knowledge or consent, as was requested here.

The majority of courts that have examined these issues are now recognizing that advances in technology have transformed cell phones into multi-function devices that perform, in many cases, identical functions to traditional tracking devices. The logical approach embraced by these courts concludes that cell phone signals are electronic communications and cell phone providers are electronic communications service providers, except to the extent that a cell phone is being used as a tracking device, e.g., to provide location data. *E.g.*, *In re Application of the United States for an Order Authorizing Use of a Pen Register with Caller Identification Device Cell Site Location Authority on a Cellular Telephone*, 2009 WL 159187 (S.D.N.Y. Jan. 13, 2009); *United States v. Bermudez*, IP05–0043–CR05–BF, 2006 WL 3197181, at *9–10 (S.D.Ind. Jun. 30, 2006); *In re Application of the United States for an Order Authorizing Installation and Use of a Pen Register and a Caller Identification System on Telephone Numbers (Sealed)*, 402 F.Supp.2d at 604; *In re Application of the United States Authorizing the Use of a Pen Register*, 384 F.Supp.2d 562, 563–64 (E.D.N.Y.2005). In reaching this conclusion, these courts have found that,

> [a] cell phone has the ability, by the use of electronic signals, to track the movement of an object (the phone itself), and by extension, of a person. It does so by locating the position of the phone, through the process of "triangulation" that Judge Kaplan and others discuss at some length in their opinions. Therefore, a cell phone falls within the literal defi-

nition of the term "tracking device" as used in the Stored Communications Act.

In re Application of the United States for an Order Authorizing Use of a Pen Register with Caller Identification Device Cell Site Location Authority on a Cellular Telephone, 2009 WL 159187, at *3 (Jan. 13, 2009). *See also Bermudez*, IP05–0043–CR05–BF, 2006 WL 3197181, at *9–10; *In re Application of the United States for an Order Authorizing Installation and Use of a Pen Register and a Caller Identification System on Telephone Numbers (Sealed)*, 402 F.Supp.2d at 604; *In re Application of the United States Authorizing the Use of a Pen Register*, 384 F.Supp.2d at 563–64.

***41** [25] This judge now joins others who have found that cell phones, to the extent that they provide prospective, real time location information, regardless of the specificity of that location information,[FN31] are tracking devices. Thus, a cell phone's prospective, real time location data [FN32]—whether cell site or GPS—is a communication from a tracking device that is excluded from coverage under the Wiretap Act and ECPA. As noted by the Southern District of New York,

> [t]his is an elegant solution to the conundrum created by the application of Congress' chosen definitions. It construes the statute in a way that makes it work in the manner that Congress clearly intended, without doing violence to its literal language. It avoids the absurd result that has caused some of my fellow jurists to dance around the Congressionally-selected definitions of the terms "tracking device" and "electronic communication." And it quite possibly forestalls any Fourth Amendment issue that might arise from the use of [cell site location data] in violation of the Supreme Court's pronouncement in *United States v. Karo*, 468 U.S. 705, 714, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984).

In re Application of the United States for an Order Authorizing Use of a Pen Register with Caller Identification Device Cell Site Location Authority on a Cellular Telephone, 2009 WL 159187, at *5 (S.D.N.Y. Jan. 13, 2009). This conclusion does not prohibit the government from obtaining prospective, real time data.[FN33] Rather, such information may be obtained in the same way that the government may obtain information from a tracking device: by meeting the requirements of Rule 41 and the Fourth Amendment.

The Court recognizes that there is some dispute as to whether a warrant based on probable cause is required in obtaining the traditional "bumper beeper." The Supreme Court on June 27, 2011 granted the government's petition for certiorari in *United States v. Jones*, 625 F.3d 766 (D.C.Cir.2010), a companion case to *United States v. Maynard*, 615 F.3d 544 (D.C.Cir.2010), discussed *supra*, presenting a Fourth Amendment challenge to warrantless GPS surveillance of automobiles. *United States v. Jones*, —— U.S. ——, 131 S.Ct. 3064, 180 L.Ed.2d 885 (2011) (granting certiorari). Accordingly, the Supreme Court is poised to address during the coming term: (1) whether the warrantless use of a tracking device on a defendant's vehicle to monitor its movements on public streets violates the Fourth Amendment; and (2) whether the government violated the defendant's Fourth Amendment rights by installing a GPS device on his vehicle without a valid warrant and without his consent. (*Id.*). Relevant to the instant matter, these issues implicate the questions of whether and under what circumstances continuous GPS surveillance constitutes a "search" under the Fourth Amendment, thereby necessitating probable cause and a warrant. While the Supreme Court's opinion in this case may be helpful, the intrusion of privacy implicated in cell phone tracking as discussed earlier is much more certain and extensive. The government seems to recognize this and did not seriously question that the location data was a "search."

***42** Having already found that the information sought here is subject to a reasonable expectation of privacy, the Court further concludes the government must obtain a search warrant under Rule 41(f) to obtain location data and must establish probable cause. As § 2703 does not govern the information requested here and the government has failed to establish the grounds for a warrant, the government's application brought under Rule 41 and 18 U.S.C. § 2703(c)(1)(A) is unavailing.

5. All Writs Act

The government's second application sought precise location information under the All Writs Act. (ECF No. 2; ECF No. 6, 6–9). This may be the most troubling position the government has taken in pursuit of this precise location data. Essentially, the govern-

ment seeks an end run around constitutional and statutory law through invocation of the All Writs Act. As discussed above, the Constitution delineates the appropriate uses of a search warrant, Rule 41 and ECPA provide the procedural guidance for law enforcement seeking tracking data. The All Writs Act gives "a federal court [ ] the power 'to issue such commands' as 'may be necessary or appropriate to effectuate and prevent the frustration of orders that it has previously issued.' " (ECF No. 6, 6). Therefore, the government suggests that the All Writs Act may be properly invoked wherever the government (1) has an active, valid arrest warrant; (2) has a reason to believe that the requested information will lead to the location of the subject of that arrest warrant; and (3) the government is not aware of the subject's precise location at the moment the warrant is requested. According to the government, nothing more—such as exhaustion of other means of surveillance or apprehension, or an absence of alternative authority—is necessary to trigger invocation of the All Writs Act. Rather, the government appears to see the All Writs Act as an alternative source of inherent authority, rather than a limited, residual one, equally constrained by the Fourth Amendment.

In support of its invocation of the All Writs Act, the government relies heavily on *N.Y. Telephone Company*, a case in which the United States Supreme Court found that an order requiring a phone company to provide assistance in furtherance of a properly issued pen register was authorized under the All Writs Act. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977). After first finding that the pen register had been properly issued on a showing of probable cause, which included establishment of a nexus between use of the phone and suspected commission of an ongoing crime, the Court analyzed the district court's order, issued under the All Writs Act, requiring the telephone company to provide technical assistance to law enforcement in furtherance of the pen register. *Id.* at 171–77, 98 S.Ct. 364. Recognizing that the Wiretap Act authorized such orders, the Court commented that "it would be remarkable if Congress thought it beyond the power of the federal courts to exercise, where required, a discretionary authority to order telephone companies to assist in the installation and operation of pen registers, which accomplish a far lesser invasion of privacy .... to prohibit the order challenged here would frustrate the clear indication by Congress that the pen register is a permissible law enforcement tool." *Id.* at 177–78, 98 S.Ct. 364.

***43** Thus, *N.Y. Telephone Company* stands for the proposition that the All Writs Act enables the Court to, in the absence of other enabling authority, issue supplemental orders to effectuate valid orders or warrants issued under existing law, but only to the extent any supplemental order issued does not constitute an additional invasion of privacy. Notably, and critically different than this matter, the Supreme Court acknowledged and deferred to congressional approval of a pen register as a permissible law enforcement tool. Also notably, the government had satisfied the lower court that there was probable cause—a nexus between use of the phone for which the pen register was sought *and* suspected commission of an ongoing crime. *N.Y. Telephone Company* does not grant the Court an unbridled inherent power to infringe on an individual's privacy rights, outside of the governing structure of the Fourth Amendment. In fact, this Court has been unable to locate a single case in which access was granted to search or seize Fourth Amendment-protected information under the All Writs Act, without satisfying the probable cause standard.

[26] Rather, the All Writs Act empowers courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act is intended to provide courts with the "instruments needed to perform their duty, as prescribed by the Congress and the Constitution," *Harris v. Nelson*, 394 U.S. 286, 300, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969) (citing *Price v. Johnston*, 334 U.S. 266, 282, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948)), so as "to process litigation to a just and equitable conclusion." *ITT Comm. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir.1978). This specifically includes the authority to use its equitable powers to resolve any issues in a case properly before it. *Id.*

[27][28] Courts generally recognize this as a gap-filling measure to issue orders necessary "to achieve 'the rational ends of law.' " *N.Y. Tel. Co.*, 434 U.S. at 172, 98 S.Ct. 364 (quoting *Harris v. Nelson*, 394 U.S. 286, 299, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969)). Consequently, courts issue such writs to "prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *Id.*; *See also* *Scardelletti v. Rinckwitz*, 68 Fed.Appx. 472, 477 (4th Cir.2003) (quoting *Pa. Bu-*

reau of Corr. v. United States Marshals Serv., 474 U.S. 34, 40, 106 S.Ct. 355, 88 L.Ed.2d 189 (1985)); *Miller v. Brooks (In re Am. Honda Motor Co.)*, 315 F.3d 417, 438–39 (4th Cir.2003) (finding that invoking the All Writs Act to order an injunction was proper where necessary to prevent direct frustration of the district court's settlement approval order). The fact that a party may be assisted in its discharge of its rights or duties by the issuance of a writ is not a sufficient basis for the writ. *Barton*, 569 F.2d at 1360 (overruling a district court's application of the All Writs Act to effectuate an order mandating deposit of funds into the court when that order would have no practical effect in advancing the court's jurisdiction). Indeed, the All Writs Act cannot be used to circumvent the safeguards set in place by existing law anywhere those safeguards prevent the requesting party's result.

***44** [29][30] Courts analyze four elements when determining whether to invoke the All Writs Act. First, courts determine whether any applicable federal law governs the request. Where other federal law controls, the All Writs Act is inapplicable. *See, e.g.*, *Denedo*, 129 S.Ct. at 2227–28 (holding that "where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling"); *Clinton v. Goldsmith*, 526 U.S. 529, 537, 119 S.Ct. 1538, 143 L.Ed.2d 720 (1999) (noting that the All Writs Act does "not generally ... provide alternatives to other, adequate remedies at law"); *Application of the United States of America for an Order*, 08–Misc.–0298, 2008 U.S. Dist. Lexis 45311, at *5 n. 3 (E.D.N.Y. Jun. 9, 2008) (holding that Fed.R.Crim.P. 57 and the All Writs Act were inapplicable where there is other controlling authority); *In re Application for Pen Register and a Trap and Trace Device*, 396 F.Supp.2d at 325–27 (holding that the All Writs Act is applicable only when used to "fill a gap in an existing statutory regime," and not to "trump existing statutory law governing the use of investigative techniques"). The government boldly asserts that "Rule 41 does not [ ] 'specifically address' the issuance of all search warrants." (ECF No. 10, 6). This assertion is entirely without support or merit. Rule 41 establishes procedures for all search warrants not excepted by other statutes, including those for tracking devices, and provides a framework for the Fourth Amendment which expressly covers all searches into areas covered by a reasonable expectation of privacy as well as warrants required for such searches.

Second, if no federal law governs the requested authorization, courts determine whether there is any constitutional issue implicated by the proposed authorization. Courts have applied the All Writs Act to issue an authorization for assistance in effectuating an existing search warrant and arrest warrant where no Fourth Amendment privacy rights or other constitutional issues are implicated. *See United States v. X*, 601 F.Supp. 1039, 1042–43 (D.Md.1984) (using the All Writs Act to authorize production of toll records finding no subscriber privacy interest in them); *United States v. Doe*, 537 F.Supp. 838, 840 (E.D.N.Y.1982) (using the All Writs Act to authorize a production of toll records as subscriber has no legitimate expectation of privacy in them); *Application of the United States of America for an Order Directing X to Provide Access to Videotapes*, M. No. 03–89, 2003 WL 22053105, at *2 (D.Md. Aug. 22, 2003) (authorizing access to surveillance videotapes of the public areas of an apartment complex under the All Writs Act "as no reasonable expectation of privacy on part of tenants or their visitors to hallway").

[31] The All Writs Act does not excuse the government from its burden of establishing probable cause where constitutionally protected information is requested. *See In re Application of the United States for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device*, 396 F.Supp.2d at 326–27 (denying an application for real-time cell phone location data when the government submitted "specific and articulable facts" and holding that probable cause would be required to obtain such data). This Court has not located, and the parties have not provided, a single case in which access was granted to search or seize Fourth Amendment-protected information under the All Writs Act absent probable cause.

***45** Where no law occupies the space and no constitutional issues are raised, courts move to the third step: determining whether a prior order of the Court exists that a further order will aid. For example, where a pen register that is properly issued by the Court upon a showing of probable cause would be frustrated by the government's inability to carry out the authorized search without assistance from the telephone company, the All Writs Act may authorize a secondary order to require the telephone company to provide technical assistance to the government. *N.Y. Tel. Co.*, 434 U.S. at 171–77, 98 S.Ct. 364. *See also United States v. X*, 601 F.Supp. at 1042–43 (ordering a

telephone company to provide limited toll records where the government had a valid arrest warrant, but the subject of that warrant was evading arrest and the government established that the toll records would provide information about his current whereabouts).

Fourth, after meeting all previous steps, the government must show that "exceptional circumstances" justify invocation of the All Writs Act. Other less intrusive means, *Pa. Bureau of Corr.*, 474 U.S. at 44, 106 S.Ct. 355, a showing that other means had been attempted and were unsuccessful, *United States v. X*, 601 F.Supp. at 1043, and the likelihood of success, *id.*, are all factors to consider. For example, the Supreme Court refused to order the United States Marshals Service to transport and supervise a witness in a Section 1983 action who was in state correctional custody to effectuate a prior habeas corpus order. *See Pa. Bureau of Corr.*, 474 U.S. at 43–44, 106 S.Ct. 355. There, the order sought would not effectuate the habeas order because no "exceptional circumstances" were demonstrated that the state could not handle transporting the witness to the courthouse itself. *Id.* at 43–44, 106 S.Ct. 355. Exceptional circumstances existed, however, where a defendant had "disappeared," efforts to locate him had been unsuccessful, defendant was likely to use his phone to contact his family members, and records collected under a pen register would likely reveal information concerning the defendant's whereabouts. *See United States v. X*, 601 F.Supp. at 1042–43; *Doe*, 537 F.Supp. at 838, 840 (authorizing production of the toll records of the mother of the subject of an arrest warrant where the subject failed to appear and had attained fugitive status); *United States v. Hall*, 583 F.Supp. 717, 722 (E.D.Va.1984) (authorizing provision of credit card records belonging to the previous girlfriend of a federal fugitive where the credit card was closely connected with underlying controversy and the location of fugitive). *See also Application of the United States of America for an Order Directing X to Provide Access to Videotapes*, 2003 WL 22053105, at *3 (use of All Writs Act proper to obtain security videotapes where an arrest warrant had issued for defendant, agent stated that defendant had disappeared, efforts to locate defendant had been unsuccessful, and it was likely that access to security videotapes would provide information about defendant's whereabouts); *Denedo*, 129 S.Ct. at 2227 n. 2 (use of All Writs Act proper where a *coram nobis* [FN34] order would be ineffectual in correcting a prior order, *i.e.*, a prior conviction, because the defendant had left the military and thus the military had no jurisdiction over him). Exceptional circumstances also exist where law enforcement would be entirely unable to obtain information that the court had authorized under a pen register, absent an order for the phone company's compliance. *N.Y. Tel. Co.*, 434 U.S. at 171–77, 98 S.Ct. 364.

***46** [32] In short, the All Writs Act may authorize a search in furtherance of a prior order only where no other law applies, no Fourth Amendment right to privacy is implicated, and exceptional circumstances are present.

[33] This is not such a situation. Here, the government requests information that implicates the Fourth Amendment's reasonable expectation of privacy. The government's request is covered by existing law—namely, the Fourth Amendment's probable cause requirement, Rule 41, and ECPA—and the government makes no allegations of extraordinary circumstances that would justify deviation from that existing law. Indeed, the government does not suggest that the subject of the arrest warrant in this case has done or is likely to do anything to "frustrate the implementation" of that arrest warrant. *Cf. N.Y. Tel. Co.*, 434 U.S. at 174, 98 S.Ct. 364 ("The power conferred by the Act extends, under appropriate circumstances, to persons who ... are in a position to frustrate the implementation of a court order or the proper administration of justice"). But, the government complains, the Court's denial of the warrant establishes a "head start" rule: "before the government could obtain an order to locate the subject of an arrest warrant, the defendant would have to be given notice of the warrant and thus a head start in which he could begin avoiding arrest." (ECF No. 10, 7). That is not the case. Indictments are routinely sealed to allow apprehension using traditional investigative means before publication of the charges. Moreover, there are constitutional limitations on law enforcement actions which undoubtedly impede effectiveness. The Court acknowledges that a defendant has no "right" to turn himself in. [FN35] But that does not mean that the government has an unfettered right to pursue him.

Importantly, the government's request, if granted, would infringe on different rights than those implicated by an arrest warrant, as the government seeks to obtain ongoing precise location data over an extended period of time rather than a one-time search for the subject himself, at a specific place.

The government simply cannot use the All Writs Act to circumvent the requirements of the Fourth Amendment and other statutes that already occupy the space. The All Writs Act will allow the Court to take the necessary steps to effectuate its orders, but only where all other means have been exhausted. The government has not exhausted its remedies here and has demonstrated no exceptional circumstances that would justify an extraordinary writ.

Moreover, application of the All Writs Act to government requests for location data would have the ill-advised result of effectively exempting this and future similar requests from the congressionally-mandated reporting requirements that accompany orders and warrants established by the Rules and statutes discussed herein. An extensive congressional scheme provides courts with guidance as to the form and substance of the authorizations. *See* 18 U.S.C. § 2518(1)-(4) (outlining authorization application requirements, probable cause standard, form of court order, and allowances for status updates applicable to orders authorizing or approving the interception of a wire, oral, or electronic communication under 18 USCS §§ 2510 et seq.); 18 U.S.C. § 2703(c) (specifying types of authorizations (warrant, order, subpoena) required for obtaining information and requirements for each). By contrast, if a cell phone used for this purpose were classified as a tracking device, specified reporting requirements would automatically apply. *See* Fed.R.Crim.P. 41(f)(2). This Rule outlines reporting requirements for use of tracking devices. *Id.* Moreover, this Rule requires that notice be provided to the tracked person after the end of the use of the device, *id.*, but does provide for delayed notification, *id.* at (f)(3). Delayed notification requires additional reporting of grants/extensions/denials of these warrants to the Administrative Office of the United States Courts. *See* 18 U.S.C. § 3103a(d).

***47** As Justice Powell noted in *Pa. Bureau of Corr.*, "[a]lthough the Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." 474 U.S. at 43, 106 S.Ct. 355. Here, in the absence of extraordinary circumstances, where statutory law properly governs the government's request and unlike *N.Y. Telephone Company*, Congress most certainly has not endorsed acquisition of location data for this purpose, the Court will not allow the government to ignore the restrictions of the Fourth Amendment and circumvent the protections established by statute by invoking the All Writs Act. Therefore, the government's application under the All Writs Act is unavailing.

III. CONCLUSION

As set forth above, the Court finds that real time, precise location data generated by a cell phone is entitled to a reasonable expectation of privacy and thus is subject to the Fourth Amendment's protections and the procedural requirements of Rule 41. This information is not exempted from Rule 41, as the Court further finds that location data is not an "electronic communication," cell phone providers are "electronic communications services" except to the extent a cell phone is used as a tracking device, and to the extent prospective location information is generated and/or requested a cell phone is classified as a tracking device.

This Court has articulated a procedure for requesting prospective, real time location information:

> When the government seeks to acquire and use real time cell site information to identify the location and movement of a phone and its possessor in real time, the court will issue a warrant upon a sworn affidavit demonstrating probable cause to believe the information will yield evidence of a crime. The court will not enter an order authorizing disclosure of real time cell site information under authority other than Rule 41, nor upon a showing of less than probable cause.

In re Application of the United States for an Order Authorizing Installation and Use of a Pen Register and a Caller Identification System on Telephone Numbers (Sealed), 402 F.Supp.2d at 605.[FN36] For the reasons articulated above, the Court finds that requests for GPS or any other precise location information generated by, for, or in relation to a cell phone are subject to the same standard. This standard is met if the affidavit provides that: a valid arrest warrant has issued for the user of the subject cell phone; the subject cell phone is in the possession of the subject of the arrest warrant; and the subject of the arrest warrant is a fugitive, that is, has demonstrated intent to flee to avoid prosecution.

Rule 41(b) provides that a tracking warrant may be used up to 45 days. Fed.R.Crim.P. 41(b). That would appear to be unnecessarily long in most fugitive situations. The Court shall grant a tracking warrant until the subject of the arrest warrant has been located or a reasonable number of days under the circumstances, whichever is sooner. The duration of the tracking warrant must be tailored to the purpose of the warrant, here, the apprehension of the subject of the arrest warrant. *Arizona*, 480 U.S. at 324–25, 107 S.Ct. 1149 ("Taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry."); *Maryland*, 480 U.S. at 86–87, 107 S.Ct. 1013 ("[T]he purposes justifying a police search strictly limit the permissible extent of the search."); *Cf. Wilson*, 526 U.S. at 612, 119 S.Ct. 1692 ("[T]he Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion."). Surveillance after the subject of the arrest warrant is located would have to be justified on another basis; otherwise, it would appear to be solely for impermissible, investigative purposes.

***48** As requests for location information are governed by existing federal law, these requests do not present extraordinary situations that justify invocation of the All Writs Act or any other inherent power of this Court. All government requests are subject to the Fourth Amendment. Having found that the government's request for location data fails to establish probable cause and, specifically, a nexus between the information sought and the alleged crime, the government's applications are hereby DENIED. This denial does not frustrate or impede law enforcement's important efforts, but rather places them within the constitutional and statutory framework which balances citizens' rights of privacy against government's protection of society. It does place precise location information out of the government's casual reach. It requires that the government meet a certain threshold requirement—a showing that the information sought is evidence of a charge under § 1073 or evidence of another crime—prior to infringing upon a person's individual privacy rights. If you are not in a public place, there is a right to anonymity of your location. If you are in a private place, you have a right to anonymity of your movements in that place. Some courts would hold that if you are in a public place, you have the right to anonymity of your movement, especially if surveilled continuously for any significant period of time.

There is no precedent for what the government seeks: the right to obtain location data without any demonstration of the subject's knowledge of, and attempt to avoid, an arrest warrant. While courts routinely authorize location data where there is a demonstration under Rule 41(c)(1) that a defendant is fleeing to avoid prosecution and a few courts have authorized other types of surveillance in aid of an arrest warrant under All Writs Act where diligent law enforcement techniques have failed or been frustrated, no court under any rubric has approved a warrant or order for location data on the simple showing of an outstanding arrest warrant and the possession of a cell phone by the subject of the arrest warrant. *See, e.g., In the Matter of the Application of United States for an order: (1) Authorizing Use of a Pen Register and Trap and Trace Device, (2) Authorizing Release of Subscriber and Other Information, (3) Authorizing Disclosure of Location-Based Services*, 727 F.Supp.2d 571, n. 22 (W.D.Tex.2010) (stating that, in a case in which the government seeks location data to track a person so that an arrest warrant may be executed, the warrant affidavit must demonstrate the existence of the arrest warrant and probable cause to believe that the phone is in the possession of the *fugitive*) (emphasis added); *In the Matter of Application for an Order Authorizing the Installation and Use of a Pen Register*, 439 F.Supp.2d 456 (denying government's application for an order authorizing access to prospective cell site information where the government failed to submit an affidavit attesting to the facts in the application, including the defendant's fugitive status).

The government's arguments, if credited, would allow law enforcement to obtain location data on any subject of an arrest warrant. This would be the result whether the defendant was charged with a misdemeanor or a felony, without any demonstration of any attempt on the part of the subject to avoid prosecution, so long as law enforcement had reason to believe that the source of the location data—here a cell phone—was in the possession of the subject.

***49** Some might say that this is an appropriate use of a new technology in the service of more efficient and effective law enforcement. Others might say it is an unnecessary use of a new technology in a society already subjected to pervasive surveillance. The Court

understands the tension. Regardless of individual views, the law does not currently sanction the requested acquisition of location data in these circumstances.

FN1. The service to which the government refers in its application is actually called "Sprint Precision Locator."

FN2. After denying the government's applications, the Court invited further argument and authorities from the government, appointed the Office of the Federal Public Defender to provide the defense perspective, and held a hearing. (ECF Nos. 4, 5, 7, 11, 12). The Court thanks the Office of the United States Attorney, the U.S. Department of Justice, and the Office of the Federal Public Defender for their briefing and argument.

FN3. For a comprehensive finding of facts regarding the technology used in cellular location tracking, *see* *In re Application of the United States for Historical Cell Site Data*, 747 F.Supp.2d at 831–835 (S.D.Tex.2010).

FN4. "Real time" in this context is a term of art. "Prospective" location data includes any location information generated after the date of the court order permitting the government to obtain that information. *See ECPA Reform and the Revolution in Location Based Technologies and Services: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 81–85 (2010) (statement of The Honorable Stephen Wm. Smith, United States Magistrate Judge, Southern District of Texas). "Real-time" location data is a subset of prospective location data which includes only information that is both generated after the court's order and is provided to the government in, or close to, "real time." *Id.* (explaining that prospective and real-time location data are distinguishable from "historical" location data, which encompasses only that location information that already has been created, collected, and recorded by the cellular service provider at the time the court authorizes a request for that information). The government's request for GPS and cell-site location information encompasses both prospective and real-time location data.

FN5. Some courts and commentators have suggested that prolonged surveillance might also implicate the subject's First Amendment rights of freedom of association. *See e.g.*, Vivek Kothari, *Autobots, Decepticons, and Panopticons: The Transformative Nature of GPS Technology and the Fourth Amendment*, 6 Crim. L. Brief 37, 45 (2010) ("More than mere locations, GPS devices provide an index of known associates and associations and insight into the frequency of those associations. The attachment of a GPS device, then, implicates fundamental First Amendment freedom of association concerns."). Notably, The Supreme Court has emphasized that the Fourth Amendment warrant requirement should be "scrupulously observed" when First Amendment concerns are presented. *See* *Stanford v. Texas*, 379 U.S. 476, 484–85, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965) (noting in the context of a warrant for seizure of books that "unrestricted power of search and seizure could also be an instrument for stifling liberty of expression"). However, this opinion does not analyze this potentially, additional bases for the privacy right.

FN6. While the government does not make the argument here that the subject of the arrest warrant relinquished his expectation of privacy in his location information by voluntarily sharing it with a third party, it has invoked this argument in a number of other cases. *See e.g.*, *In re Application of the United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F.3d 304, 317 (3d Cir.2010) ("The Government argues that no CSLI can implicate constitutional protections because the subscriber has shared its information with a third party, *i.e.*, the communications provider."); *In re the Application of the United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 534 F.Supp.2d 585, 613–614 (W.D.Pa.2008) ("The Government

has contended, and some Courts have opined, that there is no reasonable expectation of privacy in CSLI because cell-phone derived movement/location information is analogous to the dialed telephone numbers found unprotected by the Supreme Court in *Smith v. Maryland*.)"; *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Authority*, 396 F.Supp.2d 747, 756–57 (S.D.Tex.2005) ("The government contends that probable cause should never be required for cell phone tracking because there is no reasonable expectation of privacy in call site location data, analogizing such information to the telephone numbers found unprotected in *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)"); *In the Matter of the Application of the United States for an Order Authorizing Installation and Use of a Pen Register and a Caller Identification System on Telephone Numbers (Sealed)*, 402 F.Supp.2d 597, 605 (D.Md.2005) ("The government claims a warrant is never required because cell site information does not implicate the Fourth Amendment, even when the possessor resides in a private place. The government reaches this conclusion by analogizing cell site information to dialed telephone numbers, *See Smith v. Maryland*, 442 U.S. 735, 742–44, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) (dialed telephone numbers do not implicate the Fourth Amendment)"). In making this argument, the government has relied upon the Supreme Court's holding in *Smith*, 442 U.S. at 742–45, 99 S.Ct. 2577, that telephone users have no reasonable expectation of privacy in phone numbers dialed or other necessary routing-type information generated during a phone call because they voluntarily expose such information to a third party, the service provider.

It is relevant to the instant matter, however, that several courts have distinguished the unprotected telephone numbers in *Smith* from cell site location data. *See United States v. Forest*, 355 F.3d 942, 951 (6th Cir.2004); *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Authority*, 396 F.Supp.2d 747, 756–57 (2005) (discussing *Forest* and stating that "[u]nlike dialed telephone numbers, cell site data is not voluntarily conveyed by the user to the phone company. It is transmitted automatically during the registration process, entirely independent of the user's input, control, or knowledge.") (internal quotations omitted); *In the Matter of An Application of the United States of America for an Order Authorizing the Release of Historical Cell–Site Information*, 736 F.Supp.2d 578, 582–584 (E.D.N.Y.2010) (finding that *Smith* does not apply to cell-site location data and that recent cases undermine the government's reliance on *Smith* to suggest that a reasonable expectation of privacy disappears when information is held by a third-party service provider). Critically, the Third Circuit in a recent cell site decision stated that "[A] cell phone customer has not shared his location information with a cellular provider in any meaningful way ... it is unlikely that cell phone customers are aware that their cell phone providers collect and store historical location information." *In re Application of the United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F.3d at 317. This finding is particularly significant given the ubiquity of cellular telephones in modern American society. *See* Aaron Smith, Pew Internet & American Life Project, Mobile Access 2010, 12 (Jul. 7, 2010) available at http://pewinternet.org/~/media//Files/Reports/2010/PIP_Mobile_ Access_2010.pdf (reporting that 82 percent of adults own a cell phone.)

Finally, here the government seeks information—essentially, continuous pinging—that is not collected as a necessary part of cellular phone service, nor generated by the customer in placing or receiving a call. Under this circumstance it is difficult to understand how the user "voluntarily" exposed such information to a third party.

FN7. A few short months after the District of

Columbia Circuit's decision in *Maynard*, the United States Court of Appeals for the Third Circuit considered government access to historical cell site data for the first time and, while not ultimately resolving the Fourth Amendment issue, concluded that the factual record was insufficient to determine whether historical cell site records could encroach upon a citizens' reasonable expectations of privacy regarding their physical movements and locations. *In re Application of the United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F.3d 304 (3d Cir.2010). The Third Circuit opined, "We cannot reject the hypothesis that CSLI may, under certain circumstances, be used to approximate the past location of a person. If it can be used to allow the inference of present, or even future, location, in this respect CSLI may resemble a tracking device which provides information as to the actual whereabouts of the subject." *Id.* at 312.

FN8. At the hearing, the government also suggested that it was "less clear that someone [who is the subject of an arrest warrant] has an expectation of privacy in their location.". (ECF No. 15, 5). However, the government had no authority for its proposition that the subject of an arrest warrant enjoyed less of an expectation of privacy, than an uncharged person. (*Id.*). Apparently, this position is based solely on *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

> The notion that the subject of an arrest warrant relinquishes any reasonable expectation of privacy in his "person, houses, papers, and effects" upon a neutral magistrate's determination of probable cause that he has committed a crime—a concept that is implicit in the government's argument even if not explicitly stated—is clearly inconsistent with existing constitutional limitations on law enforcement. Even where law enforcement officers may permissibly enter a suspect's residence without a search warrant in order to execute an arrest warrant under *Payton*, their authority to search the residence is limited to recognized exceptions to the Fourth Amendment search warrant requirement. For instance, officers may search areas of the home where the subject might reasonably be hiding in order to locate him (i.e., they may search a closet, but not a shoe box). In the interest of safety, officers may also conduct a protective sweep of the home, *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) (holding that the Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene), and may search the area within the arrestee's immediate control, *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) (holding that, absent a search warrant, an arresting officer may search only the area "within the immediate control" of the person arrested, meaning the area from which he might gain possession of a weapon or destructible evidence). These recognized exceptions to the search warrant requirement are grounded in concerns about safety and exigency, rather than an expansive view of the authority inherent in an arrest warrant.

FN9. Although the arrest warrant in *Payton* was for a felony, courts have held that *Payton* authorizes entry into a suspect's residence to effectuate a valid misdemeanor arrest warrant. *See Smith v. Tolley*, 960 F.Supp. 977, 991 (E.D.Va.1997) ("[I]t is irrelevant whether the underlying offense for which the arrest warrant is secured is a felony or misdemeanor."); *United States v. Spencer*, 684 F.2d 220, 223 (2nd Cir.1982), cert. denied 459 U.S. 1109, 103 S.Ct. 738, 74 L.Ed.2d 960 (1983); *United States v. Gooch*, 506 F.3d 1156, 1158–59 (9th Cir.2007), cert. denied 552 U.S. 1331, 128 S.Ct. 1922, 170 L.Ed.2d 782 (2008). Regardless of the precise nature of the underlying charge, however, courts demand that law enforcement must have a "reasonable belief" that the suspect lives at the place to be entered and is present there.

Ward v. Moore 414 F.3d 968, 971 (8th Cir.2005) ("A valid arrest warrant, whether for a felony or misdemeanor, carries with it the authority to conduct a forcible entry so long as the police have a reasonable belief that the suspect resides at the place to be entered and is currently present there.").

FN10. The Supreme Court also has cited *Payton* as support for general Fourth Amendment concepts on a number of occasions. *See, e.g., Illinois v. McArthur,* 531 U.S. 326, 331, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001) (citing *Payton*, 445 U.S. at 591, 100 S.Ct. 1371, for the proposition that "[t]he chief evil against which the Fourth Amendment is directed is warrantless entry of the home[,]"); *City of Ladue v. Gilleo,* 512 U.S. 43, 58, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (citing *Payton*, 445 U.S. at 590, 100 S.Ct. 1371, for the proposition that "[a] special respect for individual liberty in the home has long been part of our culture and our law").

FN11. In applying *Wilson,* federal circuit courts have noted that Fourth Amendment privacy rights do not turn solely on the special status of the home. *See, e.g., Lauro v. Charles,* 219 F.3d 202, 211 (2d Cir.2000) (citing *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) ("[T]he Fourth Amendment protects people, not places.")). The Fourth Circuit has added that *Wilson* requires courts to conduct case-by-case inquiries into whether the police action undertaken in execution of a warrant is related to the "objectives of the authorized intrusion." *Hunsberger v. Wood,* 583 F.3d 219, 221–222 (4th Cir.2009) (Wilkinson, J., concurring in the denial of *reh'g en banc*).

FN12. "[T]he 'reason to believe' standard was not defined in *Payton,* and since *Payton,* neither the Supreme Court, nor the courts of appeal have provided much illumination." Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 6.1 (4th ed.2004) (citing *United States v. Magluta,* 44 F.3d 1530 (11th Cir.1995)). There is no Fourth Circuit precedent on this issue and the circuits which have examined it are split. Several courts of appeal have held that reasonable belief is synonymous with probable cause. *See United States v. Hardin,* 539 F.3d 404, 416 n. 6 (6th Cir.2008); *United States v. Barrera,* 464 F.3d 496, 501 (5th Cir.2006); *United States v. Gorman,* 314 F.3d 1105, 1111 (9th Cir.2002); *Magluta,* 44 F.3d 1105, 1111 (9th Cir.2002). Others have concluded that reasonable belief represents a lesser degree of knowledge than probable cause. *See United States v. Thomas,* 429 F.3d 282, 286 (D.C.Cir.2005); *Valdez v. McPheters,* 172 F.3d 1220, 1227 n. 5 (10th Cir.1999); *United States v. Lauter,* 57 F.3d 212, 215 (2d Cir.1995).

FN13. In the Consumer Resources section of its official website, Sprint Nextel further emphasizes the sensitive nature of location information in its 'Consumer Privacy FAQs'. SPRINT, CONSUMER RESOURCES—CUSTOMER PRIVACY Y FAQS, http://newsroom.sprint.com/article_display.cfm? article_id=1472# qID9 (last visited Feb. 1, 2011). In response to the frequently asked question "How is my device location information used?," Sprint Nextel states that,

> To make wireless communications possible, wireless networks use the location of your device to deliver mobile services whenever your device is turned on ... Sprint offers unique features to its users, including a number of location-enabled services that you activate and use. To provide these services, the Sprint network must use the location information of your device to deliver your services ... You should carefully review the terms and conditions and privacy policies of third party application and service providers to understand their use of your location information. Only share your location information with those you trust. It is your responsibility to inform anyone that uses your wireless device and all of the users of other wireless devices on your account of location capabilities and the location based

services that are in use for those devices.

Id.

FN14. These six Congressional hearings include: *Electronic Communications Privacy Act Reform: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (May 5, 2010) (discussing need for reform of the ECPA in light of new communications technologies); ECPA Reform and the Revolution in Location Based Technologies and Services: *Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (Jun. 24, 2010) (examining the need to update the ECPA with a particular focus on cell site information and other location based technologies); *The Electronic Communications Privacy Act–Promoting Security and Protecting Privacy in the Digital Age: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (Sept. 22, 2010) (examining the need to update the ECPA in light of advances in communications technologies); *ECPA Reform and the Revolution in Cloud Computing: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (Sept. 23, 2010) (discussing the need to update the ECPA with a particular focus on cloud computing); *The Electronic Communications Privacy Act—Government Perspectives on Protecting Privacy in the Digital Age: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (Apr. 6, 2011) (discussing how the need to update the ECPA affects the government's ability to fight crime and protect national security); *Protecting Mobile Privacy—Your Smartphones, Tablets, Cell Phones and Your Privacy: Hearing Before the Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (May 10, 2011) (discussing the privacy implications of smartphones and other mobile applications).

FN15. While there has been considerable congressional activity around ECPA reform recent months, as demonstrated by the hearings and bills discussed here, congressional concern over ECPA and location privacy is not new. For example, Representative Charles Canady introduced a bill during the 106th Congress in 2000 that sought to amend ECPA, 18 U.S.C. § 2703, to require that "a provider of mobile electronic communication service shall provide to a government entity information generated by and disclosing the current physical location of a subscriber's equipment only if the governmental entity obtains a court order issued upon a finding that there is probable cause ..." H.R. 5018, 106th Cong. (2000) (as reported by H. Comm. on the Judiciary, Oct. 4, 2000).

FN16. Demonstrating similar concern, a number of state legislatures have prohibited use of electronic tracking devices except pursuant to a *search* warrant. *See* *Maynard*, 615 F.3d at 564 ("... states have enacted legislation imposing civil and criminal penalties for the use of electronic tracking devices and expressly requiring exclusion of evidence produced by such a device unless obtained by the police acting pursuant to a warrant."). The *Maynard* court noted that "the Legislature of California, in making it unlawful for anyone but a law enforcement agency to use an electronic tracking device to determine the location or movement of a person, specifically declared that electronic tracking of a person's location without that person's knowledge violates that person's reasonable expectation of privacy, and implicitly but necessarily thereby required a warrant for police use of a GPS." *Id.* (citing California Penal Code section 637.7, Stats.1998 c. 449 (S.B.1667) § 2 (internal quotations omitted)). The *Maynard* court cited similar electronic tracking statutes from Utah, Minnesota, Florida, South Carolina, Oklahoma, Hawaii, and Pennsylvania which provide for exclusion of evidence obtained by an electronic tracking device where law enforcement fails to obtain *ex ante* judicial approval in the form of a warrant. *Id.* (citing Utah Code Ann. §§ 77–23a–4, 77–23a–7, 77–23a–15.5; Minn.Stat. §§ 626A.37, 626A.35; Fla. Stat. §§ 934.06, 934.42; S.C.Code Ann. § 17–30–140; Okla. Stat. tit. 13, §§ 176.6; Haw.Rev.Stat. §§ 803–42, 803–44.7; 18 Pa.

Cons.Stat. § 5761).

FN17. The *Griffin* holding—that search of a probationer's home, pursuant to Wisconsin regulation requiring only reasonable grounds and no prior judicial approval is clearly distinguishable here, as it involved a person convicted of a crime and still under supervision. Also, the Supreme Court found impracticability: "A warrant request would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires. Moreover, the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct ... and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create." *Id.* at 876, 107 S.Ct. 3164 (citations omitted). Lastly, the Court noted that "[a]lthough a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen ... and is supposed to have in mind the welfare of the probationer...."

FN18. For instance, the arrestee could invoke the exclusionary rule to suppress evidence obtained by the government as a result of a defective arrest warrant or impermissible warrantless arrest. *See Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (holding that evidence obtained in violation of the Fourth Amendment may not be used in criminal prosecutions in state or federal courts). In addition, the arrestee under certain circumstances could bring a civil action for damages based on state common law (i.e., false arrest or false imprisonment) or constitutional tort. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (holding that a violation of the Fourth Amendment by a federal agent acting under color of law gives rise to a cause of action for damages); *Monroe v. Pape*, 365 U.S. 167, 172, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) (explaining that 42 U.S.C.S. § 1983 "gives a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."). Notably, though, cases in which the Supreme Court has set aside a conviction due to a defective arrest warrant are exceedingly rare. *See, e.g., Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958) (setting aside a conviction verdict due to an invalid arrest warrant); *West v. Cabell*, 153 U.S. 78, 86, 14 S.Ct. 752, 38 L.Ed. 643 (1894) (explaining that a police officer has no authority to arrest if the warrant is defective).

FN19. Indeed, the response to *Hayden* of the Advisory Committee on Criminal Rules is instructive on this point. The Committee did not seek to amend Rule 41 to clarify that a search warrant may be used to obtain evidence that will aid in the apprehension of a defendant. Rather, the Committee queried: "One question is whether it is desirable to amend Rule 41(b) to provide that search warrants may issue for evidence of the commission of a crime and if it is, whether this is the way to do it. [Professor Remington] said that the Department of Justice had said that it might be desirable to amend the rule to reflect the *Hayden* case." ADVISORY COMM. ON CRIM. RULES, MINUTES OF THE SEPTEMBER 1967 MEETING OF THE ADVISORY COMM. ON CRIM. RULES 2 (Sept. 11–12, 1967), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR09–1967–min.pdf. And, indeed, Rule 41 was amended consistent with the Committee and the FPD's view of the *Hayden* holding. *See* FED. R.CRIM. P. 41, Advisory Committee's Note, 1972 Amendments ("Subdivision (b) is also changed to ... take account of a recent Supreme Court decision (*Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967)) and recent Congressional action (18 U.S.C. § 3103a) which authorize the issuance of a search warrant to search for items of solely evidentiary value.").

FN20. Under the Leahy Bill, the government

must get a search warrant to access contemporaneous (real-time) geolocation information from an electronic communications, remote computing, or geolocation information service provider, and either a search warrant or court order, issued on a showing of specific and articulable facts that there are reasonable grounds to believe the information is relevant and material to an ongoing criminal investigation, to obtain historical geolocation information from the same providers. S. 1011, 112th Cong. (2011). Therefore, in this case, under the Leahy Bill, the government would have to show probable cause and get a search warrant to access the "real time" data it requests. The Wyden Bill similarly requires the government to get a search warrant before it can obtain location data from a "wireless communication device," such as a cell phone. S. 1212, 112th Cong. (2011). It would require the government to get a search warrant when it wants to acquire an individual's geolocation information from a private company or monitor an individual's movements directly, using covertly installed tracking devices or similar means. *Id.* Notably, this bill also prohibits unlawfully intercepted geolocation information from being used as evidence. *Id.*

FN21. The government's All Writs Act argument is addressed in greater detail later in this opinion, but it bears noting here that Rule 41 does indeed address the situation at hand—the government may obtain the precise location information it seeks pursuant to a Rule 41(c)(1) warrant for information constituting evidence of a crime, as long as it meets the required probable cause standard. Here, it does not.

FN22. While later decisions in some circuits suggest that a warrant based on probable cause may not be necessary *vis a vis* the subject of the arrest warrant, *see infra*, it is still necessary to protect the interests of third parties.

FN23. The government is correct that there is nothing in Rule 41 which expressly prohibits a warrant for the information sought. In that sense, the government's request is not inconsistent with Rule 41; nor, of course, does Rule 41 expressly provide authority for issuance of the warrant or order it seeks. But this, of course, is the wrong focus. Rule 41 does not define the limits of constitutional permissibility. The Fourth Amendment does.

FN24. When reporting ECPA, the Senate underscored the important purpose of this legislation:

> A letter sent by first class mail is afforded a high level of protection against unauthorized opening by a combination of constitutional provisions, case law, and U.S. Postal Service statutes and regulations. Voice communications transmitted via common carrier are protected by title III of the Omnibus Crime Control and Safe Streets Act of 1968. But there are no comparable Federal statutory standards to protect the privacy and security of communications transmitted by new non-common carrier communications services or new forms of telecommunications and computer technology. This is so, even though American citizens and American businesses are using these new forms of technology in lieu of, or side-by-side with, first class mail and common carrier telephone services.
>
> This gap results in legal uncertainty. It may unnecessarily discourage potential customers from using innovative communications systems. It probably encourages unauthorized users to obtain access to communications to which they are not a party. It may discourage American businesses from developing new innovative forms of telecommunications and computer technology. The lack of clear standards may expose law enforcement officers to liability and may endanger the admissibility of evidence.
>
> **Most importantly, the law must advance with the technology to ensure the continued vitality of the fourth amendment. Privacy cannot be left to depend solely**

> **on physical protection, or it will gradually erode as technology advances. Congress must act to protect the privacy of our citizens. If we do not, we will promote the gradual erosion of this precious right.**
>
> *Id.* at 3559 (emphasis added).

FN25. The Third Circuit has held that a magistrate judge has discretion to require a warrant with its underlying probable cause standard, rather than a showing of "specific and articulable facts showing that there are reasonable grounds to believe that the ... information sought ... [is] relevant and material to an ongoing criminal investigation," before granting an order under § 2703(d) of the Stored Communications Act. *In re United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F.3d 304, 319 (3d Cir.2010).

FN26. While this opinion mentions Title 18's pen register and trap and trace provisions in the context of the "hybrid theory" proposed by the government and accepted by some courts for provision of cell site location information, these provisions are irrelevant to the precise location information requested herein, as the provisions are limited to "dialing, routing, addressing, and signaling information utilized in the processing and transmitting of wire or electronic communications." 18 U.S.C. § 3121(c). While the pen/trap provision could arguably be read, as some courts have done, to include stored cell site location information as "call identifying information," *e.g.*, *In re Application of the United States for an Order: (1) Authorizing the Installation and Use of a Pen Register and Trap and Trace Device; (2) Authorizing the Release of Subscriber and Other Information and (3) Authorizing the Disclosure of Location–Based Services*, 06–MC–6 & 06–MC–7, 2006 WL 1876847 (N.D.Ind.2006); *In re Cell Site Information*, 412 F.Supp.2d 947 (E.D.Wis.2006), the majority approach holds that location information is expressly exempted from these provisions by CALEA. *E.g.*, *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Authority*, 396 F.Supp.2d at 757–58; 47 U.S.C. § 1002(a)(2). However, because the information sought in this case is precise location information that cannot be classified as call identifying information in the first place, the Court need not reach this issue.

FN27. The Wiretap Act establishes a higher standard for the "contents" of contemporaneous electronic communications, as opposed to "records concerning" the communication. *Compare* 18 U.S.C. § 2703(c)-(d) (permitting a governmental entity to obtain records or other information concerning electronic communications, not including the contents thereof, upon a warrant issued under Rule 41 that meets the probable cause standard) *with* 18 U.S.C. § 2518 (permitting a governmental entity to intercept electronic communications only after meeting a heightened probable cause standard). However, neither party contends that the precise location information sought by the government here is "contents" of an electronic communication that would fall within the Wiretap Act's protections against interception. Therefore, it is unnecessary for the Court here to analyze the intricacies and protections of the Wiretap Act.

FN28. When requesting cell site information, the government often advances a "hybrid" theory using the combined authority of 18 U.S.C. §§ 2703(d) & 3121 *et seq.*, which it contends allows it to obtain cell site location data without establishing probable cause. (ECF No. 1, 2 n. 1). As explained by Judge Hogan of the D.C. District Court,

> The "hybrid theory" posits that the Court is authorized to order the disclosure of prospective cell site data under a combination of the [Stored Communications Act] and the Pen Register Statute. The government argues that the use of the word "solely" necessarily implies that another authority may be combined with the Pen Register Statute to authorize disclosure. Most of the

> Magistrate Judges that have considered the hybrid theory have found it to be unavailing, holding that the Pen Register Statute and the Stored Communications Act in tandem do not provide authority for disclosure of prospective cell site data. The first District Court to rule on the hybrid theory, however, has come out the other way, finding that this combination does allow for disclosure.
>
> *In re Application of the United States for an Order Authorizing Monitoring of Geolocation and Cell Site Data for a Sprint Spectrum Cell Phone Number*, Misc. No. 06–186, 187, & 188, 2006 WL 6217584, at *2 (D.D.C. Aug. 25, 2006). Judge Hogan followed the majority of courts in rejecting this theory and concluding instead that "prospective cell site and geolocation information is available upon a traditional probable cause showing under Rule 41." *Id.* at *3. Again, however, this particular theory is not implicated here, and the Court need not now pass judgment on the heavily criticized approach.

FN29. Two bills, part of the previously mentioned proposed legislation to update ECPA, strengthen the arguments that ECPA does not cover location data-rather, location data stands separate from other types of data covered by the Act. Senator Leahy's ECPA Amendments Act of 2011, "Leahy Bill," adds "geolocation information," defined as "any information concerning the location of an electronic communications device that is in whole or in part generated by or derived from the operation or use of the electronic communications device" under the coverage of the Act, and further defines "electronic communications device" to mean "any device that enables access to or use of an electronic communications system, electronic communication service, remote computing service, or geolocation information service." S. 1011, 112th Cong. (2011). Alternatively, Senator Wyden and Representative Chaffetz's the Geolocational Privacy and Surveillance Act, "Wyden Bill," provides for geolocation information by supplementing ECPA. The bill defines "geolocation information" as any information "that is not the content of a communication, concerning the location of a wireless communication device or tracking device [defined as an electronic or mechanical device which permits the tracking of the movement of a person or object] ... that, in whole or in part, is generated by or derived from the operation of that device and that could be used to determine or infer information regarding the location of the person." H.R. 2168, 112th Cong. (2011). The bill's rules are modeled after the federal wiretapping statute, 18 U.S.C. § 2511. Wyden, Chaffetz Introduce Geolocation Privacy and Surveillance ("GPS") Act, http://wyden.senate.gov/issues/issue/?id=b29a3450–f722–4571–96f0–83c8ededc332# sections (last visited Jul. 21, 2011). Both bills and their definitions of geolocation data support that the information the government seeks would be covered by ECPA only if it were amended or supplemented.

FN30. Given that § 2703 does not provide authority for law enforcement access to location data under the circumstances presented here, the government's novel argument that a § 2703 warrant need not comply with Rule 41 in its entirety, but rather only with procedural provisions in the Rule, is inapposite. *See* (ECF No. 10, 5) (arguing that its warrant application need not correspond to the categories listed in Rule 41(c)(1)-(4)). The government maintains that the provision in § 2703(c)(1)(A) authorizing it to obtain "information pertaining to a subscriber or customer" from an electronic communication service pursuant to "a warrant issued using the procedures described in the Federal Rules of Criminal Procedure," indicates that § 2703 incorporates only those provisions of Rule 41 that are procedural in nature, not its substantive provisions. (*Id.*) (citing *Berkos*, 543 F.3d at 398). The government cites several unreported district court cases finding that a § 2703 warrant does not incorporate the provisions of Rule 41(b) pertaining to authority to issue a warrant, and argues that, like Rule 41(b), the provisions of Rule 41(c) are properly categorized as substantive. (*Id.*) (citing *Kernell*, 2010 WL 1408437, at *4

(E.D.Tenn., Apr. 1, 2010)); *In re Search of Yahoo, Inc.*, 2007 WL 1539971, at *7 (D.Ariz., May 21, 2007)Therefore, the government argues that the items seized pursuant to a warrant issued under § 2703(c)(1)(A) need not comply with the itemized categories of Rule 41(c). However, as the Court has set forth above, § 2703 does not apply to the location data requested in the underlying applications. The allowable purposes of a search warrant are defined by constitutional law; the Fourth Amendment trumps any statutory argument.

FN31. In other cases, the government has suggested that only precise location information from cell phones should be categorized as tracking information, and that category should be distinguished from prospective and real-time cell site location information. However, § 3117 does not distinguish between general and detailed tracking, and courts have rejected such a distinction. *See* *In re U.S. for Orders Authorizing Use of Pen Registers and Caller Identification Devices on Telephone Numbers*, 416 F.Supp.2d 390, 395–96 & n. 9 (D.Md.2006) (commenting that the court is not convinced by the government's argument that provision of general cell site information does not convert a cell phone into a tracking device, and stating that "[t]he definition of "tracking device" is broad and contains no articulation of how precise a device must be"); *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Authority*, 396 F.Supp.2d at 755–56 (S.D.Tex.2005) (finding that the fact that cell phone location information may not be as detailed or accurate as a traditional tracking device is irrelevant, as the statute does not distinguish between general and detailed tracking).

FN32. Unlike historical location information, prospective location information includes any location information generated after the date of the Court order that permits the government to obtain that information. Real time location information, a subset of prospective location information, includes only information that is both generated after the Court's order and is provided to the government in, or close to, "real time."

FN33. Moreover, contrary to the conclusion of the Eastern District of New York, this Court does not find that classification of cell phones as tracking devices to the extent they act as tracking devices does not render § 2703(c) meaningless. *Cf.* *In re U.S. for an Order Authorizing the Use of Two Pen Register and Trap and Trace Devices*, 632 F.Supp.2d 202, 207–08 (E.D.N.Y.2008) (adopting the hybrid theory and declining to classify a cell phone as a tracking device as, in its opinion, to do so would result in a carrier having "no obligation to disclose *any* information to the government under Section 2703(c)"). Indeed, as other courts have alluded, the government may still obtain historical location information as well as numerous other categories of stored information under § 2703(c). *See, e.g.*, *In re U.S. for an Order Authorizing the Use of Two Pen Register and Trap and Trace Devices*, 632 F.Supp.2d 202, 207–08 (E.D.N.Y.2008); *In re Application of the United States for an Order For Disclosure of Telecommunications Records and Authorizing the Use of a Pen Register and Trap and Trace*, 405 F.Supp.2d at 447 (authorizing single tower, call-related information request when the government utilized a 2703(c) theory).

FN34. *Coram nobis* is an ancient writ designed to correct errors of fact. *Denedo*, 129 S.Ct. at 2220 (quoting *United States v. Morgan*, 346 U.S. 502, 507, 74 S.Ct. 247, 98 L.Ed. 248 (1954)).

FN35. The prosecutor has discretion to initiate prosecution either by summons or warrant, and is not required to demonstrate anything more in terms of danger or likelihood of flight to receive an arrest warrant, rather than a summons. Fed.R.Crim.P. 4.

FN36. The issue in this case was not use of location data to locate a defendant but the standard of proof required to acquire location data in a criminal investigation, but the procedure applies equally here.

D.Md.,2011.
In re Application of U.S. for an Order Authorizing Disclosure of Location Information of a Specified Wireless Telephone
--- F.Supp.2d ----, 2011 WL 3423370 (D.Md.)

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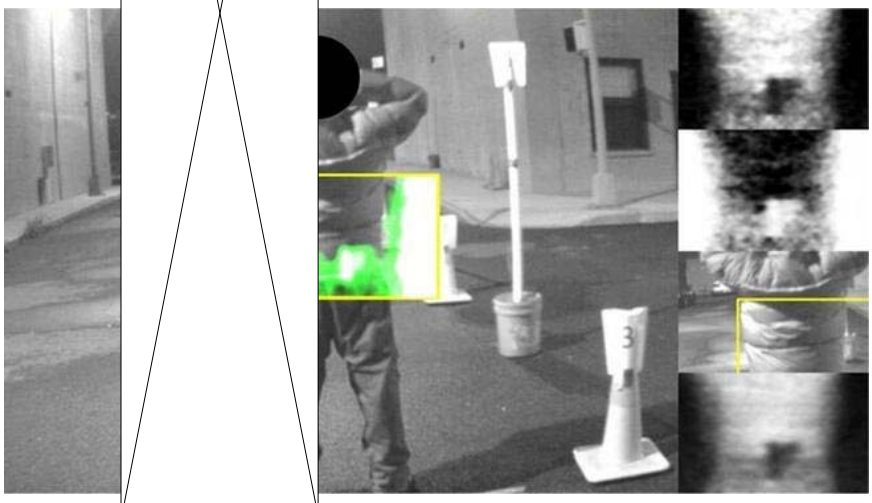
NYPD chnology to Detect Conc arms at a Distance

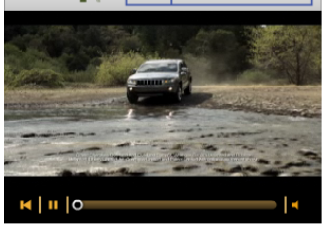
So far it car 13 feet. The NYPD wants it to work at 80 feet.

Wednesday, Jan EST



NYPD

NYPD is working with the U.S. Department of Defense to develop a gun-detection device that reads a form of natural energy akin to radiation.



The NYPD is working to develop a tool capable of detecting concealed firearms at a distance.

Police Commissioner Raymond Kelly says the department is working with the U.S. Department of Defense to develop the device that reads a form of natural energy akin to radiation.

If something is obstructing the flow of that energy, like a weapon, the device will highlight the object on a person's body.

The rendered image is often clear, said Kelly, though it can be affected by weather and other elements, and is more effective at night.

The idea would be to place a device in a vehicle and scan an area for weapons.

More Photos and Videos

The New York Civil Liberties Union said it found the technology proposal "both intriguing and worrisome."

"On the one hand, if technology like this worked as it was billed, New York City should see its stop-and-frisk rate drop by a half-million people a year," said NYCLU executive director Donna Lieberman. "On the other hand, the ability to walk down the street free from a virtual police pat-down is a matter of privacy."

Lieberman called on NYPD to release more information about the technology, how it works and the dangers it presents.

"We've been looking at this for three years," said Kelly. "We've had our lawyers involved, and they don't see constitutional issues here."

Police say the technology is currently being tested but so far is only detecting weapons from about 13 feet away. They hope to increase the distance to about 80 feet.

Posted Tuesday, Jan 17, 2012 - 3:18 PM EST

Supreme Court of the United States
OLMSTEAD et al.
v.
UNITED STATES.

No. 493.
GREEN et al.
v.
SAME

No. 532.
McINNIS
v.
SAME.

No. 533.
Argued Feb. 20 and 21, 1928.
Decided June 4, 1928.

Mr. Justice Brandeis, Mr. Justice Holmes, Mr. Justice Butler, and Mr. Justice Stone dissenting.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Roy Olmstead, Charles S. Green, Edward H. McInnis, and others were convicted of a conspiracy to violate the National Prohibition Act, which convictions were affirmed by the Circuit Court of Appeals (19 F.(2d) 842, 53 A. L. R. 1472; 19 F.(2d) 850), and they bring certiorari. Judgments of Circuit Court of Appeals affirmed, and mandate directed under rule 31.

West Headnotes

Federal Civil Procedure 170A 56

170A Federal Civil Procedure
170AI In General
170AI(C) Conformity to State Practice in General
170Ak56 k. Criminal cases. Most Cited Cases

Common-law rules of evidence, prevailing in Washington, prevail in criminal cases in federal courts sitting there.

Evidence 157 205(3)

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k205 Mode of Making and Form in General
157k205(3) k. Conversation through telephone. Most Cited Cases
(Formerly 170Ak1187)

Rules of evidence in federal courts are not affected by state statute making wire tapping misdemeanor. Rem.Comp.Stat.Wash. § 2656(18).

Criminal Law 110 393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In general. Most Cited Cases

Use of evidence of private telephone conversations, obtained by tapping wires between residences and central office of defendants, accused of conspiracy, held not to involve self-incrimination. National Prohibition Act, 27U.S.C.A. § 1 et seq.; Rem.Comp.Stat.Wash. § 2656(18); U.S.C.A.Const. Amend. 5.

Criminal Law 110 392.3(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.3 Irrelevance of Acquisition by Improper Means
110k392.3(1) k. In general. Most

Cited Cases
(Formerly 110k394.1(1))
Common law, even in criminal prosecution, did not exclude evidence because illegally obtained.

Criminal Law 110 392.3(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.3 Irrelevance of Acquisition by Improper Means
110k392.3(1) k. In general. Most Cited Cases
(Formerly 110k394.1(1))
Courts have no discretion to exclude evidence solely on ground that means of obtaining it were unethical.

Criminal Law 110 392.21

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.21 k. Electronic surveillance; telecommunications. Most Cited Cases
(Formerly 110k394.3)
Tapping of wires leading from defendants' residences to chief office from which alleged conspiracy was directed held not to constitute unlawful search or seizure, rendering evidence so obtained inadmissible. National Prohibition Act, 27 U.S.C.A.; Rem.Comp.Stat.Wash. § 2656(18); Const.U.S. Amend. 4.

Criminal Law 110 392.21

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.21 k. Electronic surveillance; telecommunications. Most Cited Cases
(Formerly 110k394.3)
Fact that evidence in conspiracy prosecution was obtained by wire tapping, in violation of state law, held not to affect its admissibility. National Prohibition Act, 27 U.S.C.A.; Rem.Comp.Stat.Wash. § 2656(18).

Telecommunications 372 1437

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1437 k. Telephone communications. Most Cited Cases
(Formerly 372k493)
Tapping of wires leading from defendants' residences to chief office from which alleged conspiracy was directed held not to constitute unlawful search or seizure. National Prohibition Act, 27U.S.C.A. § 1 et seq.; Rem.Comp.Stat.Wash. § 2656(18); U.S.C.A.Const. Amend. 4.

****564 *439** Mr. John F. Dore, of Seattle, Wash., for petitioners Olmstead and others.

***441** Mr. Frank R. Jeffrey, of Seattle, Wash., for petitioner McInnis.

***445** Mr. Arthur E. Griffin, of Seattle, Wash., for petitioners Green and others.

***447** The Attorney General and Mr. Michael J. Doherty, of St. Paul, Minn., for the United States.

***452** Messrs. Charles M. Bracelen, of New York City, Otto B. Rupp. of Seattle, Wash., Clarence B. Randall, of Chicago, Ill., and Robert H. Strahan, of New York City, for Pacific Telephone & Telegraph Co., American Telephone & Telegraph Co., United States Independent Telephone Ass'n and Tri-State Telephone & Telegraph Co., as amici curiae.

***455** Mr. Chief Justice TAFT delivered the opinion of the Court.

These cases are here by certiorari from the Circuit Court of Appeals for the Ninth Circuit. 19 F.(2d) 842, 53 A. L. R. 1472, and 19 F.(2d) 850. The petition in No. 493 Was filed August 30, 1927; in Nos. 532 and 533, September****565** 9, 1927. They were granted with the distinct limitation that the hearing should be confined to the single question whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments. 276 U. S. 609, 48 S. Ct. 207, 72 L. Ed. —.

The petitioners were convicted in the District Court for the Western District of Washington of a conspiracy to violate the National Prohibition Act (27 USCA) by unlawfully possessing, transporting and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors. Seventy-two others, in addition to the petitioners, were indicted. Some were not apprehended, some were acquitted, and others pleaded guilty.

The evidence in the records discloses a conspiracy of amazing magnitude to import, possess, and sell liquor unlawfully.***456** It involved the employment of not less than 50 persons, of two seagoing vessels for the transportation of liquor to British Columbia, of smaller vessels for coastwise transportation to the state of Washington, the purchase and use of a branch beyond the suburban limits of Seattle, with a large underground cache for storage and a number of smaller caches in that city, the maintenance of a central office manned with operators, and the employment of executives, salesmen, deliverymen dispatchers, scouts, bookkeepers, collectors, and an attorney. In a bad month sales amounted to $176,000; the aggregate for a year must have exceeded $2,000,000.

Olmstead was the leading conspirator and the general manager of the business. He made a contribution of $10,000 to the capital; 11 others contributed $1,000 each. The profits were divided, one-half to Olmstead and the remainder to the other 11. Of the several offices in Seattle, the chief one was in a large office building. In this there were three telephones on three different lines. There were telephones in an office of the manager in his own home, at the homes of his associates, and at other places in the city. Communication was had frequently with Vancouver, British Columbia. Times were fixed for the deliveries of the 'stuff' to places along Puget Sound near Seattle, and from there the liquor was removed and deposited in the caches already referred to. One of the chief men was always on duty at the main office to receive orders by the telephones and to direct their filling by a corps of men stationed in another room-the 'bull pen.' The call numbers of the telephones were given to those known to be likely customers. At times the sales amounted to 200 cases of liquor per day.

The information which led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers. Small ***457** wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.

The gathering of evidence continued for many months. Conversations of the conspirators, of which refreshing stenographic notes were currently made, were testified to by the government witnesses. They revealed the large business transactions of the partners and their subordinates. Men at the wires heard the orders given for liquor by customers and the acceptances; they became auditors of the conversations between the partners. All this disclosed the conspiracy charged in the indictment. Many of the intercepted conversations were not merely reports, but parts of the criminal acts. The evidence also disclosed the difficulties to which the conspirators were subjected, the reported news of

the capture of vessels, the arrest of their men, and the seizure of cases of liquor in garages and other places. It showed the dealing by Olmstead, the chief conspirator, with members of the Seattle police, the messages to them which secured the release of arrested members of the conspiracy, and also direct promises to officers of payments as soon as opportunity offered.

The Fourth Amendment provides:

'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

And the Fifth:

'No person * * * shall be compelled in any criminal case to be a witness against himself.'

***458** It will be helpful to consider the chief cases in this court which bear upon the construction of these amendments.

Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, was an information filed by the District Attorney in the federal court in a cause of seizure and forfeiture against 35 cases of plate glass, which charged that the owner and importer, with intent to defraud the revenue, made an entry of the imported merchandise by means of a fraudulent or false invoice. It became important to show the quantity and value of glass contained in 29 cases previously imported. The fifth section of the Act of June 22, 1874 (19 USCA s 535), provided that, in cases not criminal under the revenue laws, the United States attorney, whenever he thought an invoice, belonging****566** to the defendant, would tend to prove any allegation made by the United States, might by a written motion, describing the invoice and setting forth the allegation which he expected to prove, secure a notice from the court to the defendant to produce the invoice, and, if the defendant refused to produce it, the allegations stated in the motion should be taken as confessed, but if produced the United States attorney should be permitted, under the direction of the court, to make an examination of the invoice, and might offer the same in evidence. This act had succeeded the act of 1867 (14 Stat. 547), which provided in such cases the District Judge, on affidavit of any person interested, might issue a warrant to the marshall to enter the premises where the invoice was and take possession of it and hold it subject to the order of the judge. This had been preceded by the act of 1863 (12 Stat. 740) of a similar tenor, except that it directed the warrant to the collector instead of the marshal. The United States attorney followed the act of 1874 and compelled the production of the invoice.

The court held the act of 1874 repugnant to the Fourth and Fifth Amendments. As to the Fourth Amendment, Justice Bradley said (page 621 (6 S. Ct. 527)):

***459** 'But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seziure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence

against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.'

Concurring, Mr. Justice Miller and Chief Justice Waite said that they did not think the machinery used to get this evidence amounted to a search and seizure, but they agreed that the Fifth Amendment had been violated.

The statute provided an official demand for the production of a paper of document by the defendant, for official search and use as evidence on penalty that by refusal he should be conclusively held to admit the incriminating***460** character of the document as charged. It was certainly no straining of the language to construe the search and seizure under the Fourth Amendment to include such official procedure.

The next case, and perhaps the most important, is Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1815C, 1177, a conviction for using the mails to transmit coupons or tickets in a lottery enterprise. The defendant was arrested by a police officer without a warrant. After his arrest, other police officers and the United States marshal went to his house, got the key from a neighbor, entered the defendant's room, and searched it, and took possession of various papers and articles. Neither the marshal nor the police officers had a search warrant. The defendant filed a petition in court asking the return of all his property. The court ordered the return of everything not pertinent to the charge, but denied return of relevant evidence. After the jury was sworn, the defendant again made objection, and on introduction of the papers contended that the search without warrant was a violation of the Fourth and Fifth Amendments, and they were therefore inadmissible. This court held that such taking of papers by an official of the United States, acting under color of his office, was in violation of the constitutional rights of the defendant, and upon making seasonable application he was entitled to have them restored, and that by permitting their use upon the trial the trial court erred.

The opinion cited with approval language of Mr. Justice Field in Ex parte Jackson, 96 U. S. 727, 733, 24 L. Ed. 877, saying that the Fourth Amendment as a principle of protection was applicable to sealed letters and packages in the mail, and that, consistently with it, such matter could only be opened and examined upon warrants issued on oath or affirmation particularly describing the thing to be seized.

In Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426, the defendants were arrested at their homes and ***461** detained in custody. While so detained, representatives of the government without authority went to the office of their company and seized all the books, papers, and documents found there. An application for return of the things was opposed by the district attorney, who produced a subpoena for certain documents relating to the charge in the indictment then on file. The court said:

'Thus the case is not that of knowledge acquired through the wrongful act of a stranger, ****567** but it must be assumed that the government planned or at all events ratified the whole performance.'

And it held that the illegal character of the original seizure characterized the entire proceeding and under the Weeks Case the seized papers must be restored.

In Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654, the defendant was convicted of concealing whisky on which the tax had not been paid. At the trial he presented a petition asking that private property seized in a search of his house and

store 'within his curtilage' without warrant should be returned. This was denied. A woman, who claimed to be his wife, was told by the revenue officers that they had come to search the premises for violation of the revenue law. She opened the door; they entered and found whisky. Further searches in the house disclosed more. It was held that this action constituted a violation of the Fourth Amendment, and that the denial of the motion to restore the whisky and to exclude the testimony was error.

In Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, the facts were these: Gouled and two others were charged with conspiracy to defraud the United States. One pleaded guilty and another was acquitted. Gouled prosecuted error. The matter was presented here on questions propounded by the lower court. The first related to the admission in evidence of a paper surreptitiously taken from the office of the defendant by one acting under the direction***462** of an officer of the Intelligence Department of the Army of the United States. Gouled was suspected of the crime. A private in the United States Army, pretending to make a friendly call on him, gained admission to his office, and in his absence, without warrant of any character, seized and carried away several documents. One of these, belonging to Gouled, was delivered to the United States attorney and by him introduced in evidence. When produced it was a surprise to the defendant. He had had no opportunity to make a previous motion to secure a return of it. The paper had no pecuniary value, but was relevant to the issue made on the trial. Admission of the paper was considered a violation of the Fourth Amendment.

Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409, held that the Fourth and Fifth Amendments were violated by admission in evidence of contraband narcotics found in defendant's house, several blocks distant from the place of arrest, after his arrest and seized there without a warrant. Under such circumstances the seizure could not be justified as incidental to the arrest.

There is no room in the present case for applying the Fifth Amendment, unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually and voluntarily transacting business without knowledge of the interception. Our consideration must be confined to the Fourth Amendment.

The striking outcome of the Weeks Case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in court, really forbade its introduction, if obtained by government officers through a violation of the amendment. Theretofore many had supposed that under the ordinary common-law rules, if the tendered evidence was pertinent, the method of obtaining it was ***463** unimportant. This was held by the Supreme Judicial Court of Massachusetts in Commonwealth v. Dana, 2 Metc. 329, 337. There it was ruled that the only remedy open to a defendant whose rights under a state constitutional equivalent of the Fourth Amendment had been invaded was by suit and judgment for damages, as Lord Camden held in Entick v. Carrington, 19 Howell, State Trials, 1029. Mr. Justice Bradley made effective use of this case in Boyd v. United States. But in the Weeks Case, and those which followed, this court decided with great emphasis and established as the law for the federal courts that the protection of the Fourth Amendment would be much impaired, unless it was held that not only was the official violator of the rights under the amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received.

The well-known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will. This phase of the mis-

use of governmental power of compulsion is the emphasis of the opinion of the court in the Boyd Case. This appears, too, in the Weeks Case, in the Silverthorne Case, and in the Amos Case.

Gouled v. United States carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication, and must be confined to the precise state of facts disclosed by the record. A representative of the Intelligence Department of the Army, having by stealth obtained admission to the defendant's office, seized and carried away certain private papers valuable for evidential purposes. This was held an unreasonable search and seizure within the Fourth Amendment. A stealthy entrance in such circumstances***464** became the equivalent to an entry by force. There was actual entrance into the private quarters of defendant and the taking away of something ****568** tangible. Here we have testimony only of voluntary conversations secretly overheard.

The amendment itself shows that the search is to be of material things-the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or things to be seized.

It is urged that the language of Mr. Justice Field in Ex parte Jackson, already quoted, offers an analogy to the interpretation of the Fourth Amendment in respect of wire tapping. But the analogy fails. The Fourth Amendment may have proper application to a sealed letter in the mail, because of the constitutional provision for the Postoffice Department and the relations between the government and those who pay to secure protection of their sealed letters. See Revised Statutes, ss 3978 to 3988, whereby Congress monopolizes the carriage of letters and excludes from that business everyone else, and section 3929 (39 USCA s 259), which forbids any postmaster or other person to open any letter not addressed to himself. It is plainly within the words of the amendment to say that the unlawful rifling by a government agent of a sealed letter is a search and seizure of the sender's papers of effects. The letter is a paper, an effect, and in the custody of a government that forbids carriage, except under its protection.

The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

***465** By the invention of the telephone 50 years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place.

The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched.

This court, in Carroll v. United States, 267 U. S. 132, 149, 45 S. Ct. 280, 284 (69 L. Ed. 543, 39 A. L. R. 790), declared:

'The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests, as well as the interest and rights of individual citizens.'

Justice Bradley, in the Boyd Case, and Justice Clarke, in the Gouled Case, said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.

Hester v. United States, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898, held that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves 100 yards away from his house, and saw him come out and hand a bottle of whisky to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers, or effects. United States v. Lee, 274 U. S. 559, 563, 47 S. Ct. 746, 71 L. Ed. 1202; Eversole v. State, 106 Tex. Cr. R. 567, 294 S. W. 210.

Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, ***466** and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant, unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure.

We think, therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

What has been said disposes of the only question that comes within the terms of our order granting certiorari in these cases. But some of our number, departing from that order, have concluded that there is merit in the twofold objection, overruled in both courts below, that evidence obtained through intercepting of telephone messages by a government agents was inadmissible, because the mode of obtaining it was unethical and a misdemeanor under the law of Washington. To avoid any misapprehension of our views of that objection we shall deal with it in both of its phases.

While a territory, the English common law prevailed in Washington, and thus continued after her admission in 1889. The rules of evidence in criminal cases in courts of the ****569** United States sitting there consequently are those of the common law. ***467**United States v. Reid, 12 How. 361, 363, 366, 13 L. Ed. 1023; Logan v. United States, 144 U. S. 263, 301, 12 S. Ct. 617, 36 L. Ed. 429; Rosen v. United States, 245 U. S. 467, 38 S. Ct. 148, 62 L. Ed. 406; Withaup v. United States (C. C. A.) 127 F. 530, 534; Robinson v. United States (C. C. A.) 292 F. 683, 685.

The common-law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. Professor Greenleaf, in his work on Evidence (volume 1 (12th Ed., by Redfield) s 254(a)), says:

'It may be mentioned in this place, that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question.'

Mr. Jones, in his work on the same subject, refers to Mr. Greenleaf's statement, and says:

'Where there is no violation of a constitutional guaranty, the verity of the above statement is absolute.' Section 2075, note 3, vol. 5.

The rule is supported by many English and American cases cited by Jones in section 2075, note

3, and section 2076, note 6, vol. 5; and by Wigmore, vol. 4, s 2183. It is recognized by this court in Adams v. New York, 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575. The Weeks Case announced an exception to the commonlaw rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amendments. Many state courts do not follow the Weeks Case. People v. Defore, 242 N. Y. 13, 150 N. E. 585. But those who do treat it as an exception to the general common-law rule and required by constitutional limitations. Hughes v. State, 145 Tenn. 544, 551, 566, 238 S. W. 588, 20 A. L. R. 639; State v. Wills, 91 W. Va. 659, 677, 114 S. E. 261, 24 A. L. R. 1398; State v. Slamon, 73 Vt. 212, 214, 215, 50 A. 1097, 87 Am. St. Rep. 711; Gindrat v. People, 138 Ill. 103, 111, 27 N. E. 1085; People v. Castree, 311 Ill. 392, 396, 397, 143 N. E. 112, 32 A. L. R. 357; ***468**State v. Gardner, 77 Mont. 8, 21, 249 P. 574, 52 A. L. R. 454; State v. Fahn, 53 N. D. 203, 210, 205 N. W. 67. The common-law rule must apply in the case at bar.

Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the common-law doctrine generally supported by authority. There is no case that sustains, nor any recognized text-book that gives color to, such a view. Our general experience shows that much evidence has always been receivable, although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oathbound conspiracies for murder, robbery, and other crimes, where officers of the law have disguished themselves and joined the organizations, taken the oaths, and given themselves every appearance of active members engaged in the promotion of crime for the purpose of securing evidence. Evidence secured by such means has always been received.

A standard which would forbid the reception of evidence, if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

The statute of Washington, adopted in 1909, provides (Remington Compiled Statutes 1922, s 2656(18) that:

'Every person * * * who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line * * * shall be guilty of a misdemeanor.'

***469** This statute does not declare that evidence obtained by such interception shall be inadmissible, and by the common law, already referred to, it would not be. People v. McDonald, 177 App. Div. 806, 165 N. Y. S. 41. Whether the state of Washington may prosecute and punish federal officers violating this law, and those whose messages were intercepted may sue them civilly, is not before us. But clearly a statute, passed 20 years after the admission of the state into the Union, cannot affect the rules of evidence applicable in courts of the United States. Chief Justice Taney, in United States v. Reid, 12 How. 361, 363 (13 L. Ed. 1023), construing the thirty-fourth section of the Judiciary Act (now 28 USCA s 77), said:

'But it could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another.'

See, also, Withaup v. United States (C. C. A.) 127 F. 530, 534.

The judgments of the Circuit Court of Appeals are affirmed. The mandates will go down forthwith under rule 31.

Affirmed.

****570 *471** Mr. Justice BRANDEIS (dissenting).

The defendants were convicted of conspiring to violate the National Prohibition Act (27 USCA). Before any of the persons now charged had been arrested or indicted, the telephones by means of which they habitually communicated with one another and with others had been tapped by federal officers. To this end, a lineman of long experience in wire tapping was employed, on behalf of the government and at its expense. He tapped eight telephones, some in the homes of the persons charged, some in their offices. Acting on behalf of the government and in their official capacity, at least six other prohibition agents listened over the tapped wires and reported the messages taken. Their operations extended over a period of nearly five months. The typewritten record of the notes of conversations overheard occupies 775 typewritten pages. By objections seasonably made and persistently renewed, the defendants objected to the admission of the evidence obtained by wire tapping, on the ground that the government's wire tapping constituted an unreasonable search and seizure, in violation of the Fourth Amendment, and that the use as evidence of the conversations overheard compelled the defendants to be witnesses against themselves, in violation of the Fifth Amendment.

The government makes no attempt to defend the methods employed by its officers. Indeed, it concedes ***472** that, if wire tapping can be deemed a search and seizure within the Fourth Amendment, such wire tapping as was practiced in the case at bar was an unreasonable search and seizure, and that the evidence thus obtained was inadmissible. But it relies on the language of the amendment, and it claims that the protection given thereby cannot properly be held to include a telephone conversation.

'We must never forget,' said Mr. Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 407 4 L. Ed. 579, 'that it is a Constitution we are expounding.' Since then this court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the fathers could not have dreamed. See Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 9, 24 L. Ed. 708; Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897; Dakota Central Telephone Co. v. South Dakota, 250 U. S. 163, 39 S. Ct. 507, 63 L. Ed. 910, 4 A. L. R. 1623; Brooks v. United States, 267 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699, 37 A. L. R. 1407. We have likewise held that general limitations on the powers of government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the states from meeting modern conditions by regulations which 'a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.' Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 387, 47 S. Ct. 114, 118 (71 L. Ed. 303); Buck v. Bell, 274 U. S. 200, 47 S. Ct. 584, 71 L. 1000. Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world. It was with reference to such a clause that this court said in Weems v. United States, 217 U. S. 349, 373, 30 S. Ct. 544, 551 (54 L. Ed. 793, 19 Ann. Cas. 705):

'Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions ***473** and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality

as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a Constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.'

When the Fourth and Fifth Amendments were adopted, 'the form that evil had theretofore taken' had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. It could compel the individual to testify-a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life-a seizure effected, if need be, by breaking and entry. Protection against such invasion of 'the sanctities of a man's home and the privacies of life' was provided in the Fourth and Fifth Amendments by specific language. Boyd v. United States, 116 U. S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746. But 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

***474** Moreover, 'in the application of a Constitution, our contemplation cannot be only of ****571** what has been, but of what may be.' The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. 'That places the liberty of every man in the hands of every petty officer' was said by James Otis of much lesser intrusions than these.[FN1] To Lord Camden a far slighter intrusion seemed 'subversive of all the comforts of society.'[FN2] Can it be that the Constitution affords no protection against such invasions of individual security?

FN1. Otis' argument against Writs of Assistance. See Tudor, James Otis, p. 66; John Adams' Works, vol. II, p. 524; Minot, Continuation of the History of Massachusetts Bay, vol. II, p. 95.

FN2 Entick v. Carrington, 19 Howell's State Trials, 1030, 1066.

A sufficient answer is found in Boyd v. United States, 116 U. S. 616, 627-630, 6 S. Ct. 524, 29 L. Ed. 746, a case that will be remembered as long as civil liberty lives in the United States. This court there reviewed the history that lay behind the Fourth and Fifth Amendments. We said with reference to Lord Camden's judgment in Entick v. Carrington, 19 Howell's State Trials, 1030:

'The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employe s of the sanctities of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security,***475** personal liberty and private property, where that right has never been forfeited by his conviction of some public offense-it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but

any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.' FN3

FN3 In Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 155 U. S. 3, 14 S. Ct. 1125, 15 S. Ct. 19, 38 L. Ed. 1047, 39 L. Ed. 49, the statement made in the Boyd Case was repeated, and the court quoted the statement of Mr. Justice Field in Re Pacific Railway Commission (C. C.) 32 F. 241, 250: 'Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.' The Boyd Case has been recently reaffirmed in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, in Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, and in Byars v. United States, 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520.

In Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877, it was held that a sealed letter intrusted to the mail is protected by the amendments. The mail is a public service furnished by the government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message. As Judge Rudkin said below:

'True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed; but these are distinctions without a difference.'

The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations ***476** between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.

Time and again this court, in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it. This was notably illustrated in the Boyd Case itself. Taking language in its ordinary meaning, there is no 'search' or 'seizure' when a defendant is required to produce a document in the orderly process of a court's procedure. 'The right of the people of be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' would not be violated, under any ordinary construction of language, by compelling obedience to a subpoena. But this court holds the evidence inadmissible simply because the information leading to the issue of the subpoena has been unlawfully secured. Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319. Literally, there is no 'search' or 'seizure' when a friendly visitor abstracts papers from an office; yet we held in Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, that evidence so obtained could not be used. No court which looked at the words of the amendment rather than at its underlying purpose would hold, as this court did in Ex parte Jackson, 96 U. S. 727, 733, 24 L. Ed. 877, that its protection extended to letters in the mails. ****572** The provision against self-incrimination in the Fifth Amendment has been given an equally broad construction. The language is:

'No person * * * shall be compelled in any criminal case to be a witness against himself.'

Yet we have held not only that the ***477** protection of the amendment extends to a witness before a grand jury, although he has not been charged with crime (Counselman v. Hitchcock, 142 U. S. 547, 562, 586, 12 S. Ct. 195, 35 L. Ed. 1110), but that:

'It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.' McCarthy v. Arndstein, 266 U. S. 34, 40, 45 S. Ct. 16, 17 (69 L. Ed. 158).

The narrow language of the Amendment has been consistently construed in the light of its object, 'to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.' Counselman v. Hitchcock, supra, page 562 (12 S. Ct. 198).

Decisions of this court applying the principle of the Boyd Case have settled these things. Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper;[FN4] whether the paper when taken by the federal officers was in the home,[FN5] in an office,[FN6] or elsewhere;[FN7] whether the taking was effected by force,[FN8] by ***478** fraud,[FN9] or in the orderly process of a court's procedure.[FN10] From these decisions, it follows necessarily that the amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it, and that use, in any criminal proceeding, of the contents of the paper so examined-as where they are testified to by a federal officer who thus saw the document or where, through knowledge so obtained, a copy has been procured elsewhere[FN11]-any such use constitutes a violation of the Fifth Amendment.

FN4 Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647.

FN5 Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654; Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145; Byars v. United States, 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520.

FN6 Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746; Hale v. Henkel, 201 U. S. 43, 70, 26 S. Ct. 370, 50 L. Ed. 652; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319; Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231.

FN7 Ex parte Jackson, 96 U. S. 727, 733, 24 L. Ed. 877; Carroll v. United States, 267 U. S. 132, 156, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790; Gambino v. United States, 275 U. S. 310, 48 S. Ct. 137, 72 L. Ed. 293, 52 A. L. R. 1381.

FN8 Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319; Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654; Carroll v. United States, 267 U. S. 132, 156, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790; Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145; Gambino v. United States, 275 U. S. 310, 48 S. Ct. 137, 72 L. Ed. 293, 52 A. L. R. 1381.

FN9 Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647.

FN10 Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746; Hale v. Henkel, 201 U. S. 43, 70, 26 S. Ct. 370, 50 L. Ed. 652. See Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; Byars v. United States, 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520; Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231.

FN11 Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319. Compare Gouled v. United States, 255 U. S. 298, 307, 41 S. Ct. 261, 65 L. Ed. 647. In Stroud v. United States, 251 U. S. 15, 40 S. Ct. 50, 64 L. Ed. 103, and Hester v. United States, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898, the letter and articles admitted were not obtained by unlawful search and seizure. They were voluntary disclosures by the defendant. Compare Smith v. United States (C. C. A.) 2 F.(2d) 715; United States v. Lee, 274 U. S. 559, 47 S. Ct. 746, 71 L. Ed. 1202.

The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence ***479** in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wire tapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel****573** invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.FN12

FN12 The point is thus stated by counsel for the telephone companies, who have filed a brief as amici curiae: ‘Criminals will not escape detection and conviction merely because evidence obtained by tapping wires of a public telephone system is inadmissible. if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts. Legislation making wire tapping a crime will not suffice if the courts nevertheless hold the evidence to be lawful.’

Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wire tapping is a crime.FN13 Pierce's ***480** Code 1921, s 8976(18). To prove its case, the government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. Compare Harkin v. Brundage (No. 117) 276 U. S. 36, 48 S. Ct. 268, 72 L. Ed. 457, decided February 20, 1928.

FN13 In the following states it is a criminal offense to intercept a message sent by

telegraph and/or telephone: Alabama, Code 1923, s 5256; Arizona, Revised Statutes 1913, Penal Code, s 692; Arkansas, Crawford & Moses' Digest, 1921, s 10246; California, Deering's Penal Code 1927, s 640; Colorado, Compiled Laws 1921, s 6969; Connecticut, General Statutes 1918, s 6292; Idaho, Compiled Statutes 1919, ss 8574, 8586; Illinois, Revsied Statutes 1927, c. 134, s 16; Iowa, Code 1927, s 13121; Kansas, Revised Statutes 1923, c. 17, s 1908; Michigan Compiled Laws 1915, s 15403; Montana, Penal Code 1921, s 11518; Nebraska, Compiled Statutes 1922, s 7115; Nevada, Revised Laws 1912, ss 4608, 6752(18); New York, Consolidated Laws, c. 40, s 1423(6); North Dakota, Compiled Laws 1913, s 10231; Ohio, Page's General Code 1926, s 13402; Oklahoma, Session Laws 1923, c. 46; Oregon, Olson's Laws 1920, s 2265; South Dakota, Revised Code 1919, s 4312; Tennessee, Shannon's Code 1917, ss 1839, 1840; Utah, Compiled Laws 1917, s 8433; Virginia, Code 1924, s 4477(2), (3); Washington, Pierce's Code 1921, s 8976(18); Wisconsin, Statutes 1927, s 348.37; Wyoming, Compiled Statutes 1920, s 7148. Compare State v. Behringer, 19 Ariz. 502, 172 P. 660; State v. Nordskog, 76 Wash. 472, 136 P. 694, 50 L. R. A. (N. S.) 1216.

In the following states it is a criminal offense for a company engaged in the transmission of messages by telegraph and/or telephone, or its employees, or, in many instances, persons conniving with them, to disclose or to assist in the disclosure of any message: Alabama, Code 1923, ss 5543, 5545; Arizona, Revised Statutes 1913, Penal Code, ss 621, 623, 691; Arkansas, Crawford & Moses' Digest 1921, s 10250; California, Deering's Penal Code 1927, ss 619, 621, 639, 641; Colorado, Compiled Laws 1921, ss 6966, 6968, 6970; Connecticut, General Statutes 1918, s 6292; Florida, Revised General Statutes 1920, ss 5754, 5755; Idaho, Compiled Statutes 1919, ss 8568, 8570; Illinois, Revised Statutes 1927, c. 134, ss 7, 7a; Indiana, Burns' Revised Statutes 1926, s 2862; Iowa, Code 1924, s 8305; Louisiana, Acts 1918, c. 134, p. 228; Maine, Revised Statutes 1916, c. 60, s 24; Maryland, Bagby's Code 1926, art. 27, s 489; Michigan, Compiled Statutes 1915, s 15104; Minnesota, General Statutes 1923, ss 10423, 10424; Mississippi, Hemingway's Code 1927, s 1174; Missouri, Revised Statutes 1919, s 3605; Montana, Penal Code 1921, s 11494; Nebraska, Compiled Statutes 1922, s 7088; Nevada, Revised Laws 1912, ss 4603, 4605, 4609, 4631; New Jersey, Compiled Statutes 1910, p. 5319; New York, Consolidated Laws, c. 40, ss 552, 553; North Carolina, Consolidated Statutes 1919, ss 4497, 4498, 4499; North Dakota, Compiled Laws 1913, s 10078; Ohio, Page's General Code 1926, ss 13388, 13419; Oklahoma, Session Laws 1923, c. 46; Oregon, Olson's Laws 1920, ss 2260, 2262, 2266; Pennsylvania. Statutes 1920, ss 6306, 6308, 6309; Rhode Island, General Laws, 1923, s 6104; South Dakota, Revised Code 1919, ss 4346, 9801; Tennessee, Shannon's Code 1917, ss 1837, 1838; Utah, Compiled Laws 1917, ss 8403, 8405, 8434; Washington, Pierce's Code 1921, ss 8982, 8983; Wisconsin, Statutes 1927, s 348.36.

The Alaska Penal Code, Act of March 3, 1899, c. 429, 30 Stat. 1253, 1278, provides that, ‘if any officer, agent, operator, clerk, or employee of any telegraph company, or any other person, shall wilfully divulge to any other person than the party from whom the same was received, or to whom the same was addressed, or his agent or attorney, any message received or sent, or intended to be sent, over any telegraph line,

or the contents, substance, purport, effect, or meaning of such message, or any part thereof, * * * the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by a fine not to exceed one thousand dollars or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court.'

The Act of October 29, 1918, c. 197, 40 Stat. 1017 (Comp. St. s 3115 3/4 xx), provided: 'That whoever during the period of governmental operation of the telephone and telegraph systems of the United States * * * shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line, or wilfully interfere with the operation of such telephone and telegraph systems or with the transmission of any telephone or telegraph message, or with the delivery of any such message, or whoever being employed in any such telephone or telegraph service shall divulge the contents of any such telephone or telegraph message to any person not duly authorized or entitled to receive the same, shall be fined not exceeding $1,000 or imprisoned for not more than one year, or both.'

The Radio Act of February 23, 1927, c. 169, s 27. 44 Stat. 1162, 1172 (47 USCA s 107), provides that 'no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person.'

***481** The situation in the case at bar differs widely from that presented in Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159. There only a single lot of papers was involved. They had been obtained by a private detective while acting on behalf of a private party, without the knowledge of any federal official, long before any one had thought of instituting a ***482** federal prosecution. Here the evidence obtained by crime was obtained at the government's expense, by its officers, while acting on its behalf; the officers who committed these crimes are the same officers who were charged with the enforcement of the Prohibition Act; the crimes of these officers were committed for the purpose of securing evidence with which to obtain an indictment and to secure a conviction. The evidence so obtained constitutes the warp and woof of the government's case. The aggregate of the government evidence occupies 306 pages of the printed record. More than 210 of them are ****574** filled by recitals of the details of the wire tapping and of facts ascertained thereby.[FN14] There is literally no other evidence of guilt on the part of some of the defendants except that illegally obtained by these officers. As to nearly all the defendants (except those who admitted guilt), the evidence relied upon to secure a conviction consisted mainly of that which these officers had so obtained by violating the state law.

FN14 The above figures relate to case No. 493. In Nos. 532, 533, the government evidence fills 278 pages, of which 140 are recitals of the evidence obtained by wire tapping.

As Judge Rudkin said below (19 F.(2d) 842):

'Here we are concerned with neither eavesdroppers nor thieves. Nor are we concerned with the acts of private individuals. * * * We are concerned only with the acts of federal agents, whose powers are limited and controlled by the Constitution of the United States.'

The Eighteenth Amendment has not in terms empowered Congress to authorize any one to violate the criminal laws of a state. And Congress has never purported to do so. Compare Maryland v. Soper, 270 U. S. 9, 46 S. Ct. 185, 70 L. Ed. 449.

The terms of appointment of federal prohibition agents do not purport to confer upon them authority to violate any criminal law. Their superior officer, the Secretary of the Treasury, has not instructed them to commit ***483** crime on behalf of the United States. It may be assumed that the Attorney General of the United States did not give any such instruction. FN15

FN15 According to the government's brief, p. 41, 'The Prohibition Unit of the Treasury disclaims it (wire tapping) and the Department of Justice has frowned on it.' See, also, 'Prohibition Enforcement,' 69th Congress, 2d Session, Senate Doc. No. 198, pp. iv, v, 13, 15, referred to committee, January 25, 1927; also same, part 2.

When these unlawful acts were committed they were crimes only of the officers individually. The government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. Compare the Paquete Habana, 189 U. S. 453, 465, 23 S. Ct. 593, 47 L. Ed. 900; O'Reilly de Camara v. Brooke, 209 U. S. 45, 52, 28 S. Ct. 439, 52 L. Ed. 676; Dodge v. United States, 272 U. S. 530, 532, 47 S. Ct. 191, 71 L. Ed. 392; Gambino v. United States, 275 U. S. 310, 48 S. Ct. 137, 72 L. Ed. 293, and if this court should permit the government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the government itself would become a lawbreaker.

Will this court, by sustaining the judgment below, sanction such conduct on the part of the executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. FN16 The maxim of unclean hands comes ***484** from courts of equity. FN17 But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling. FN18

FN16 See Hannay v. Eve, 3 Cranch, 242, 247, 2 L. Ed. 427; Bank of the United States v. Owens, 2 Pet. 527, 538, 7 L. Ed. 508; Bartle v. Nutt, 4 Pet. 184, 188, 7 L. Ed. 825; Kennett v. Chambers, 14 How. 38, 52, 14 L. Ed. 316; Marshall v. Baltimore & Ohio R. R. Co., 16 How. 314, 334, 14 L. Ed. 953; Tool Co. v. Norris, 2 Wall. 45, 54, 17 L. Ed. 868; The Ouachita Cotton, 6 Wall. 521, 532, 18 L. Ed. 935; Coppell v. Hall, 7 Wall. 542, 19 L. Ed. 244; Forsyth v. Woods, 11 Wall. 484, 486, 20 L. Ed. 207; Hanauer v. Doane, 12 Wall. 342, 349, 20 L. Ed. 439; Trist v. Child, 21 Wall. 441, 448, 22 L. Ed. 623; Meguire v. Corwine, 101 U. S. 108, 111, 25 L. Ed. 899; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; Irwin v. Williar, 110 U. S. 499, 510, 4 S. Ct. 160, 28 L. Ed. 225; Woodstock Iron Co. v. Richmond & Danville Extension Co., 129 U. S. 643, 9 S. Ct. 402, 32 L. Ed. 819; Gibbs v. Consolidated Gas Co., 130 U. S. 396, 411, 9 S. Ct. 553, 32 L. Ed. 979; Embrey v. Jemison, 131 U. S. 336, 348, 9 S. Ct. 776, 33 L. Ed. 172; West v. Camden, 135 U. S. 507, 521, 10 S. Ct. 838, 34 L. Ed. 254; McMullen v. Hoffman, 174 U. S. 639, 654, 19 S. Ct. 839, 43 L. Ed. 1117; Hazelton v. Sheckells, 202 U. S. 71, 26 S. Ct. 567, 50 L. Ed. 939, 6 Ann. Cas. 217; Crocker v. United States, 240 U. S. 74, 78, 36 S. Ct. 245, 60 L. Ed. 533. Compare Holman v. Johnson, 1 Cowp. 341.

FN17 See Creath's Administrator v. Sims, 5 How. 192, 204, 12 L. Ed. 111; Kennett v. Chambers, 14 How. 38, 49, 14 L. Ed. 316;

Randall v. Howard, 2 Black, 585, 586, 17 L. Ed. 269; Wheeler v. Sage, 1 Wall. 518, 530, 17 L. Ed. 646; Dent v. Ferguson, 132 U. S. 50, 64, 10 S. Ct. 13, 33 L. Ed. 242; Pope Manufacturing Co. v. Gormully, 144 U. S. 224, 236, 12 S. Ct. 632, 36 L. Ed. 414; Miller v. Ammon, 145 U. S. 421, 425, 12 S. Ct. 884, 36 L. Ed. 759; Hazelton v. Sheckells, 202 U. S. 71, 79, 26 S. Ct. 567, 50 L. Ed. 939, 6 Ann. Cas. 217. Compare International News Service v. Associated Press, 248 U. S. 215, 245, 39 S. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293.

FN18 Compare State v. Simmons, 39 Kan. 262, 264, 265, 18 P. 177; State v. Miller, 44 Mo. App. 159, 163, 164; In re Robinson, 29 Neb. 135, 45 N. W. 267, 8 L. R. A. 398, 26 Am. St. Rep. 378; Harris v. State, 15 Tex. App. 629, 634, 635, 639.

The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. [FN19] Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order ****575** to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes ***485** spoken of as a rule of substantive law. But it extends to matters of procedure as well.[FN20] A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself.[FN21] It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

FN19 See Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468; Brooks v. Martin, 2 Wall. 70, 17 L. Ed. 732; Planters' Bank v. Union Bank, 16 Wall. 483, 499, 500, 21 L. Ed. 473; Houston & Texas Central R. Co. v. Texas, 177 U. S. 66, 99, 20 S. Ct. 545, 44 L. Ed. 673; Bothwell v. Buckbee, Mears Co., 275 U. S. 274, 48 S. Ct. 124, 72 L. Ed. 277.

FN20 See Lutton v. Benin, 11 Mod. 50; Barlow v. Hall, 2 Anstr. 461; Wells v. Gurney, 8 Barn. & C. 769; Ilsley v. Nichols, 12 Pick. (Mass.) 270, 22 Am. Dec. 425; Carpenter v. Spooner, 4 N. Y. Super. Ct. (N. Y.) 717; Metcalf v. Clark, 41 Barb. (N. Y.) 45; Reed v. Williams, 29 N. J. Law, 385; Hill v. Goodrich, 32 Conn. 588; Townsend v. Smith, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793; Blandin v. Ostrander (C. C. A.) 239 F. 700; Harkin v. Brundage, 276 U. S. 36, 48 S. Ct. 268, 72 L. Ed. 457.

FN21 Coppell v. Hall, 7 Wall. 542, 558, 19 L. Ed. 244; Oscanyan v. Arms Co., 103 U. S. 261, 267, 26 L. Ed. 539; Higgins v. McCrea, 116 U. S. 671, 685, 6 S. Ct. 557, 29 L. Ed. 764. Compare Evans v. Richardson, 3 Mer. 469; Norman v. Cole, 3 Esp. 253; Northwestern Salt Co. v. Electrolytic Alkali Co., (1913) 3 K. B. 422.

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine

this court should resolutely set its face.

Mr. Justice HOLMES.

My brother BRANDEIS has given this case so exhaustive an examination that I desire to add but a few words. While I do not deny it I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them. Gooch v. Oregon Short Line R. R. Co., 258 U. S. 22, 24, 42 S. Ct. 192, 66 L. Ed. 443. But I think, as Mr. Justice BRANDEIS says, that apart from the Constitution the government ought not to use ***470** evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.

For those who agree with me no distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorenys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed. See Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426. And if all that I have said so far be accepted it makes no difference that in this case wire tapping is made a crime by the law of the state, not by the law of the United States. It is true that a state cannot make rules of evidence for courts of the United States, but the state has authority over the conduct in question, and I hardly think that the United States would appear to greater advantage when paying for an odious crime against state law than when inciting to the disregard of its own. I am aware of the often-repeated statement that in a criminal proceeding the court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and the cases that have followed it. I have said that we are free to choose between two principles of policy. But if we are to confine ourselves to precedent and logic the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.

Mr. Justice BUTLER (dissenting).

I sincerely regret that I cannot support the opinion and judgments of the court in these cases.

486** The order allowing the writs of certiorari operated to limit arguments of counsel to the constitutional question. I do not participate in the controversy that has arisen here as to whether the evidence was inadmissible because*576** the mode of obtaining it was unethical and a misdemeanor under state law. I prefer to say nothing concerning those questions because they are not within the jurisdiction taken by the order.

The court is required to construe the provision of the Fourth Amendment that declares:

'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 Fifth Amendment prevents the use of evidence obtained through searches and seizures in viol-

ation of the rights of the accused protected by the Fourth Amendment.

The single question for consideration is this: May the government, consistently with that clause, have its officers whenever they see fit, tap wires, listen to, take down, and report the private messages and conversations transmitted by telephones?

The United States maintains that:

'The 'wire tapping' operations of the federal prohibition agents were not a 'search and seizure' in violation of the security of the 'persons, houses, papers and effects' of the petitioners in the constitutional sense or within the intendment of the Fourth Amendment.'

The court, adhering to and reiterating the principles laid down and applied in prior decisions FN22 construing the search and seizure clause, in substance adopts the contention of the government.

> FN22 Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746; Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426; Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654.

The question at issue depends upon a just appreciation of the facts.

***487** Telephones are used generally for transmission of messages concerning official, social, business and personal affairs including communications that are private and privileged-those between physician and patient, lwayer and client, parent and child, husband and wife. The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down.

In Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, there was no 'search or seizure' within the literal or ordinary meaning of the words, nor was Boyd-if these constitutional provisions were read strictly according to the letter-compelled in a 'criminal case' to be a 'witness' against himself. The statute, there held unconstitutional because repugnant to the search and seizure clause, merely authorized judgment for sums claimed by the government on account of revenue if the defendant failed to produce his books, invoices and papers. The principle of that case has been followed, developed and applied in this and many other courts. And it is in harmony with the rule of liberal construction that always has been applied to provisions of the Constitution safeguarding personal rights (Byars v. United States, 273 U. S. 28, 32, 47 S. Ct. 248, 71 L. Ed. 520), as well as to those granting governmental powers. McCulloch v. Maryland, 4 Wheat. 316, 404, 406, 407, 421, 4 L. Ed. 579; Marbury v. Madison, 1 Cranch, 137, 153, 176, 2 L. Ed. 60; Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257; Myers v. United States, 272 U. S. 52, 47 S. Ct. 21, 71 L. Ed. 160.

This court has always construed the Constitution in the light of the principles upon which it was founded. ***488** The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words. That construction is consonant with sound reason and in full accord with the course of decisions since McCulloch v.

Maryland. That is the principle directly applied in the Boyd Case.

When the facts in these cases are truly estimated, a fair application of that principle decides the constitutional question in favor of the petitioners. With great deference, I think they should be given a new trial.

Mr. Justice STONE (dissenting).

I concur in the opinions of Mr. Justice HOLMES and Mr. Justice BRANDEIS. I agree also with that of Mr. Justice BUTLER so far as it deals with the merits. The effect of the order granting certiorari was to limit the argument to a single question, but I do not understand that it restrains the court from a consideration of any question which we find to be presented by the record, for, under Judicial Code, s 240(a), 28 USCA s 347(a), this court determines a case here on certiorari 'with the same power and authority, and with like effect, as if the cause had been brought (here) by unrestricted writ of error or appeal.'

U.S.,1928
Olmstead v. U.S.
277 U.S. 438, 48 S.Ct. 564, 66 A.L.R. 376, 72 L.Ed. 944

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People v Hall

2011 NY Slip Op 05936 [86 AD3d 450]

July 14, 2011

Appellate Division, First Department

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As corrected through Wednesday, August 31, 2011

The People of the State of New York, Respondent,
v
Alexander Hall, Appellant.

—[*1] Mischel & Horn, P.C., New York (Richard E. Mischel of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Susan Axelrod of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J., at suppression motion; Ruth Pickholz, J., at jury trial and sentence), rendered November 8, 2007, convicting defendant of manslaughter in the second degree, assault in the third degree (two counts) and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 5 to 15 years on the manslaughter count, one year on the assault counts and 15 years on the weapon count, unanimously affirmed.

At about 3:30 a.m. on the morning of October 12, 2005, defendant and three of his friends, after spending the night drinking at a club, were involved in an altercation with a club promoter, which ended with the arrival of police. As they walked to their cars, one of defendant's friends was hit on the head with a broken bottle, sustaining a cut. Records of cell tower transmissions disclosed that defendant and one companion first drove south toward his apartment but, at 4:02 a.m., headed back north toward the club. At 4:08 a.m., calls placed from both men's phones were relayed from a cell tower located to the north of the club. Defendant's call was received by one of his friends riding in the other car, who related that defendant had stated that he was on his way back to the club.

At about 4:10 a.m., defendant opened fire on a group of club patrons who had just left the club and remained in front of the establishment after its 4:00 a.m. closing time. One bullet struck Tabitha Perez, the mother of a seven-year-old boy, piercing her lung and causing her death. Another round struck Ruben Batista, a homeless man, in the leg, shattering a bone. A third victim, Jeremy Soto, was injured by a bullet that passed through his calf and another that grazed his finger. The parties stipulated that a call was made to 911 at 4:11 a.m., and cell phone records revealed that a call made from defendant's phone at 4:13 a.m. was handled by a cell tower at 179th Street, just north of the club, located between 176th and 177th Streets. Defendant was identified as the shooter at a lineup by a witness who had described him as young, with dark hair and a light complexion, dark eyes and distinctive, arched eyebrows.

Some nine months later, as the result of an unrelated narcotics investigation, police arrested defendant's traveling companion on the night of the shootings, recovering a .357 magnum revolver. While the condition of the bullets that struck the victims did not permit them to be matched to the gun, a ballistics expert testified that the weapon was capable of firing those [*2]rounds.

Defendant was indicted for murder in the second degree for causing the death of Tabitha Perez, assault in the first degree for causing serious physical injury to Jeremy Soto, assault in the first degree for causing serious physical injury to Ruben Batista, and criminal possession of a weapon in the second degree for possessing a loaded pistol with intent to use it unlawfully against another, all on or about October 12, 2005. The murder and assault counts alleged that defendant had acted with depraved indifference to human life.

The jury acquitted defendant of murder in the second degree but found him guilty of manslaughter in the second degree. Similarly, the jury acquitted defendant of both counts of assault in the first degree but found him guilty of assault in the third degree. The jury found defendant guilty of criminal possession of a weapon in the second degree.

The court properly denied defendant's motion to suppress historical cell site location information (CSLI) for calls made over his cell phone during the three-day period surrounding the shootings. These records were obtained by court order under 18 USC § 2703 (d), which does not require that the People establish probable cause or obtain a warrant. Even if a cell phone could be considered a "tracking device" under 18 USC § 3117

(b) to the extent that it permits the tracking of movement, the People are not thereby precluded from obtaining CSLI records pursuant to section 2703 (*see In re Application of US for Order Directing Provider of Elec. Communication Serv. to Disclose Records to Govt.*, 620 F3d 304, 308-310 [3d Cir 2010]; *In re Applications of US for Orders Pursuant to Title 18, US Code Section 2703 [d]*, 509 F Supp 2d 76, 79-80, 80 n 8 [D Mass 2007]).

Obtaining defendant's CSLI without a warrant did not violate the Fourth Amendment because, under the Federal Constitution, defendant had no reasonable expectation of privacy while traveling in public (*see e.g. United States v Knotts*, 460 US 276, 281 [1983]; *In re Application*, 620 F3d at 312). Defendant's argument for suppression under the New York State Constitution (*see People v Weaver*, 12 NY3d 433, 445 [2009]) is unpreserved (*see e.g. People v Garcia*, 284 AD2d 106, 108 [2001], *lv denied* 97 NY2d 641 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. Although *Weaver* requires the police to obtain a warrant supported by probable cause for the installation of a global positioning system device, it does not address the matter of CSLI records. Additionally, in *Weaver* the device was used to track the defendant's movements for 65 days, as opposed to a mere three days in the instant case. To the extent that prolonged surveillance might require a warrant under federal law (*see United States v Maynard*, 615 F3d 544 [DC Cir 2010], *cert denied* 562 US —, 131 S Ct 671 [2010]), we find that three days of CSLI records does not constitute a protracted surveillance.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). On the contrary, the evidence of defendant's guilt was overwhelming. There is no basis for disturbing the jury's determinations concerning credibility and identification. The People's case included an eyewitness's identification, defendant's confession to two civilians, his partly incriminating statements to police, and compelling circumstantial evidence.

Since there was extensive evidence connecting defendant to the crime besides the identification, the trial court properly exercised its discretion in denying defendant's request to call an expert on eyewitness identification (*see People v Abney*, 13 NY3d 251, 269 [2009]). The [*3]trial court properly exercised its discretion in admitting computer-generated evidence and denying defendant's request to permit the jury to visit the crime scene. Defendant's challenge to the court's charge is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. In any event,

any error in regard to the court's discretionary determinations and its jury charge was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We find the sentence not excessive under the circumstances of this case. Concur—Gonzalez, P.J., Tom, Andrias, Moskowitz and Freedman, JJ.

88 N.Y.2d 534
(Cite as: 88 N.Y.2d 534, 670 N.E.2d 434)

People v Quackenbush
88 N.Y.2d 534, 647 N.Y.S.2d 150
N.Y. 1996.

88 N.Y.2d 534, 670 N.E.2d 434, 647 N.Y.S.2d 150, 1996 WL 390804

The People of the State of New York, Respondent,
v.
James Quackenbush, Appellant.
Court of Appeals of New York

Argued June 6, 1996;
Decided July 9, 1996

CITE TITLE AS: People v Quackenbush

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Term of the Supreme Court in the Second Judicial Department, entered October 16, 1995, which (1) reversed, on the law, an order of the Justice Court of the Town of East Hampton, Suffolk County (James R. Ketchum, J.), granting a motion by defendant to suppress evidence obtained as the result of a safety inspection of his motor vehicle pursuant to Vehicle and Traffic Law § 603, and (2) remanded the matter for further proceedings.

People v Quackenbush, 166 Misc 2d 364, affirmed.

HEADNOTES

Motor Vehicles--Brakes--Authority of Police to Impound Vehicle Involved in Personal Injury Accident

(1) The police possessed the authority to impound defendant's vehicle after it was involved in a fatal accident in order to comply with the investigatory and reporting duties imposed by Vehicle and Traffic Law § 603, which requires that whenever an accident resulting in injury to a person has been reported to the police within five days of its occurrence, the police "shall immediately investigate the facts, or cause the same to be investigated, and report the matter to the commissioner [of Motor Vehicles] forthwith" (Vehicle and Traffic Law § 603 [1]) on a form prepared by the Commissioner that includes, among other data, a description of the accident, the damage to the vehicles and their undercarriages, and a report on whether the vehicle operators were ticketed, arrested or charged with any violations. A determination of whether the vehicle was suffering from a safety defect at the time of the accident has obvious relevance in preparing the accident description and in reporting whether violations were issued to drivers of vehicles involved. Section 603 does not expressly authorize the police to remove the vehicle from the accident scene and impound it in order to complete the requisite investigation and report, but as a practical matter, an inspection of a vehicle to determine whether any defects in its safety equipment constituted a contributing cause of the accident cannot reasonably be undertaken on the roadway. Thus, section 603 implicitly grants the police the authority to impound a vehicle in furtherance of their administrative mandate to fully investigate the cause of a fatal automobile accident, as well as to ensure the safety of those conducting the accident investigation.

Searches and Seizures--Warrantless Impoundment of Vehicle--Personal Injury Accident

(2) The warrantless impoundment and inspection of defendant's vehicle pursuant to Vehicle and Traffic Law § 603 after it was involved in a fatal accident ***535** did not violate the constitutional proscriptions against unreasonable searches and seizures *(see,* US Const 4th Amend; NY Const, art I, § 12). Warrantless administrative searches may be upheld in the limited category of cases where the activity or premises sought to be inspected is subject to a long tradition of pervasive government regulation and the regulatory statute authorizing the search pre-

scribes specific rules to govern the manner in which the search is conducted. As a practical matter, a person involved in a closely regulated business or activity generally has a diminished expectation of privacy in the conduct of that business because of the degree of governmental regulation. The inspection scheme at issue here, designed to further the compelling safety interest of the government in regulating the use of motor vehicles on the State's public highways, provides assurances that the inspection will be reasonable. The mechanical areas of automobiles are subject to extensive and long-standing safety regulation and, therefore, there is only a diminished expectation of privacy in the mechanical areas of a vehicle, which necessarily yields to the State's legitimate public safety interests in determining all of the circumstances surrounding the death and the cause of the accident and in ensuring that the vehicle is not returned to the roadway in an unsafe condition when a fatal accident involving an automobile has occurred. Here, the rules remove the possibility that the inspection will be undertaken in an arbitrary manner: the safety inspection authorized by section 603 is only conducted in response to a particular event that calls into question the safe mechanical functioning of the vehicle, and it is the standard policy of the police department to uniformly conduct this mechanical inspection on every vehicle involved in an accident resulting in either serious physical injury or death. The scope of the intrusion was strictly tailored to a determination of whether any safety violations existing on the vehicle at the time of the accident could have contributed to its cause--the initial justification for the intrusion. The length of the intrusion, a two-day impoundment, although greater than the temporary detainment of automobiles normally associated with a stop for a routine traffic check, was not unreasonable as a matter of law.

Searches and Seizures--Warrantless Impoundment of Vehicle--Exigent Circumstances

(3) With respect to the warrantless impoundment and inspection of defendant's vehicle pursuant to Vehicle and Traffic Law § 603 after it was involved in a fatal accident, any exigency normally associated with the mobility of a vehicle was removed by its impoundment and thus could not justify the warrantless intrusion.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Searches and Seizures, §§ 77, 106, 199.

Vehicle and Traffic Law § 603; NY Const, art I, § 12.

US Const 4th Amend.

NY Jur 2d, Criminal Law, § 514.

ANNOTATION REFERENCES

See ALR Index under Search and Seizure.***536**

POINTS OF COUNSEL

John P. Courtney, Amagansett, for appellant.

I. The impounding of defendant's vehicle violated the rights guaranteed him under the 4th Amendment of the United States Constitution and under article I, § 12 of the New York State Constitution. *(People v Galak*, 81 NY2d 463;*New York v Belton*, 453 US 454;*California v Carney*, 471 US 386;*People v Blasich*, 73 NY2d 673;*People v Yancy*, 86 NY2d 239;*People v Belton*, 55 NY2d 49;*South Dakota v Opperman*, 428 US 364;*People v Class*, 63 NY2d 491, 67 NY2d 431.)

II. The warrantless search of defendant's vehicle two days after it had been impounded by the police violated the rights guaranteed him under the 4th Amendment of the United States Constitution and under article I, § 12 of the New York State Constitution. *(People v Milerson*, 51 NY2d 919;*People v Ready*, 61 NY2d 790;*People v Drayton*, 172 AD2d 849;*People v Allen*, 124 AD2d 1046;*Michigan v Tyler*, 436 US 499;*Colonnade Corp. v United States*, 397 US 72;*United States v Biswell*, 406 US 311;*People v Burger*, 67 NY2d 338;*Colorado v Bertine*, 479 US 367;*People v Galak*, 80 NY2d 715.)

88 N.Y.2d 534
(Cite as: 88 N.Y.2d 534, 670 N.E.2d 434)

James M. Catterson, Jr., District Attorney of Suffolk County, Riverhead *(Mary-Ellen Harkin* of counsel), for respondent.

I. The impoundment and performance of a safety inspection on respondent's vehicle was properly conducted pursuant to the mandates of Vehicle and Traffic Law § 603. *(People v Keta,* 79 NY2d 474, 185 AD2d 994;*South Dakota v Opperman,* 428 US 364;*People v Scott,* 63 NY2d 518;*South Dakota v Neville,* 459 US 553.)

II. The police-directed examination of appellant's brakes was clearly proper and not violative of the dictates of either State or Federal constitutional provisions, protecting the People from unreasonable searches and seizures; as there exists no reasonable expectation of privacy in the brakes of an automobile, any inspection thereof does not constitute a "search".*(Maryland v Macon,* 472 US 463; *California v Ciraola,* 476 US 207;*Rawlings v Kentucky,* 448 US 98;*Katz v United States,* 389 US 347; *People v Whitfield,* 81 NY2d 904;*Oliver v United States,* 466 US 170;*People v Scott,* 63 NY2d 518; *United States v Martinez-Fuerte,* 428 US 543; *People v Belton,* 55 NY2d 49;*People v Class,* 63 NY2d 491,475 US 106,67 NY2d 431.)

III. Appellant consented to have his vehicle impounded and a safety inspection performed. *(People v Gonzalez,* 39 NY2d 122;*People v Springer,* 92 AD2d 209;*Schneckloth v Bustamonte,* 412 US 218; *People v Kuhn,* 33 NY2d 203;***537***People v Yukl,* 25 NY2d 585;*People v Day,* 150 AD2d 595;*People v Hall,* 142 AD2d 735;*People v Anderson,* 42 NY2d 35;*People v Rodney P.,* 21 NY2d 1;*People v Torres,* 97 AD2d 802.)

OPINION OF THE COURT

Titone, J.

(1, 2) Defendant has been charged with the offense of operating a motor vehicle with inadequate brakes (Vehicle and Traffic Law § 375 [1]). He seeks to suppress evidence of the defective condition of his brakes which was obtained by police when his vehicle was impounded and inspected after being involved in a fatal accident. Defendant claims that the police lacked the authority to impound his vehicle and that the warrantless inspection of his brakes that yielded evidence of their defective condition constituted an illegal search and seizure in violation of the 4th and 14th Amendments to the United States Constitution and article I, § 12 of the New York State Constitution. We conclude that the police possessed the authority to impound the vehicle in order to comply with the investigatory and reporting duties imposed by Vehicle and Traffic Law § 603. We also hold that the warrantless inspection, which was limited to the vehicle's safety equipment that is normally subject to extensive government regulation and which was related in scope to the duty to investigate the facts surrounding an accident involving a death, did not offend the constitutional prohibitions against unreasonable searches and seizures.

I.

Defendant's vehicle was involved in a fatal accident with a bicyclist on August 23, 1993. At the accident scene, defendant was informed that the police were impounding the vehicle for a safety inspection. A mechanic employed by the Town of East Hampton inspected the vehicle on August 25, 1995 and completed a standard form Motor Vehicle Examination Report, in which he was asked to report, in a sworn statement, the condition of the following equipment on defendant's vehicle: the horn, windshield, wipers, brake pedal, headlights, tires, brakes, and steering. Significantly, the mechanic stated that he found "metal to metal contact" on the right rear brakes. Defendant was charged with the misdemeanor of operating a motor vehicle with inadequate brakes in violation of ***538**Vehicle and Traffic Law § 375 (1) based on the results of that safety inspection.[FN1]

FN1 Defendant was not charged with any offense in connection with the bicyclist's death.

Defendant moved to suppress the evidence on the

ground that the Vehicle and Traffic Law does not explicitly authorize the police to impound a vehicle to conduct a safety inspection after an accident involving personal injury. Defendant also claimed that the inspection of the vehicle without a warrant, probable cause or exigent circumstances constituted an illegal search in violation of the 4th and 14th Amendments to the United States Constitution and of article I, § 12 of the New York State Constitution.

At a *Mapp* hearing, Detective Reich testified that the damage to the vehicle and defendant's admission that he had collided with the bicycle led him to conclude that defendant's vehicle was the instrumentality that caused the victim's death and that the car should be impounded and held for an inspection to enable the police to comply with their accident investigating duties and reporting obligations dictated by Vehicle and Traffic Law § 603. Detective Reich testified that the impoundment was also necessary to avoid the potential destruction of evidence, given that defendant was known to be a mechanic, and that police department policy required impoundment in all automobile accidents that resulted in serious physical injury or death.

Justice Court suppressed the evidence obtained as a result of the safety inspection. The court held that evidence obtained pursuant to the investigation and reporting responsibility mandated by Vehicle and Traffic Law § 603--an "administrative inspection"--could not be utilized for purposes of a criminal prosecution. The court also ruled that the police failure to fully inform the defendant of his right to withhold his consent to the inspection effectively eradicated an otherwise valid consent and that the "exigent circumstances" exception to the warrant requirement could not be asserted after the impoundment of the vehicle. Finally, the court held that the car could not be seized based on a threshold probable cause showing because the police did not have reasonable cause to believe that defendant had committed a crime at the time of the accident.

On the People's appeal, a divided Appellate Term reversed the order granting the motion to suppress and denied the motion. ***539** The court ruled that the impoundment and inspection of the vehicle was properly performed pursuant to the mandates of Vehicle and Traffic Law § 603, that the examination of the brakes was not a "search" within the meaning of the 4th Amendment, and that defendant had consented to the impoundment and inspection of his vehicle. The court further concluded that defendant had not met his burden of proving that he had a legitimate expectation of privacy in the vehicle, especially where a death had resulted. Under such circumstances, the majority concluded that "it could be readily understood why a 'safety inspection' looking for anything that might constitute a malfunction on any part of the pickup truck was mandatory ... to avoid the possibility of a repetition thereof."

One Justice dissented on the ground that the safety inspection and examination of defendant's brakes was a "search" of a "hidden area" of a motor vehicle in which defendant enjoyed a reasonable expectation of privacy under the New York State Constitution. Thus, the dissent concluded that the warrantless search of the brakes was unjustified. A Judge of this Court granted defendant's application for leave to appeal, and we now affirm.

II.

(1) The initial question for this Court is whether the police had the authority to impound defendant's vehicle for a safety inspection after it was involved in the fatal accident. We conclude that Vehicle and Traffic Law § 603 implicitly grants the police the authority to impound vehicles for a safety inspection in order to fulfill their investigatory and reporting duties under the statute.

Vehicle and Traffic Law § 603 requires that whenever an accident resulting in injury to a person has been reported to the police within five days of its occurrence, the police "shall immediately investigate the facts, or cause the same to be investigated,

and report the matter to the commissioner [of Motor Vehicles] forthwith" (Vehicle and Traffic Law § 603 [1]) on a form prepared by the Commissioner (*id.*, § 604). The information transmitted from the police to the Commissioner must include, among other data, a description of the accident, the damage to the vehicles and their undercarriages, and a report on whether the vehicle operators were ticketed, arrested or charged with any violations (*see*, Department of Motor Vehicles ***540** Form MV-104A). FN2 The officer's determination of whether the vehicle was suffering from a safety defect at the time of the accident has obvious relevance in preparing the accident description and in reporting whether violations were issued to drivers of vehicles involved. FN3 The police reports are designed to serve several administrative functions, such as aiding the Commissioner of Motor Vehicles in promulgating regulations to enhance the safety of our roads (*see*, L 1973, ch 634, Bill Jacket, Mem of Chairman of Committee on Transportation, dated May 27, 1973), and assisting in the prompt resolution of personal injury and property damage claims against automobile owners and insurers arising from automobile collisions (*see*, Bill Jacket, L 1969, ch 517).

FN2 The following safety violations are delineated in the Vehicle and Traffic Law: bad brakes (Vehicle and Traffic Law § 375 [1]); unsafe tires (§ 375 [35] [c]); cracked or obstructed windshield (§ 375 [30]); inadequate muffler (§ 375 [31]) and improper headlights (§ 375 [2]).

FN3 A 1993 statistical report prepared by the Department of Motor Vehicles contained in the respondent's appendix indicates that information on the "apparent accident contributing factors" is compiled solely from State-wide police reports submitted to the Commissioner and that "defective brakes" is one among a number of mechanical defects on a vehicle that may be listed on a police accident report as a contributing cause of the accident.

Section 603 does not expressly authorize the police to remove the vehicle from the accident scene and impound it in order to complete the requisite investigation and report. However, that legislation "impose[s] a duty of investigation" (Bill Jacket, L 1969, ch 517, Mem of Motor Vehicle Commissioner Tofany to Governor's Counsel, dated May 5, 1969), and in turn, a proper investigation may require an inspection of the mechanical areas of the vehicle. As a practical matter, an inspection of a vehicle to determine whether any defects in its safety equipment constituted a contributing cause of the accident cannot reasonably be undertaken on the roadway where licensed mechanics and proper facilities and equipment are unavailable. Thus, we conclude that section 603 implicitly grants the police the authority to impound a vehicle in furtherance of their administrative mandate to fully investigate the cause of a fatal automobile accident, as well as to ensure the safety of those conducting the accident investigation (*see*, *South Dakota v Opperman*, 428 US 364, 368- 369).

(3) Having concluded that the police had implicit authority to impound the vehicle for a safety inspection, we turn our attention to a determination of whether the impoundment and inspection procedure, undertaken without the issuance of a ***541** warrant, violated the constitutional proscriptions against unreasonable searches and seizures (*see*,US Const 4th Amend; NY Const, art I, § 12). We agree with defendant that any exigency normally associated with the mobility of a vehicle (*see, e.g., People v Belton*, 55 NY2d 49, 54) was removed by its impoundment and thus could not justify the warrantless intrusion. Nonetheless, we conclude that the warrantless inspection was justified by other factors providing assurances that the initiation and scope of the search were reasonable.

The 4th Amendment of the United States Constitution and article I, § 12 of our State Constitution protect individuals " 'from unreasonable government intrusions into their legitimate expectations of

privacy' " (*People v Class*, 63 NY2d 491, 494, quoting *United States v Chadwick*, 433 US 1, 7). In determining whether a seizure and search is unreasonable, we must be satisfied that the governmental intrusion "was justified at its inception" and "was reasonably related in scope to the circumstances which justified the interference in the first place" (*Terry v Ohio*, 392 US 1, 20).

The requirement that the police, "whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure" (*Terry v Ohio*, 392 US 1, 20,*supra)* serves to ensure that a determination of the reasonableness of the search results from a neutral balancing of the need for the intrusion on the one hand and the severity of the invasion on an individual's legitimate expectation of privacy on the other (*id.*, at 19). The warrant requirement, traditionally applied "to searches undertaken to procure evidence of criminality" (*People v Scott*, 79 NY2d 474, 493) also extends to searches of private property undertaken by State agents in the furtherance of administrative or regulatory schemes *see also*, *Michigan v Tyler*, 436 US 499, 505).

Warrantless administrative searches may be upheld in the limited category of cases where the activity or premises sought to be inspected is subject to a long tradition of pervasive government regulation and the regulatory statute authorizing the search prescribes specific rules to govern the manner in which the search is conducted (*People v Scott*, 79 NY2d 474, 499,*supra*). As a practical matter, a person involved in a closely regulated business or activity generally has a diminished expectation of privacy in the conduct of that business because of the degree of governmental regulation. Because of the minimal expectation of privacy in a closely regulated business, warrantless searches of such conduct are considered "more ***542** necessary and less intrusive than such inspections would be if conducted on less heavily regulated businesses" (2 Ringel, Searches & Seizures, Arrests and Confessions, at 14-20 [2d ed]).

"Pervasive regulation" will only be found where the operations of an industry or activity are regulated by detailed governmental standards (*People v Scott*, 79 NY2d, at 499,*supra*). The requisite close regulation will not be found where governmental regulations impose "relatively nonintrusive obligations" on businesses or activities, such as the requirements that participants pay fees, register or report to governmental agencies (*id.*).

The additional requirement that the administrative search of a pervasively regulated activity be governed by specific rules designed "to guarantee the 'certainty and regularity of ... application' " (*id.*, at 499) serves to "provide either a meaningful limitation on the otherwise unlimited discretion the statute affords or a satisfactory means to minimize the risk of arbitrary and/or abusive enforcement" (*id.*, at 500). Together, these dual components of the "pervasively regulated business" exception to the administrative warrant requirement constitute "a constitutionally adequate substitute for a warrant" (*id.*, at 502) because they ensure that there is a compelling need for the governmental intrusion and that the search is limited in scope to that necessary to meet the interest that legitimized the search in the first place (*Terry v Ohio*, 392 US, at 19,*supra; see also*, *Michigan v Tyler*, 436 US, at 507,*supra*).

III.

(2) The justifications for dispensing with the warrant requirements in closely regulated businesses provide a useful analytical framework for our resolution of this case. The inspection scheme at issue here, designed to further the compelling safety interest of the government in regulating the use of motor vehicles on the State's public highways (*People v Ingle*, 36 NY2d 413, 419), provides similar assurances that the inspection will be reasonable. The mechanical areas of automobiles are subject to extensive and long-standing safety regulation analogous to that which has served to except pervasively regulated businesses from the administrative warrant requirement. New York drivers must sub-

ject their vehicles to annual inspections of their safety equipment by licensed mechanics before being granted the privilege of driving on our roadways (*see*,Vehicle and Traffic Law § 301; 15 NYCRR part 79).

Because of this extensive regulation of vehicular safety equipment, there is only a diminished expectation of privacy ***543** in the mechanical areas of a vehicle.[FN4] When a fatal accident involving an automobile has occurred, that minimal privacy expectation necessarily yields to the State's legitimate public safety interests in determining all of the circumstances surrounding the death and the cause of the accident (*People v Ingle*, 36 NY2d 413,*supra*) and in ensuring that the vehicle is not returned to the roadway in an unsafe condition. As one jurisdiction has noted in reaching a similar conclusion, "[s]ociety places great importance on learning all the circumstances of any motor vehicle accident resulting in death", and would not "recognize as objectively reasonable an expectation of privacy in the braking mechanism of a motor vehicle that had come into police possession following the death of a motorist on the highway" (*Commonwealth v Mamacos*, 409 Mass 635, 640, 568 NE2d 1139, 1142).

> FN4 Although constitutional protections against unreasonable government intrusions extend to searches of automobiles and seizures of their contents (*People v Class*, *supra; Terry v Ohio*, *supra*), there is generally "only a diminished expectation of privacy in an automobile" (*People v Scott*, 63 NY2d 518, 525, citing *United States v Martinez-Fuerte*, 428 US 543, 561). Drawing on precedent of the United States Supreme Court, this Court has explained that the reduced expectation of privacy in a vehicle is occasioned by the facts that "automobiles 'operate on public streets; ... are serviced in public places; ... their interiors are highly visible and they are subject to extensive regulation and inspection' " (*People v Belton*, 55 NY2d 49, 53, quoting *Rakas v Illinois*, 439 US 128, 154).

The rules governing the inspection at issue here also comport with 4th Amendment principles because they remove the possibility that the inspection will be undertaken in an arbitrary manner.[FN5] The safety inspection authorized by Vehicle and Traffic Law § 603 is only conducted in response to a particular event--an automobile accident resulting in personal injury or ***544** death--that calls into question the safe mechanical functioning of the vehicle. Uncontroverted hearing testimony also established that it is the standard policy of the East Hampton Police Department to uniformly conduct this mechanical inspection on every vehicle involved in an accident resulting in either serious physical injury or death. Thus, vehicles are not randomly or arbitrarily selected from the flow of traffic for enforcement of the inspection scheme at issue here (*cf.*, *People v Ingle*, 36 NY2d 413,*supra; People v Miller*, 52 AD2d 425, 431,*affd*43 NY2d 789).

> FN5 In *People v Ingle* (36 NY2d 413, *supra*), this Court discussed the reasonableness of "routine safety checks" undertaken by the State Police pursuant to Vehicle and Traffic Law § 390 in which the police temporarily detained vehicles to determine whether they were "being operated in compliance with the Vehicle and Traffic Law" (*id.*, at 415). The Court explained that the reasonableness of the stop must be measured by a balancing of the State's "vital and compelling interest in safety on the public highways" against the motorist's "general right to be free from arbitrary State intrusion on his freedom of movement even in an automobile" (*id.*, at 419). Noting that such stops are "limited seizure [s] within the meaning of constitutional limitations" (*id.*, at 419), the Court explained that the police must have "some

> valid reason, however slight" to single out a particular vehicle for an inspection to determine whether any equipment violations are present" (*id.*, at 416). While the Court determined that random traffic checks on the highways are also permissible, the Court concluded that those stops must be undertaken by " some system or uniform procedure, and not gratuitously or by individually discriminatory selection" (*id.*) to be reasonable in the constitutional sense.

The scope of the intrusion was also strictly tailored to a determination of whether any safety violations existing on the vehicle at the time of the accident could have contributed to its cause--the initial justification for the intrusion. This safety inspection, which included an examination of the brakes, wipers, windshield, and headlights was less extensive than that required to be conducted annually on all cars in this State (*see*,Vehicle and Traffic Law § 301; 15 NYCRR 79.3). The police and licensed mechanics are accorded no discretion in selecting the areas subject to examination and the mechanics must examine the vehicle according to standard protocol. The inspection is limited to mechanical parts of the vehicle and does not extend to the private areas of the car where personal effects would be expected to be contained and to which " different and more stringent rules apply" (*People v Ingle*, 36 NY2d 413, 421,*supra; see also, People v Class*, 63 NY2d 491, 495,*supra*).

The fact that the length of the intrusion here--a two-day impoundment--is greater than the temporary detainment of automobiles normally associated with a stop for a routine traffic check (*see*,Vehicle and Traffic Law § 390; *People v Ingle*, 36 NY2d 413,*supra*) does not change the result. The immediate and more extended seizure of the vehicle without a warrant in this case was justified to ensure that the police report to the Commissioner accurately reflected the condition of the safety equipment on the vehicle at the time of the accident. Indeed, the officers at the scene would have been remiss in their duties had they prematurely released the vehicle to defendant, an auto mechanic, prior to a full determination of the cause of the accident. The impoundment served to secure the accident condition of the vehicle from changes due to subsequent road use or even intentional tampering. Given that the police must ***545** employ licensed mechanics to conduct the safety inspection on the vehicle, the two-day delay in conducting the inspection-- which for safety and reliability reasons could not be conducted at the scene-- was not unreasonable as a matter of law.

On these facts, we are satisfied that the inspection of the braking mechanism on defendant's vehicle after its involvement in a fatal collision did not constitute an unreasonable search in the constitutional sense. Given our conclusion that this search was reasonable under the 4th Amendment, the evidence obtained through that inspection was properly held admissible by Appellate Term in this criminal prosecution (*People v Scott*, 79 NY2d, at 502, n 5, *supra).*

Accordingly, the order of Appellate Term should be affirmed.

Chief Judge Kaye and Judges Simons, Bellacosa, Smith, Levine and Ciparick concur.
Order affirmed.***546**

N.Y. 1996.
PEOPLE v QUACKENBUSH
88 N.Y.2d 534, 670 N.E.2d 434578647 N.Y.S.2d 1506021996 WL 390804999, 670 N.E.2d 434578647 N.Y.S.2d 1506021996 WL 390804999, 670 N.E.2d 434578647 N.Y.S.2d 1506021996 WL 390804999

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United States Constitution, 4th Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

New York Constitution, Article I

§12. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

(New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)