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## The Shrinking Window of Privacy: The Decision in Skinner and How it Opens Wider the Prying Eyes of Government

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# THE SHRINKING WINDOW OF PRIVACY: THE DECISION IN *SKINNER* AND HOW IT OPENS WIDER THE PRYING EYES OF THE GOVERNMENT

## I. INTRODUCTION

Rapid advances in the field of location-based technology have reached the point where accurately pinpointing an electronic device within only a few feet of its actual location is considered normal.<sup>1</sup> Apple technology now allows its users to track a lost or stolen iPhone with its free “Find My iPhone” application, which provides a road map to the phone’s precise location.<sup>2</sup> Smartphone global positioning system (“GPS”) advances have even prompted the question of whether smartphones are near surpassing standard GPS personal navigation devices.<sup>3</sup> GPS-enabled cell phones have allowed law enforcement to track suspects and fugitives with greater ease, and at a fraction of the cost of physical surveillance.<sup>4</sup> A popular method of tracking is to “ping” a target’s cell phone to locate the phone without a call being made.<sup>5</sup>

In assessing law enforcement’s use of real time GPS cell phone tracking, the Court of Appeals for the Sixth Circuit held in the 2012 case of *United States v. Skinner*<sup>6</sup> that the use of such technology was acceptable without a warrant because of the lack of a reasonable expectation of privacy.<sup>7</sup> The court made that determination based on the individual’s voluntary use of his cell phone and his travel on public roads.<sup>8</sup> It reasoned that the government made no physical contact with the individual’s phone, and its ability to use GPS technology at all stemmed from the individual obtaining a phone with those capabilities.<sup>9</sup>

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1. Suvi Ahonen et al., *Cellular Location Technology*, CELLO CONSORTIUM (May 11, 2001), [http://lyle.smu.edu/~rajand/courses/8377/papers/e911\\_recent.pdf](http://lyle.smu.edu/~rajand/courses/8377/papers/e911_recent.pdf).

2. Christina Ortiz, *Oh, I WILL Find My iPhone!*, DISCOVERY NEWS (Dec. 12, 2012, 3:53 PM), <http://news.discovery.com/tech/apps/oh-i-will-find-my-iphone-121212.htm>.

3. See, e.g., Fred Zahradnik, *Smartphone vs. Dedicated Car GPS (PND): Five Factors to Help You Decide*, ABOUT.COM, <http://gps.about.com/od/gpsproductoverview/a/smartphone-vs-dedicated-gps.htm> (last visited Jan. 29, 2013).

4. Eric Lichtblau, *Police Are Using Phone Tracking as a Routine Tool*, N.Y. TIMES (Mar. 31, 2012), [http://www.nytimes.com/2012/04/01/us/police-tracking-of-cellphones-raises-privacy-fears.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/04/01/us/police-tracking-of-cellphones-raises-privacy-fears.html?pagewanted=all&_r=0).

5. Denise Yost, *Cell Phone Pinging: Safe or Invasion of Privacy?*, NBC4I.COM (Nov. 13, 2012), <http://www.nbc4i.com/story/20750149/cell-phone-pinging-safe-or-invasion-of-privacy> (stating that pinging takes place when “cell phones send signals to nearby cell towers, and police can track those signals to the tower and track individual people—within a few feet of the signal”).

6. *United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012).

7. *Id.* at 781.

8. *Id.*

9. *Id.*

Unsurprisingly, many were—and continue to be—concerned following the court’s ruling<sup>10</sup> and have questioned the sharp increase in governmental surveillance powers without a probable cause justification.<sup>11</sup> As courts in many parts of the country seek to resolve similar issues, one is led to wonder what the future holds for the government’s use of location technology and when the Supreme Court will intervene.<sup>12</sup>

By allowing the government to induce a cell phone to emit GPS location information without acquiring a search warrant justified by a probable cause showing, the court in *United States v. Skinner* incorrectly asserted that there is no reasonable expectation of privacy in such information. The Supreme Court should address the issue and uphold the Fourth Amendment’s privacy guarantee.

Part II of this article details the background of the *Skinner* case and the Sixth Circuit’s reasoning for affirming Mr. Skinner’s conviction in the lower court. Part III examines how Fourth Amendment search and seizure law has adapted to ever-changing technology and assesses how the Supreme Court has balanced the privacy of individuals with the government’s pursuit of criminal activity. Part IV first analyzes the direction *Skinner* takes current law and the implications of moving in that direction. It then shows how *Skinner* expands the boundaries of unmonitored tracking by the government, and how such an expansion invites the potential for abuse. Part IV then presents suggested responses to *Skinner* by way of both Supreme Court action and federal congressional legislation. Finally, Part V concludes that privacy interests are among the most important in the Constitution, and that the holding in *Skinner* that there is no reasonable expectation of privacy in cell phone GPS data requires corrective action by the Court and Congress to protect the privacy interests affected.

## II. THE CASE: *UNITED STATES V. SKINNER*

### A. *Facts*

In 2006, a traffic stop in Flagstaff, Arizona, led to information detailing the operations of a high-level drug trafficking conspiracy orchestrated by James Michael West.<sup>13</sup> Police stopped and arrested Christopher S. Shearer, a courier for the conspiracy, on his way to deliver \$362,000 to the conspiracy leader’s marijuana supplier.<sup>14</sup> Shearer revealed to members of the Drug Enforcement Administration (“DEA”) the inner workings of the

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10. See Hanni Fakhoury, *To Make Sure Criminals Get No Location Privacy, the 6th Circuit Kills it for Everyone Else Too*, ELECTRONIC FRONTIER FOUNDATION (Aug. 15, 2012), <https://www EFF.org/deeplinks/2012/08/to-make-sure-criminals-get-no-location-privacy-6th-cir-kills-it-everyone-else-too>; Greg Nojeim, *Tracking Big Foot: Why GPS Location Requires a Warrant*, CENTER FOR DEMOCRACY & TECHNOLOGY (Aug. 17, 2012), <https://www.cdt.org/blogs/greg-nojeim/1708tracking-big-foot-why-gps-location-requires-warrant>; Julian Sanchez, *How a Drug Mule Named “Big Foot” Helped Create Terrible GPS Search Law*, ARSTECHNICA (Aug. 15, 2012, 4:00 PM), <http://www.arstechnica.com/tech-policy/2012/08/how-a-drug-mule-named-big-wolf-helped-create-terrible-gps-search-law/>.

11. Suzanne Choney, *ACLU Asks Court to Reconsider Cellphone Tracking Decision*, NBC NEWS (Sept. 5, 2012), <http://www.nbcnews.com/technology/aclu-asks-court-reconsider-cellphone-tracking-decision-978388>.

12. See, e.g., *In re The Application of the U.S. for an Order Directing a Provider of Elec. Comm’n Serv. to Disclose Records to the Gov’t*, 620 F.3d 304 (3rd Cir. 2010); *In re An Application of the U.S. for an Order Authorizing the Release of Historical Cell-site Info.*, 809 F. Supp. 2d 113 (E.D.N.Y. 2011).

13. *Skinner*, 690 F.3d at 775.

14. *Id.*

drug conspiracy and the operating methods that West employed.<sup>15</sup> He subsequently began working with DEA agents as a confidential informant, facilitating information to the agents about the conspiracy for a few months following his arrest.<sup>16</sup>

Agents learned from Shearer that beginning in 2001, the supplier would obtain marijuana from Mexico and then have couriers transport it to West in Tennessee.<sup>17</sup> The couriers would communicate with the supplier by way of pay-as-you-go cell phones under fake names, which they would throw away in favor of new ones from time to time.<sup>18</sup> A few months after Shearer's arrest, the agents intercepted communications between West and Shearer through phones subscribed under West's name.<sup>19</sup> By interception of those calls and direct conversations with Shearer, the agents discovered that West used a courier, later identified as Melvin Skinner, who drove trucks for money delivery and marijuana pick-up under the alias "Big Foot."<sup>20</sup> During the course of West's transactions with the supplier since 2001, Big Foot had frequently delivered money to the supplier in Arizona and transported large amounts of marijuana to West in Tennessee.<sup>21</sup>

Further interception of phone calls revealed that Big Foot had recently delivered a large sum of money to the supplier as payment for both past purchases and future drug transactions.<sup>22</sup> The calls also revealed that Big Foot planned to return to the supplier soon after to pick up drugs that West had purchased with the recent money delivery.<sup>23</sup> Big Foot was to meet the supplier in Tucson, Arizona, to pick up 900 pounds of marijuana on July 11, 2006.<sup>24</sup> Agents learned that he would be driving an RV and would be accompanied by his son, who would be driving a pickup truck.<sup>25</sup> After picking up the marijuana, Big Foot was to deliver it to West in Tennessee within a couple of days.<sup>26</sup>

By that time, agents had learned that West was using one phone to communicate with the supplier and a separate phone to communicate with Big Foot.<sup>27</sup> One day after Big Foot arrived in Tucson, authorities obtained a court order requiring the phone company to release information regarding the phone that they believed Big Foot was carrying, including real time GPS location and ping data.<sup>28</sup> Upon immediately pinging the phone, agents learned that it was not Big Foot's phone, but it belonged to West and was located at his residency in North Carolina.<sup>29</sup> By intercepting calls from West's phone and accessing his call records, the agents determined the specific number of the phone that Big Foot actually possessed and was using to communicate with West.<sup>30</sup> They then ob-

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15. *Id.*

16. *United States v. Skinner*, No. 3:06-CR-100, 2007 WL 1556596, at \*2-3 (E.D. Tenn. May 24, 2007).

17. *Skinner*, 690 F.3d at 775.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Skinner*, 690 F.3d at 775.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 776.

27. *Skinner*, 690 F.3d at 775.

28. *Id.* at 776.

29. *Id.*

30. *Id.*

tained a similar court order from a magistrate judge to gain GPS location and ping data from the phone in Big Foot's possession.<sup>31</sup>

By pinging Big Foot's phone, agents discovered that it was located in Tucson, Arizona, as they expected.<sup>32</sup> Continued pinging revealed that Big Foot departed from Tucson on July 14, 2006.<sup>33</sup> Two days later, when movement stopped near Abilene, Texas, authorities contacted a Texas DEA office and local agents were dispatched to the phone's location.<sup>34</sup> Upon arriving at the given location, the agents found both Big Foot's RV and his son's pickup truck.<sup>35</sup> The agents knocked on the RV door and spoke with the man believed to be Big Foot, but he refused to allow the agents to conduct a search of the vehicle.<sup>36</sup> Agents then had a local police officer bring a K-9 dog to the location, whose actions indicated that drugs were present.<sup>37</sup> Big Foot—now known to be Melvin Skinner—and his son, Samuel, were arrested after a search of the RV revealed over 1,100 pounds of marijuana, two cell phones, and two handguns.<sup>38</sup>

### B. Procedure

Following his arrest, Skinner was charged with multiple crimes, including conspiracy to distribute marijuana, possession with intent to distribute marijuana, conspiracy to commit money laundering, and aiding and abetting the attempt to distribute marijuana.<sup>39</sup> Skinner filed a motion to suppress evidence revealed in the search of the RV on the basis that the pinging of his phone was a warrantless search in violation of the Fourth Amendment.<sup>40</sup> Magistrate Judge H. Bruce Guyton presided over the hearing and concluded in his report and recommendation that Skinner's Fourth Amendment claim lacked merit.<sup>41</sup> He reasoned that Skinner had no reasonable expectation of privacy because the cell phone was actually subscribed to West under a fictitious name, its signals were knowingly exposed to the third-party phone company, and Skinner used the phone in criminal ventures.<sup>42</sup> In addition, he reasoned that Skinner did not have a reasonable expectation of privacy because he drove on, and possessed the cell phone on, public roads during the time that the DEA pinged the phone.<sup>43</sup> The district court accepted the report and recommendation in whole and denied Skinner's motion to suppress.<sup>44</sup>

Skinner filed a motion to reconsider in light of a recently released Sixth Circuit decision,<sup>45</sup> which the court granted.<sup>46</sup> After further review, however, the court found his

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31. *Id.*

32. *Skinner*, 690 F.3d at 776.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Skinner*, 690 F.3d at 776.

38. *Id.*

39. *Id.*

40. *Id.*

41. *United States v. Skinner*, No. 3:06-CR-100, 2007 WL 1556596, at \*20 (E.D. Tenn. May 24, 2007).

42. *Id.* at \*16-17.

43. *Id.* at \*17.

44. *Id.* at \*1.

45. *United States v. Skinner*, No. 3:07-CR-89, 2007 WL 4223530, at \*1 (E.D. Tenn. Nov. 28, 2007). Skinner relied on the 2007 case, *United States v. Ellis*, which held that even if a defendant does not have a reason-

argument unpersuasive and admitted the prosecution's evidence.<sup>47</sup> The jury found Skinner guilty on all counts and the district court sentenced him to 235 months in prison.<sup>48</sup> Skinner then appealed to the Sixth Circuit, arguing in part that the GPS information obtained from his cell phone was a warrantless search in violation of the Fourth Amendment.<sup>49</sup>

### C. *Holding*

On appeal to the Sixth Circuit, the court upheld Skinner's conviction, finding no Fourth Amendment violation on the basis that Skinner did not have a reasonable expectation of privacy.<sup>50</sup> The court compared the data emissions from the cell phone to any other information emitted from the tools of a criminal, such as his scent for dogs to track or a license plate number from a getaway car,<sup>51</sup> and reasoned that advances in technology should not change that rationale.<sup>52</sup> If criminals are allowed to make use of modern technology, the court explained, law enforcement should be allowed to use technology to the same degree.<sup>53</sup>

The court analogized Skinner's situation to that of *United States v. Knotts*,<sup>54</sup> where police placed a beeper in a drum of chloroform to track an individual and determine the location of his drug laboratory.<sup>55</sup> It reasoned that, like authorities following the beeper across public streets and highways in *Knotts*, agents tracked Skinner's phone across public roads, and then confronted him at a public rest stop.<sup>56</sup> Because he traveled publicly, authorities could have discovered the same information gained from pinging the cell phone by physical surveillance with a law enforcement vehicle following him on the roads.<sup>57</sup> The court implied that the GPS information acted only as a supplement used to simplify what the authorities could have otherwise accomplished by traditional surveillance.<sup>58</sup>

Continuing its analysis, the court used another example from *United States v. Forest*,<sup>59</sup> in which the DEA lost sight of a vehicle that it was physically following.<sup>60</sup> In that situation, the DEA had used cellular information to reestablish the location of the vehicle that it was tracking.<sup>61</sup> Applying *Forest*, the court noted that the determining factor is not

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ble expectation of privacy in his searched vehicle, he "may still challenge the stop and detention and argue that the evidence should be suppressed as fruits of illegal activity." *United States v. Ellis*, 497 F.3d 606, 612 (6th Cir. 2007) (citations omitted).

46. *Skinner*, 2007 WL 4223530, at \*1.

47. *United States v. Skinner*, No. 3:07-CR-89, 2008 WL 304861, at \*1 (E.D. Tenn. Jan. 31, 2008).

48. *United States v. Skinner*, 690 F.3d 772, 777 (6th Cir. 2012).

49. *Id.*

50. *Id.* at 775.

51. *Id.* at 777.

52. *Id.*

53. *Skinner*, 690 F.3d at 777-78.

54. *United States v. Knotts*, 460 U.S. 276 (1973).

55. *Skinner*, 690 F.3d at 777-78.

56. *Id.* at 778.

57. *Id.*

58. *Id.* at 777-78.

59. *United States v. Forest*, 355 F.3d 942 (6th Cir. 2004).

60. *Skinner*, 690 F.3d at 778.

61. *See Forest*, 355 F.3d at 947.

whether law enforcement is *capable* of physical surveillance at that given moment, but whether “visual observation was *possible* by any member of the public.”<sup>62</sup> The court dismissed Skinner’s argument that the DEA had never made physical surveillance at a time before pinging his phone by reinforcing that any member of the public could have observed his movements.<sup>63</sup> The court concluded that even though agents in *Knotts* and *Forest* made at least momentary visual contact before using electronic surveillance, it did not consider it a Fourth Amendment violation for agents in the present case to employ more efficient means to establish initial contact.<sup>64</sup>

The Sixth Circuit distinguished its decision from *United States v. Jones*<sup>65</sup>—the Supreme Court’s most recent decision involving the tracking of a vehicle with modern technology.<sup>66</sup> The Sixth Circuit reasoned that the Court in *Jones* based its condemnation of police action on the trespassing aspect of physically placing a tracking device on a suspect’s car, whereas the DEA partook in no such physical invasion in Skinner’s case.<sup>67</sup> Because no physical trespass occurred, the Sixth Circuit found that Skinner’s case fell outside the ambit of *Jones*, including the Supreme Court’s concerns about comprehensive tracking.<sup>68</sup> The Sixth Circuit distinguished the intrusiveness of the extended tracking over the course of weeks in *Jones* with the short-term monitoring of Skinner’s phone over the course of three days.<sup>69</sup> It concluded its reasoning by returning to the core of its argument that the authorities should not be punished for using efficient and cheaper methods of obtaining information, when the use of physical surveillance could have accomplished the same result.<sup>70</sup>

Judge Bernice B. Donald concurred in the judgment based on the good faith exception,<sup>71</sup> but disagreed with the majority’s holding that Skinner had no reasonable expectation of privacy.<sup>72</sup> She argued that the legitimacy of Skinner’s expectation of privacy rests on the emission of GPS data from cell phones in general, and not the kind of activity in which the phone’s possessor is engaged—be it criminal or otherwise.<sup>73</sup> Judge Donald applied the two-part test—which the majority did not directly refer to—used for determining the existence of a legitimate expectation of privacy, first introduced in *Katz v. United States*:<sup>74</sup> “[F]irst 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

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62. *Skinner*, 690 F.3d at 778-79 (quoting *Forest*, 355 F.3d at 951).

63. *Id.* at 779.

64. *Id.*

65. *United States v. Jones*, 132 S. Ct. 945 (2012).

66. *See id.* at 947 (stating that law enforcement tracked a suspect by attaching a GPS device to the underside of his vehicle).

67. *Skinner*, 690 F.3d at 779-80.

68. *Id.* at 780 (noting that the Sixth Circuit’s references to *Jones* characterized “comprehensive” tracking as monitoring that reveals a person’s every movement over the course of weeks).

69. *Id.*

70. *Id.*

71. The good faith exception allows the use of evidence at trial obtained from an unlawful search and seizure when officers had reasonable, good faith belief that they were acting legally. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 905-25 (1984).

72. *Skinner*, 690 F.3d at 784 (Donald, J., concurring).

73. *Id.* at 786.

74. *Katz v. United States*, 389 U.S. 347 (1967).

‘reasonable.’”<sup>75</sup> With regard to the first element of the test, Judge Donald reasoned that Skinner had a subjective expectation of privacy because the DEA used data from the cell phone in a way in which he did not think the phone was capable, indicating his belief that the data emitted would remain private.<sup>76</sup>

Based on the conclusions of many courts, Judge Donald addressed the second part of the test by stating that “privacy expectations are not diminished by the criminality of a defendant’s activities.”<sup>77</sup> She argued that situations where a person loses Fourth Amendment protection by actually possessing an item illegally were distinguishable from Skinner’s situation because his possession of the cell phone in and of itself was legal, despite his using it for criminal activity.<sup>78</sup> She analogized Skinner’s situation to the Sixth Circuit’s decision in *United States v. Bailey*,<sup>79</sup> in which the court reasoned that in situations where law authorities suspect that legally possessed items are being used for a criminal purpose, the proper method of action is to obtain a search warrant.<sup>80</sup> Though the majority did not specifically address the second part of the test, Judge Donald mentioned that its focus on Skinner’s criminal behavior manifested its conclusion.<sup>81</sup>

Judge Donald also found fault in the majority’s assertion that the information used to follow Skinner could have been obtained by visual surveillance as well.<sup>82</sup> Judge Donald argued that although the public could have observed Skinner generally, it would not have known what activity it was observing.<sup>83</sup> She distinguished the majority’s use of the *Knotts* and *Forest* cases, noting that unlike the authorities in those cases who used location information only after initiating physical surveillance of the suspects, the DEA in *Skinner* had conducted no previous physical observation.<sup>84</sup> Judge Donald explained that the “[a]uthorities did not know the identity of their suspect, the specific make and model of the vehicle he would be driving, or the particular route by which he would be traveling.”<sup>85</sup> She concluded that the DEA’s inability to have obtained any of that information without first pinging Skinner’s cell phone constituted further reason to find that there is a legitimate expectation of privacy in a cell phone’s GPS data.<sup>86</sup>

### III. LEGAL BACKGROUND: EVOLUTION OF FOURTH AMENDMENT LAW AND TECHNOLOGY

#### A. *The Beginnings*

Search and seizure law in the United States originates from the Fourth Amendment to the Constitution, which states: “The right of the people to be secure in their persons,

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75. *Id.* at 361 (Harlan, J., concurring).

76. *Skinner*, 690 F.3d at 784 (Donald, J., concurring).

77. *Id.* at 785.

78. *Id.*

79. *United States v. Bailey*, 628 F.2d 938 (6th Cir. 1980).

80. *See id.* at 944.

81. *Skinner*, 690 F.3d at 784 (Donald, J., concurring).

82. *Id.* at 786.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Skinner*, 690 F.3d at 786 (Donald, J., concurring).



houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”<sup>87</sup> As evidenced by the four searchable items listed in the Fourth Amendment, the historical purpose of the amendment was to curtail the government’s physical invasion of a person or his property.<sup>88</sup> That concept has evolved in the courts, with the Supreme Court importantly noting in *Boyd v. United States*<sup>89</sup> that “[i]t 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 scrutiny, personal liberty, and private property . . . .”<sup>90</sup> In *Boyd*, the government, acting pursuant to a statute, sought to force production of a man’s private papers to use against him in a criminal case.<sup>91</sup> The Court found that the government’s apprehension of the papers was an invasion of privacy, reasoning that it is the liberty and security of the person that the Fourth Amendment seeks to protect.<sup>92</sup> The Court’s reasoning suggested that the policy behind the argument was to avoid the masses of innocent people having to sacrifice their privacy to curtail the actions of the guilty few.<sup>93</sup>

The advance of technology, including the ability to intercept telephone communications, forced the Court to analyze searches through a different lens than the founding fathers had envisioned in *Olmstead v. United States*.<sup>94</sup> The Court shied away from technology early on, allowing wiretapping of telephones in *Olmstead* because that communication did not fit neatly within the listed rights of security in the Fourth Amendment.<sup>95</sup> Confronted with a wired communication transmitted far away from its origination in the sender’s home, the *Olmstead* Court concluded that a violation of the amendment did not exist unless an actual entry or invasion of tangible items occurred.<sup>96</sup> The Court noted that although it previously likened the protections of the Fourth Amendment to an interest in liberty in the *Boyd* case,<sup>97</sup> it could not justify allowing that expanded understanding of the amendment to apply to wiretapping.<sup>98</sup>

While the *Olmstead* majority temporarily shut the door on technology entering the realm of the Fourth Amendment, Justice Brandeis’s dissent envisioned treatment of the Fourth Amendment in a less literal manner, revolving more around the privacy of the individual.<sup>99</sup> He argued that the Court should consider not only the technology that existed at the creation of the amendment, but also the technology that currently exists and that which may exist in the future.<sup>100</sup> Justice Brandeis recognized that at the time of the

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87. U.S. CONST. amend. IV.

88. *See id.*

89. *Boyd v. United States*, 116 U.S. 616 (1886).

90. *Id.* at 630.

91. *Id.* at 622.

92. *See id.* at 630.

93. *See id.* at 629.

94. *See Olmstead v. United States*, 277 U.S. 438, 462-69 (1928).

95. *Id.* at 466.

96. *Id.* at 464-66.

97. *Boyd*, 116 U.S. at 630.

98. *Olmstead*, 277 U.S. at 465.

99. *See id.* at 471-85 (Brandeis, J., dissenting); *see also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (detailing Justice Brandeis’ broad theory on the magnitude of the privacy of the individual).

100. *Olmstead*, 277 U.S. at 472-74 (Brandeis, J., dissenting).

Fourth Amendment's creation, "force and violence" were the only methods by which the government could invade privacy, but he believed that using the inventions of the time and those to come in order to expose private behaviors is no less invasive.<sup>101</sup> In fact, he had the forethought that science would one day allow the government to explore and reproduce the "most intimate occurrences of the home" without physical invasion.<sup>102</sup>

### B. *Setting the Foundation for Modern Law*

The Fourth Amendment requires that warrants may only be issued "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>103</sup> The latter years of the 1960s marked a time of great significance for the Supreme Court, featuring many landmark decisions that bear great weight on modern Fourth Amendment jurisprudence.<sup>104</sup> Included within that period are two that addressed the probable cause requirement of the Fourth Amendment and laid the groundwork for modern search and seizure law.<sup>105</sup> The first case, *Berger v. New York*,<sup>106</sup> confirmed that the Court had rendered the *Olmstead* decision obsolete and that wiretapping fell directly within Fourth Amendment protections, despite no physical entry into the home.<sup>107</sup>

In *Berger*, the use of covert microphones, more commonly known as "bugs," revealed that Berger had been acting as a go-between to obtain liquor licenses for New York City clubs by paying off the state authority.<sup>108</sup> The prosecution used recordings from the bugs as evidence to convict Berger for conspiracy to commit bribery.<sup>109</sup> At that time, New York had a statute in place that allowed such eavesdropping upon receipt of a court order.<sup>110</sup> To obtain a court order—as added in an amendment to the New York Constitution—police were only required to show "reasonable ground to believe that evidence of crime may be thus obtained . . ."<sup>111</sup> The Court found the statute satisfactory in that it removed the decision to eavesdrop from the potentially biased hands of law enforcement and required approval by a neutral and detached authority, but found that its probable cause requirement fell short of the Fourth Amendment standard.<sup>112</sup> The *Berger* Court reasoned that the New York statute failed to meet probable cause requirements because it lacked specificity in not requiring "*belief* that any particular offense has been or

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101. *Id.* at 473.

102. *Id.* at 474.

103. U.S. CONST. amend. IV.

104. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (extending First Amendment protection to Vietnam War black armband protests); *Loving v. Virginia*, 388 U.S. 1 (1967) (finding a Virginia state ban on interracial marriage unconstitutional); *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring law enforcement to advise a suspect of his or her rights prior to questioning); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (extending the Twenty-fourth Amendment to the states).

105. *See Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1967).

106. *Berger*, 388 U.S. 41.

107. *See id.* at 50-51. In fact, Congress had outlawed wiretapping without authorization as part of the Communications Act of 1934, not long after *Olmstead*. Federal Communications Act of 1934, Pub. L. No. 73-416, § 605, 48 Stat. 1064, 1103 (1934) (current version codified at 47 U.S.C. § 605 (2012)).

108. *See Berger*, 388 U.S. at 44-45.

109. *See id.*

110. *Id.* at 45.

111. N.Y. CONST. art. I, § 12.

112. *See Berger*, 388 U.S. at 54-55.

is being committed.”<sup>113</sup> The Court found that law enforcement’s widespread use of bugs to eavesdrop, as well as the broad invasion of privacy that their use entailed, made it the courts’ responsibility to supervise their use with a close-watching eye.<sup>114</sup>

By the time the Supreme Court decided *Berger*, members of the Court had already displayed sensitivity to technological advances chipping away at the privacy of individuals.<sup>115</sup> Chief Justice Warren’s statement only four years prior to *Berger*, that “fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual,” proved true at many points in time as technology continued to expand.<sup>116</sup> Justice Brennan also warned of the ramifications of unmonitored technological invasions, noting that “[i]f electronic surveillance by government becomes sufficiently widespread, and there is little in prospect for checking it, the hazard that as a people we may become hagridden and furtive is not fantasy.”<sup>117</sup>

Only months after deciding *Berger*, the Court issued its landmark *Katz v. United States*<sup>118</sup> decision, setting a new paradigm for the way courts examine search and seizure cases.<sup>119</sup> The Court shifted its focus to the privacy of the individual, reasoning that the designs of the Fourth Amendment are to protect people, not places.<sup>120</sup> *Katz* originated from the FBI recording and listening to a man’s calls from a public telephone booth without first obtaining a warrant.<sup>121</sup> With the use of those calls as evidence, a district court convicted the man for illegal interstate betting over the phone.<sup>122</sup> His argument on appeal to the Supreme Court framed the case as an issue of whether the telephone booth was a constitutionally protected area and whether physical invasion was required to find a violation.<sup>123</sup> In making its monumental shift to people and away from places, the Court rejected the petitioner’s suggestion that it determine whether a physical invasion of a protected area took place.<sup>124</sup> It instead chose to analyze the situation based on what a person “seeks to preserve as private,” regardless of whether the area is accessible to the public.<sup>125</sup> With the government claiming that the telephone booth’s glass exterior caused a lack of privacy, the Court further developed its rationale that the significant determination is the assumption of privacy that a person may have in a given situation.<sup>126</sup> It also rejected the government’s claim that no physical invasion took place, making a clear departure from an analysis that looked only for a physical trespass.<sup>127</sup>

Having set a new standard of review for privacy violations, the Court found that a

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113. *Id.* at 58 (emphasis added).

114. *See id.* at 56.

115. *See e.g.*, *Lopez v. United States*, 373 U.S. 427 (1963); *Silverman v. United States*, 365 U.S. 505 (1961).

116. *Lopez*, 373 U.S. at 441 (Warren, J., concurring).

117. *Id.* at 470 (Brennan, J., dissenting).

118. *Katz v. United States*, 389 U.S. 347 (1967).

119. *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 820 (2004) (noting the significance and impact of *Katz*).

120. *See Katz*, 389 U.S. at 353.

121. *See id.* at 348.

122. *Id.*

123. *Id.* at 349-50.

124. *Id.* at 350.

125. *See Katz*, 389 U.S. at 351.

126. *See id.* at 352.

127. *Id.* at 352-53.

search within the meaning of the Fourth Amendment took place when the government recorded the petitioner's phone calls, based on the "privacy upon which he justifiably relied . . ." <sup>128</sup> The Court noted that because of the strong possibility of criminal activity taking place and the limited search of only the petitioner's phone calls for the limited purpose of discovering that specific criminal activity, a federal court could have justifiably found the existence of probable cause and authorized a search warrant. <sup>129</sup> The government, however, did not seek the authorization of a court and made the determination of probable cause on its own, thus defeating the purpose of involving an objective decision-maker in the process. <sup>130</sup> The Court added that searches without approval by a judge or magistrate are "per se unreasonable," with only a few specific exceptions, none of which applied in *Katz*. <sup>131</sup>

In analyzing whether an unreasonable search has taken place, courts often cite the language of Justice Harlan's concurrence in *Katz* that set forth the test for determining whether the asserted privacy interest warrants protection: "[F]irst 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.'" <sup>132</sup> Once the defendant satisfies this two-part test, a search of the constitutionally protected area or information is unreasonable unless granted by a search warrant that is justified by probable cause. <sup>133</sup> While the Court may have taken gradual steps away from the trespass requirement prior to *Katz*, its opinion in that case had the desired effect of drastically hastening the transition. <sup>134</sup> The Court's shift to a privacy analysis allowed individuals to seek society's blessing when attempting to protect their actions from intrusion. <sup>135</sup> In doing so, however, it left open much ambiguity about when exactly society may yield its "reasonable expectation" stamp of approval. <sup>136</sup> That gray area forces the courts to view ongoing advancements in surveillance technology—including cell phone GPS tracking—in the same line of thought as what society views as reasonable. <sup>137</sup>

Only four years after its decision in *Katz*, the Court offered at least some appeasement to critics of its expanded search definition by tugging back on the reigns of privacy in *United States v. White*. <sup>138</sup> In *White*, government agents listened in on conversations between the defendant and an informant upon whom they had planted a hidden radio transmitter. <sup>139</sup> They then used recordings of those conversations as primary evidence to

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128. *Id.* at 353.

129. *Id.* at 354-56.

130. *See Katz*, 389 U.S. at 356-57.

131. *Id.* at 357-58.

132. *Id.* at 361 (Harlan, J., concurring).

133. *See id.* (Harlan, J., concurring).

134. *See* David A. Sullivan, *A Bright Line in the Sky? Toward a New Fourth Amendment Search Standard for Advancing Surveillance Technology*, 44 ARIZ. L. REV. 967, 973 (2002) (asserting that *Katz* "abruptly abandoned" both English common law and the Trespass Doctrine).

135. *Katz*, 389 U.S. at 361-62 (Harlan, J., concurring).

136. *See, e.g.*, Courtney E. Walsh, *Surveillance Technology and the Loss of Something a Lot Like Privacy: An Examination of the "Mosaic Theory" and the Limits of the Fourth Amendment*, 24 ST. THOMAS L. REV. 169, 188-190 (2012) (suggesting that clarity was still lacking when changes in "space, position, darkness, and time" could give an expectation of privacy to even the most traditionally public areas).

137. *See id.* at 191.

138. *United States v. White*, 401 U.S. 745 (1971).

139. *See id.* at 746-47.

obtain a conviction for narcotics transactions against the defendant.<sup>140</sup> Although *Katz* had stretched the boundaries of a search, the Court found that this form of eavesdropping still fell outside those boundaries.<sup>141</sup> It explained that it did not doubt that the defendant maintained a subjective expectation of privacy, but that expectation is not justifiable when combined with the knowledge that any colleague could easily turn into a police informer.<sup>142</sup> The Court's reasoning suggested that a person's objective claim to privacy falters when he *voluntarily* communicates to another, and he should at least be aware of the risks of such voluntary action.<sup>143</sup> It added that the radio transmitter was only a more effective means of communicating what the informant could have repeated from memory or written down to reveal later.<sup>144</sup>

After celebrating the Supreme Court's breakthrough decision in *Katz*, strong Fourth Amendment privacy supporters have been critical of the Court's sidestepping decision in *White*.<sup>145</sup> After concurring in *Katz*, Justice Douglas issued a strong warning regarding technology's potential for government invasion of privacy in his dissent in *White*.<sup>146</sup> In light of advancing technology—still in its dinosaur age compared to what would exist forty years later—he referenced Arthur R. Miller's view that with “the advancing state of both the remote sensing art and the capacity of computers to handle an uninterrupted and synoptic data flow, there seem to be no physical barriers left to shield us from intrusion.”<sup>147</sup> He further suggested that the manner in which the Court reconciled privacy with current technology was critically lacking in its appreciation for the advancing state of that area.<sup>148</sup> Although in the minority in *White*, Justice Douglas would prove wise in his reference to Miller and his warnings of technological advances pressing on privacy.<sup>149</sup>

### C. *The Modern Landscape and the Law's Coexistence with New Technology*

The Supreme Court's balancing act between technology and the Fourth Amendment began anew in the 1980s when it confronted law enforcement's use of technology to track suspects in *United States v. Knotts*.<sup>150</sup> In *Knotts*, a chemical manufacturing company alerted authorities about a former employee who had stolen chemicals during his

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140. *Id.*

141. *See id.* at 751-54.

142. *Id.* at 752-53.

143. *See White*, 401 U.S. at 752.

144. *Id.* at 753.

145. *See, e.g.,* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1511-14 (1996) (noting that some scholars complain that the Court gives weight to a defendant's guilt when determining if a search took place, rather than doing so independently); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1252-54 (1983) (arguing that the Court's rationale is much harder to justify when viewed through the lens of an innocent person, instead of focusing on the perspective of the defendant already known to be guilty).

146. *See White*, 401 U.S. at 756-65 (Douglas, J., dissenting).

147. *Id.* at 757 (Douglas, J., dissenting) (quoting ARTHUR R. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* 46 (1971)).

148. *See id.* at 757-58 (Douglas, J., dissenting).

149. *See generally* Alex Kozinski & Stephanie Grace, *The (Continued) Assault on Privacy: A Timely Book Review Forty Years in the Making*, 90 OR. L. REV. 1135 (2012) (looking back on Arthur Miller's 1971 observations and predictions about the loss of informational privacy due to technology).

150. *See United States v. Knotts*, 460 U.S. 276 (1983).

employment that could be used to manufacture drugs and who later began purchasing similar chemicals from another company.<sup>151</sup> Authorities began observing the suspect and discovered that he was delivering chemicals to another individual after purchasing them.<sup>152</sup> With permission of the company from which the suspect was purchasing the chemicals, authorities placed a radio transmitting “beeper” inside a chloroform container, which the company sold to the suspect upon his next purchase.<sup>153</sup> After the suspect purchased the chloroform, authorities observed him transferring the container to another individual’s vehicle, and the authorities began physically following the second individual while monitoring the beeper signals.<sup>154</sup> The individual began driving evasively after apparently becoming aware of the surveillance, prompting authorities to cease physical monitoring, which in turn caused them to lose the beeper signal as well.<sup>155</sup> Authorities used a helicopter to relocate the beeper signal about an hour later and subsequently discovered that the container had stopped moving and was located in the area of a lakeside cabin.<sup>156</sup> After three days of visually monitoring the cabin, authorities obtained a search warrant for the cabin, which revealed a full-scale drug laboratory.<sup>157</sup>

Considering authorities’ warrantless use of the beeper, the Supreme Court found such use proper under the Fourth Amendment because the individual had no legitimate expectation of privacy while traveling on public roads.<sup>158</sup> The Court reasoned that use of the beeper only aided that which was already publicly viewable.<sup>159</sup> It noted that a police officer “could have observed him leaving the public highway and arriving at the cabin . . . .”<sup>160</sup> The Court also noted that surveillance of the beeper did not reveal anything about movement of the container within the interior of the cabin, which was not publicly viewable.<sup>161</sup> The Court did, however, offer hope for curtailing the potential for law enforcement to abuse its use of discretion with future technologies by stating, “if such dragnet type law enforcement practices . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.”<sup>162</sup>

Only two years later, the Court decided another case involving beeper surveillance

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151. *Id.* at 278.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Knotts*, 460 U.S. at 278.

156. *Id.*

157. *Id.* at 279.

158. *See id.* at 281-84.

159. *See id.* at 285.

160. *Knotts*, 460 U.S. at 285. Critics of *Knotts* point to the dangers of the Court’s hypotheticals about what law enforcement *could* do with their human capabilities, when the reality to observe is what they *did* do with capabilities augmented by technology. *See, e.g.*, Tracey Maclin, Katz, Kyllo, and *Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 *MISS. L.J.* 51, 85-87 (2002) (suggesting that the Court’s “hypothetical” proposition gives little weight to the “financial, personnel and political restraints” that law enforcement surveillance methods face); Richard H. McAdams, *Tying Privacy in Knotts: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 *VA. L. REV.* 297, 317 (1985) (arguing that the effects of beeper monitoring should be considered, because from the perspective of an individual subject “electronic tracking is merely the equivalent of conventional tailing,” but it “may facilitate a higher frequency of surveillance, and its technological nature may generate greater societal anxiety.”).

161. *Knotts*, 460 U.S. at 285.

162. *Id.* at 284.

in *United States v. Karo*<sup>163</sup> that allowed it to address issues left unresolved by *Knotts*.<sup>164</sup> In *Karo*, the DEA placed a beeper in a shipment of ether that three men had ordered from a government informant to use for extracting cocaine from clothing.<sup>165</sup> When one of the men picked up the ether, agents followed him using the beeper along with physical surveillance to his house.<sup>166</sup> Over the course of a few days, agents used the beeper to track the transfer of the ether to two other houses and then a commercial storage facility.<sup>167</sup> A few weeks later, one of the men removed the ether while managing to avoid setting off an entry alarm that agents had placed in the storage facility locker.<sup>168</sup> Using the beeper, agents tracked the ether to another storage facility where, over three months later, agents viewed—by way of an installed video camera—a man and woman removing the ether from the facility.<sup>169</sup> Using both the beeper and visual physical surveillance, agents followed the ether to a home where, after obtaining a warrant, they discovered the cocaine.<sup>170</sup>

Addressing whether the DEA's placing of the beeper in the ether violated the rights of those that had transported it, the Supreme Court first ruled that there could be no expectation of privacy in an item that is not yet in the individual's possession.<sup>171</sup> The Court went on to find that a beeper's use does constitute a search when its location has been removed from public view.<sup>172</sup> The reasoning of the Court suggests that when authorities cannot locate a tracking device by visual means, its use goes beyond the "augmentation" theory that the Court submitted in *Knotts*.<sup>173</sup> In that regard, the Court found that information that the beeper revealed about the ether's location within a private residence fell under Fourth Amendment protection because the authorities could not have confirmed that information visually.<sup>174</sup> The Court concluded, however, that enough information existed from monitoring the beeper through areas within the public eye to justify the search warrant that led to discovery of the cocaine;<sup>175</sup> therefore, the Court held that the trial court properly admitted the evidence.<sup>176</sup>

Moving into the twenty-first century, the Supreme Court quickly tackled a Fourth Amendment issue involving technology in *Kyllo v. United States*<sup>177</sup> that the likes of Thomas Jefferson and Benjamin Franklin could not have foreseen.<sup>178</sup> While the Court's back and forth reactions to new technology may induce a Fourth Amendment seasick-

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163. *United States v. Karo*, 468 U.S. 705 (1984).

164. *Id.* at 707.

165. *Id.* at 708.

166. *Id.*

167. *Id.*

168. *Karo*, 468 U.S. at 708-09.

169. *Id.* at 709.

170. *See id.* at 709-10.

171. *See id.* at 711-13.

172. *Id.* at 717-18.

173. *See Karo*, 468 U.S. at 717-18.

174. *Id.* at 715-17.

175. *Id.* at 719.

176. *Id.* at 721.

177. *Kyllo v. United States*, 533 U.S. 27 (2001).

178. *Kyllo* was the first case to place thermal imaging technology at issue before the Supreme Court. *See id.* at 29-30.

ness for some, Professor Orin Kerr's "equilibrium-adjustment" theory suggests that the Court is only adjusting to new facts so that it may "restore the status quo level of protection."<sup>179</sup> In *Kyllo*, the Court combated the government's use of new thermal imaging technology to detect potential criminal activity with heightened Fourth Amendment protection.<sup>180</sup>

The *Kyllo* case originated from the suspicions of a government agent that an individual, *Kyllo*, was growing marijuana in his home.<sup>181</sup> Because of the lack of sunlight, growing marijuana indoors requires the use of powerful lighting to facilitate growth.<sup>182</sup> To detect whether the house contained such lighting, agents used an Agema Thermo-vision 210 thermal imaging device to scan *Kyllo*'s home.<sup>183</sup> The scan revealed certain areas of the home that were much warmer than others, and were much warmer than neighboring homes as well.<sup>184</sup> The agents used information gained from local law enforcement and *Kyllo*'s utility records, which indicated abnormally high electricity usage, in accompaniment with the thermal imaging scans to obtain a search warrant from a magistrate judge.<sup>185</sup> The resulting search of the home revealed large-scale marijuana growth and over 100 plants.<sup>186</sup> Both the district court and the Ninth Circuit denied *Kyllo*'s motion to suppress evidence gained from the thermal imaging scans, which led him to enter a conditional guilty plea for manufacturing marijuana.<sup>187</sup>

Justice Scalia delivered the opinion of the Supreme Court in *Kyllo*, holding that the thermal imaging scans constituted an unreasonable search and, therefore, were impermissibly considered as evidence to justify the search warrant.<sup>188</sup> The Court acknowledged that the agents viewed *Kyllo*'s home from a public location, but explained that their view of the home consisted of "more than naked-eye surveillance . . ."<sup>189</sup> It reasoned that the agents could not have obtained the information otherwise without intrusion into the home, which is the most private of all constitutionally protected areas.<sup>190</sup> The Court aptly compared the use of thermal imaging to capture heat emitted from inside

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179. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 478 (2011) (introducing his theory of equilibrium-adjustment and concluding that judicial delay is essential to its employing it successfully).

180. *See Kyllo*, 533 U.S. at 40.

181. *Id.* at 29.

182. *Id.*

183. Thermal imaging devices detect the emission of infrared radiation and convert the radiation into a picture that depicts the heat emitted from an object by displaying different colors for varying degrees of warmth. *Id.* at 29-30. Though a particularly invasive method was curtailed under Fourth Amendment protection in *Kyllo*, law enforcement's use of thermal imaging has expanded in many ways—some undoubtedly beneficial, some questionable—in the years since. *See, e.g.*, Brad Harvey, *Top 10 Uses for Thermal Imaging in Law Enforcement*, TACTICAL RESPONSE MAGAZINE (June 2006), [http://www.bullard.com/V3/products/thermal\\_imaging/law\\_enforcement/training/articles/0002.php](http://www.bullard.com/V3/products/thermal_imaging/law_enforcement/training/articles/0002.php) (listing ways for law enforcement to use thermal imaging to perform their job with more efficiency and safety); *New Thermal Imaging System Could Help Detect Drunk People*, CBS SEATTLE (Sept. 12, 2012, 10:26 AM), <http://seattle.cbslocal.com/2012/09/12/new-thermal-imaging-system-could-help-detect-drunk-people/> (describing a very new and most interesting method of thermal imaging use).

184. *Kyllo*, 533 U.S. at 30.

185. *See United States v. Kyllo*, 190 F.3d 1041, 1043-44 (9th Cir. 1999).

186. *Kyllo*, 533 U.S. at 30.

187. *Id.* at 30-31.

188. *Id.* at 40-41.

189. *Id.* at 33.

190. *See id.* at 34.



a house blocked from sight to the situation in *Katz*, where a device captured sound emitted from a phone booth that otherwise blocked the ability to hear its user's voice from the outside.<sup>191</sup>

The *Kyllo* Court went on to reject the government's argument that prohibition of thermal imaging should be limited to "intimate details."<sup>192</sup> The Court provided two lines of reasoning: first, that all details of the home are intimate; and second, that application of a rule distinguishing between intimate and nonintimate details would be impracticable.<sup>193</sup> It reasoned that distinguishing between intimate and nonintimate areas would be impracticable because the intimacy of an area in the home may very well change based on the time of day, the one that owns or resides in the home, and the sophistication of the technology employed.<sup>194</sup> The Court also noted that when a device that is not in "general public use" is utilized to discover otherwise unknowable details, it is presumptively an unreasonable search.<sup>195</sup> In furtherance of an expectation that all characteristics of the inside of a home are free from government viewing, the Court stated that the Fourth Amendment draws "a firm line at the entrance to the house."<sup>196</sup>

The key point in the *Kyllo* opinion, for the purposes of application to *Skinner*, is the Court's notion that law enforcement would not know if it were accessing intimate details in advance if such a standard dictated constitutionality.<sup>197</sup> The Court also reasoned that applying a rule that draws a firm line benefits law enforcement along with people in their homes.<sup>198</sup> The privacy benefits to those in their homes are clear, and a precise standard provides law enforcement the predictability of knowing which specific instances will—or will not—require a warrant.<sup>199</sup> The *Kyllo* Court's denial of testing a search retroactively falls in line with the idea that the Fourth Amendment protects the exposure of innocent persons' privacy by relying on the exposure first being justified with the probability of criminal activity.<sup>200</sup> Attempting to detect criminal behavior without advance knowledge of whether the area is an intimate one would come at the expense of also exposing many legal—yet still uncomfortable before the public eye—acts, whose actor could be an innocent person.<sup>201</sup>

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191. See *Kyllo*, 533 U.S. at 35-36.

192. See *id.* at 37-39. The argument stemmed from the Court's holding in *Dow Chemical* that the enhanced aerial photography of an industrial complex did not violate the Fourth Amendment because it did not reveal "intimate details." *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986). The comparison to *Dow Chemical* failed, as noted by the Court, because an industrial complex is greatly lacking in the privacy associated with a residence. See *Kyllo*, 533 U.S. at 37.

193. *Kyllo*, 533 U.S. at 37-38.

194. See *id.* at 38-39.

195. See *id.* at 40.

196. *Id.* (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

197. *Id.* at 39.

198. See *Kyllo*, 533 U.S. at 39.

199. See *id.* at 39-40; see also Kerr, *supra* note 119, at 861-62 (arguing that clarity "minimizes official discretion and encourages compliance," and unclear rules increase the likelihood of government abuse).

200. See Renée McDonald Hutchins, *The Anatomy of a Search: Intrusiveness and the Fourth Amendment*, 44 U. RICH. L. REV. 1185, 1203 n.95 (2010) (noting that the Fourth Amendment is concerned with what might be disclosed, and that "it is the reaching, not just the retrieving" that is at issue).

201. See, e.g., Loewy, *supra* note 145, at 1229-30 (arguing that the Fourth Amendment is designed to protect those innocent people that do not come before the Court, and its benefits to those that are guilty are merely incidental).

D. *The Supreme Court's First Step into GPS Surveillance*

The Supreme Court in *United States v. Jones*<sup>202</sup> offered the first insight into its view of modern GPS technology and the Fourth Amendment, and sought to resolve split circuit decisions.<sup>203</sup> The background for the case began with a joint operation between the FBI and a local police department, revolving around a man suspected of drug trafficking.<sup>204</sup> Through a variety of investigative methods, the investigators obtained information that the government used to apply for a search warrant to place a GPS tracker on the suspect's vehicle.<sup>205</sup> The United States District Court for the District of Columbia granted the warrant, but limited its installation to the District of Columbia and within ten days.<sup>206</sup> Officers installed the device eleven days later at a public parking lot in Maryland—one day later than and outside the area prescribed by the warrant.<sup>207</sup>

The government tracked the movements of the vehicle over the following twenty-eight days, maintaining its location within an accuracy range of 50 to 100 feet.<sup>208</sup> Information gained from the GPS tracking established a connection between the suspect and several co-conspirators, as well as a stash house containing large amounts of cash and cocaine.<sup>209</sup> The suspect and his co-conspirators were subsequently indicted for conspiracy to distribute cocaine.<sup>210</sup> The case eventually reached the Supreme Court, with the constitutionality of the GPS evidence obtained at issue.<sup>211</sup>

The Court's unanimous decision in *Jones* that a Fourth Amendment search had taken place made the result quite simple for the parties involved,<sup>212</sup> but its varied paths in reaching that decision left some confusion and speculation as to how it would handle similar cases in the future.<sup>213</sup> Justice Scalia wrote for the majority, which found that a search took place by focusing on the physical intrusion aspect of Fourth Amendment jurisprudence.<sup>214</sup> The majority reasoned that the actions of the government clearly fit within the original bounds of the Fourth Amendment because it "physically occupied private

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202. *United States v. Jones*, 132 S. Ct. 945 (2012).

203. *Compare United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010) (holding that attaching to a car and monitoring a GPS tracker did not constitute a Fourth Amendment search), *with United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010) (holding that a GPS tracker did constitute a Fourth Amendment search because a reasonable expectation of privacy existed in the movements of a vehicle), *cert. denied*, 131 S. Ct. 671 (2010), *and cert. granted sub nom. United States v. Jones*, 131 S. Ct. 3064 (2011), *and judgment aff'd in part*, 132 S. Ct. 945 (2012).

204. *See Jones*, 132 S. Ct. at 947.

205. *Id.*

206. *Id.*

207. *See id.*

208. *Id.*

209. *See Jones*, 132 S. Ct. at 947-49.

210. *Id.* at 947.

211. *See id.*

212. *Id.* at 949.

213. *See, e.g., Criminal Procedure — Fourth Amendment — Sixth Circuit Holds That "Pinging" a Target's Cell Phone to Obtain GPS Data is Not a Search Subject to the Warrant Requirement.* *United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012), *Reh'g And Reh'g En Banc Denied, No. 09-6497 (6th Cir. Sept. 26, 2012)*, 126 HARV. L. REV. 802, 808-09 (2013) [hereinafter *Criminal Procedure*] (noting the ambiguity of the *Jones* decision and lack of clarity concerning the analysis the Court will apply in the future); Tom Goldstein, *Jones Confound the Press*, SCOTUSBLOG (Jan. 25, 2012, 11:30 AM), <http://www.scotusblog.com/?p=137791> (pointing out the complicated nature of *Jones*, evidenced by the misrepresentation of the Court's decision in press coverage).

214. *See Jones*, 132 S. Ct. at 949.

property. . . .”<sup>215</sup> Justice Scalia’s historical-based reasoning deemed it unnecessary to extend the analysis beyond the items listed in the Fourth Amendment<sup>216</sup> when the issue could be resolved as a clear trespass on property.<sup>217</sup>

The majority went on to acknowledge the reasonable expectation of privacy test introduced in *Katz*,<sup>218</sup> but asserted that a property-based analysis could act independently of it when appropriate.<sup>219</sup> It noted that the *Katz* test “has been added to, not substituted for, the common-law trespassory test.”<sup>220</sup> The presence of a physical trespass seemed to make the choice of analysis a simple one for the majority while still recognizing that future cases involving only electronic submissions and no physical trespass would remain within the *Katz* framework.<sup>221</sup> The way the majority distinguished the instances in which different frameworks apply may have caused some confusion in the *Jones* case itself, but it is helpful in setting the scope of analysis the Court would use in a case like *Skinner*<sup>222</sup> (assuming the membership of the Court remains the same when it hears such a case).<sup>223</sup>

In her concurring opinion, Justice Sotomayor sided with the majority because she believed the trespass met the minimum Fourth Amendment requirements for a search, and she did not conform to Alito’s four-member concurrence that a *Katz* analysis sufficed for all issues of search and seizure.<sup>224</sup> More significantly, however, she contemplated how a *Katz* analysis would be necessary to address technologically advanced surveillance that does not involve physical intrusion, including GPS monitoring of smartphones.<sup>225</sup> She asserted that long-term GPS surveillance would surely violate a societal expectation of privacy and suggested that even short-term monitoring could extend beyond privacy expectations.<sup>226</sup> She reasoned that GPS information could reveal private information that allows for easy inferences about “familial, political, professional, religious, and sexual associations.”<sup>227</sup>

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215. *Id.*

216. “[P]ersons, houses, papers, and effects.” U.S. CONST. amend. IV.

217. *See Jones*, 132 S. Ct. at 950-51; *see also* Fabio Arcila Jr., *GPS Tracking Out of Fourth Amendment Dead Ends: United States v. Jones and the Katz Conundrum*, 91 N.C. L. REV. 1, 28-31 (2012) (noting that Justice Scalia’s approach may have added a new “plain-text factor” to a property-centered analysis that would apply to only those items enumerated in the Fourth Amendment).

218. “[F]irst 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.’” *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

219. *See Jones*, 132 S. Ct. at 951-52.

220. *Id.* at 952.

221. *See id.* at 953.

222. It seems evident that the Court would apply the reasonable expectation of privacy test because the government had no physical contact with, or sight of, *Skinner* prior to his arrest. *See United States v. Skinner*, 690 F.3d 772, 775-76 (6th Cir. 2012).

223. With the majority only securing five votes in *Jones*, the retirement of even one could flip the way future GPS tracking cases are decided. *See, e.g.*, Lawrence Hurley, *Supreme Court: Speculation Starts on Retirements, Nominations in Obama’s Second Term*, E & E NEWS (Nov. 8, 2012), <http://eenews.net/public/Greenwire/2012/11/08/4> (assessing the speculation surrounding possible new Supreme Court members in the next four years); *What Happens to Supreme Court in Obama’s Second Term?*, NPR (Nov. 11, 2012, 5:15 PM), <http://www.npr.org/blogs/thetwo-way/2012/11/11/164916287/odds-in-favor-of-a-new-supreme-court-justice-in-obamas-second-term> (noting that four Supreme Court Justices are over seventy already, and suggesting that Justices Ginsburg and Breyer are the most likely to retire).

224. *Jones*, 132 S. Ct. at 954-55 (Sotomayor, J., concurring).

225. *See id.* at 955-57.

226. *See id.* at 955-56.

227. *Id.* at 955. Justice Sotomayor also provided specific examples of personal information that GPS data

Justice Sotomayor continued her analysis, adding that the inexpensiveness and efficiency of GPS tracking allows the government to store information long into the future, and easy access to such information increases the likelihood of abuse.<sup>228</sup> She suggested that when GPS monitoring without trespass is at issue, the reasonable expectation test should give special consideration to the far-reaching attributes of GPS technology and the effects of a “tool so amenable to misuse” in the hands of law enforcement.<sup>229</sup> Justice Sotomayor concluded by suggesting that the modern technological landscape may require altering the idea that individuals possess no reasonable expectation of privacy in information voluntarily disclosed to a third party.<sup>230</sup> She reasoned that society’s expectations would likely not approve of the government having knowledge through third parties of every phone number one contacts, every website one visits, or every online purchase one makes.<sup>231</sup>

Justice Alito’s concurrence criticized the majority’s use of a trespass analysis, arguing instead that the *Katz* reasonable expectation of privacy test had replaced such an analysis as the exclusive test.<sup>232</sup> Applying the *Katz* analysis, Justice Alito reasoned that a search clearly took place because the GPS tracking occurred for such an extended period of time.<sup>233</sup> He noted that such extended tracking would have required a very large expenditure of time and resources—an amount beyond that which society would reasonably expect law enforcement to use, except for the most high profile of cases.<sup>234</sup> Justice Alito added that short-term monitoring may conform to society’s reasonable expectations, but declined to identify at what precise time the monitoring became a search in *Jones*.<sup>235</sup> He did, however, suggest that police may seek a warrant when it is questionable whether the length of time spent on GPS surveillance qualifies it as a search.<sup>236</sup> In perhaps the most practical part of his concurrence, Justice Alito submitted that legislative intervention may be the best solution because of the blurred privacy lines and ease with which law enforcement can employ GPS tracking.<sup>237</sup>

#### IV. ANALYSIS

##### A. *Why the Sixth Circuit Got it Wrong in Skinner*

While the majority’s reasoning in *Skinner* is problematic in many ways, perhaps the most troublesome is that it primarily based its reasoning on the criminal activity that

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could keep record of, including: “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 . . . .” *Id.* (quoting *People v. Weaver*, 12 N.Y.3d 433, 441-42 (N.Y. 2009)).

228. *See Jones*, 132 S. Ct. at 955-56 (Sotomayor, J., concurring).

229. *Id.* at 956.

230. *Id.* at 957.

231. *Id.*

232. *See id.* at 959-62 (Alito, J., concurring).

233. *See Jones*, 132 S. Ct. at 964 (Alito, J., concurring).

234. *See id.* at 963-64.

235. *See id.* at 964.

236. *Id.*

237. *Id.* at 963-64.

GPS surveillance revealed.<sup>238</sup> The majority claimed early in its analysis that it did not reach its decision based on Skinner's guilt, then subsequently used Skinner's criminal behavior as a foundational point for its reasoning.<sup>239</sup> In fact, it began its Fourth Amendment analysis by characterizing Skinner's phone as "a tool used to transport contraband . . . ."<sup>240</sup> Despite the focus on Skinner's guilt, the majority explicitly denied a reasonable expectation of privacy in cell phone GPS data to *everyone*, including the innocent.<sup>241</sup> While it is easy to justify monitoring Skinner's phone with knowledge of the subsequent marijuana discovery in his RV, the actions of the defendant should not alter the analysis of law enforcement's actions.<sup>242</sup> Whether a search took place is analyzed independent of what it later reveals.<sup>243</sup> As referenced in Part II, Judge Donald's concurrence in *Skinner* aptly raised this point that the majority focused on Skinner's criminal behavior as a basis for finding that no search took place.<sup>244</sup>

The majority's comment that the DEA monitored Skinner's phone while he engaged in criminal activity is not inconsequential, but, as Judge Donald pointed out, there was nothing illegal about his possession of the phone itself.<sup>245</sup> While it is evident that one may lack a privacy interest in contraband or illegally possessed items, that interest is not lost when items are possessed legally, "whatever their suspected use . . . ."<sup>246</sup> The Sixth Circuit itself made this point evident in *United States v. Bailey* when it noted that there is a clear distinction between contraband and goods whose possession is legal.<sup>247</sup> It added in *Bailey* that the Fourth Amendment contains no exception for warrantless surveillance of items owned legitimately.<sup>248</sup> The question becomes rhetorical when considering "whether the law is prepared to recognize as legitimate an individual's expectation of privacy with respect to what he does in private with personal property he has a right to possess."<sup>249</sup>

Law enforcement may suspect that a person is using, or will use, an item to commit a crime, but that does not alter the expectation of privacy held by the possessor of the item.<sup>250</sup> One may argue that the *Bailey* court's rationale gives an upper hand to criminals, but recognizing a reasonable expectation of privacy only classifies an intrusion by law

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238. See Fakhoury, *supra* note 10 (characterizing *Skinner* as a "results-oriented opinion.").

239. See *United States v. Skinner*, 690 F.3d 772, 777 (6th Cir. 2012).

240. *Id.*

241. *Id.* at 777 n.1.

242. L. Rush Atkinson, *The Bilateral Fourth Amendment and the Duties of Law-abiding Persons*, 99 GEO. L.J. 1517, 1533 (stating that "the Court avoids using the searched party's guilt or innocence as a constitutionally relevant factor").

243. See, e.g., *Byars v. United States*, 273 U.S. 28, 29 (1927) (stating that "[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light"); Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 316 (2012) (noting that in the sequential approach to Fourth Amendment analysis, "[e]ach step counts as its own Fourth Amendment event and is evaluated independently of the others").

244. *Skinner*, 690 F.3d at 784-85 (Donald, J., concurring).

245. *Id.* at 785.

246. *United States v. Moore*, 562 F.2d 106, 111 (1st Cir. 1977).

247. *United States v. Bailey*, 628 F.2d 938, 944 (6th Cir. 1980).

248. *Id.*

249. *Id.*

250. See *id.*

enforcement as a search.<sup>251</sup> If law enforcement observes that a form of GPS surveillance will constitute a violation of the Fourth Amendment, the law offers it a remedy to perform its desired tactics by obtaining a warrant.<sup>252</sup>

The rationale is not one of letting crime take place—even if law enforcement knows about it—so long as it happens in an area or manner that society finds private; instead, the rationale is to safeguard those expectations of privacy by bringing an unbiased decision-maker into the process.<sup>253</sup> As the Supreme Court stated in *Johnson v. United States*:<sup>254</sup>

The point of the Fourth Amendment . . . is not that it denies law enforcement the support of usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.<sup>255</sup>

The troubling nature of the Sixth Circuit’s decision in *Skinner* is not that the DEA’s suspicions of criminal activity were unfounded prior to monitoring Skinner’s phone, but that it failed to subject those suspicions to a probable cause determination by a neutral magistrate.<sup>256</sup>

The quick counter to the criticism of the DEA’s failure to obtain a warrant is that the DEA did consult a magistrate in *Skinner* when it obtained a court order to ping Skinner’s cell phone.<sup>257</sup> In fact, the majority in *Skinner* furthered that point when it said that the DEA’s obtaining a court order strengthened its argument that no Fourth Amendment violation took place.<sup>258</sup> That argument fails, however, because the DEA obtained the order under the Stored Communications Act, which only requires reasonable grounds to believe that the information sought is “relevant and material to an ongoing criminal investigation.”<sup>259</sup> The reasonable grounds and “relevant to an investigation” standard falls far short of the Fourth Amendment’s probable cause requirement,<sup>260</sup> which is now also required by Federal Rule of Criminal Procedure 41 (“Rule 41”).<sup>261</sup> A persuasive addition to the argument that the DEA should have sought a warrant in *Skinner* is that the Justice Department expressly “recommends the use of a warrant based on probable cause” when

251. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

252. *See United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring).

253. *See, e.g., United States v. Chadwick*, 433 U.S. 1, 9 (1977) (stating that the “judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer.”).

254. *Johnson v. United States*, 333 U.S. 10 (1948).

255. *Id.* at 13-14.

256. *See United States v. Skinner*, 690 F.3d 772, 775-76 (6th Cir. 2012).

257. *See id.* at 776.

258. *Id.* at 779.

259. 18 U.S.C. § 2703(d) (2012).

260. U.S. CONST. amend. IV.

261. FED. R. CRIM. P. 41 (requiring a magistrate to “issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.”).

seeking to obtain prospective GPS data because “[s]uch data is much more precise.”<sup>262</sup>

In addition to the privacy rights of innocent persons protected by using a probable cause standard in situations like *Skinner*, satisfying that higher standard would not have left the DEA without the ability to track Skinner’s phone by obtaining a warrant.<sup>263</sup> Judge Donald’s concurrence makes this point by affirming Skinner’s conviction under the good faith exception because “officers clearly had probable cause.”<sup>264</sup> The DEA had a large amount of information regarding West’s drug ring, information regarding an upcoming drug run, and had reason to believe it could track Big Foot through a phone in his possession.<sup>265</sup> That situation in *Skinner* runs parallel to the one in *Katz*, where the Court pointed out that agents possessed sufficient information to satisfy probable cause, but it would not condone the agents’ electronic surveillance because they failed to involve an authorized magistrate.<sup>266</sup> That the DEA in *Skinner* took the time and effort to obtain a court order supported by both a nineteen-page and a five-page affidavit is evidence that obtaining a Rule 41 search warrant would not have deterred its pursuit of stopping criminal activity.<sup>267</sup>

The next point of error in the Sixth Circuit’s reasoning is its comparison of Skinner’s situation to *Knotts* because the defendants in each case traveled only on public roads.<sup>268</sup> The majority in *Skinner* held that there is no reasonable expectation of privacy in public areas, and law enforcement could have obtained the same information through visual surveillance.<sup>269</sup> The key distinguishing point between the two is that in *Knotts*, the officers had already initiated visual surveillance of the suspect and only used electronic means to aid surveillance.<sup>270</sup> To the contrary, in *Skinner*, agents’ use of GPS surveillance was not supplemental because they never established visual contact of Skinner’s vehicle prior to pinging his phone.<sup>271</sup> As pointed out by the concurrence, they did not even know so much as his name, the make or model of his vehicle, the color of his vehicle, or the roads upon which he would drive.<sup>272</sup> In fact, the DEA searched Skinner’s GPS data just to locate him in the first place.<sup>273</sup>

The majority attempted to dismiss the argument that agents had not initiated visual observation prior to using GPS surveillance by claiming that the relevant inquiry is what

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262. *The Electronic Communications Privacy Act—Government Perspectives on Protecting Privacy in the Digital Age: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7 (2011) (statement of James A. Baker, Assoc. Deputy Att’y Gen. of the United States); see also Letter from Rena Y. Kim, Chief, Freedom of Info./Privacy Act Unit, Office of Enforcement Operations, Crim. Div., to Catherine Crump, Staff Att’y, Am. Civil Liberties Union Found. (Jun. 1, 2009) (including a PowerPoint presentation that suggests using a Rule 41 search warrant to obtain prospective GPS data), available at [http://www.aclu.org/pdfs/freespeech/18cellfoia\\_release\\_CRM-200800622F\\_06012009.pdf](http://www.aclu.org/pdfs/freespeech/18cellfoia_release_CRM-200800622F_06012009.pdf).

263. See Nojeim, *supra* note 10.

264. *United States v. Skinner*, 690 F.3d 772, 787 (6th Cir. 2012) (Donald, J., concurring).

265. See *id.* at 775-76.

266. See *Katz v. United States*, 389 U.S. 347, 354-57 (1967).

267. See *Skinner*, 690 F.3d at 787-88 (Donald, J., concurring).

268. *Id.* at 777-78.

269. *Id.* at 778.

270. See *United States v. Knotts*, 460 U.S. 276, 278 (1983).

271. See *Skinner*, 690 F.3d at 776.

272. *Id.* at 786 (Donald, J., concurring).

273. See *id.* at 776 (majority opinion).

the defendant is disclosing to the public, not what is known to police.<sup>274</sup> While it is true that Skinner's RV remained exposed to the public, neither the public nor the police would have known what they were looking for even if they had seen him.<sup>275</sup> The only thing known at the time the search took place was that an RV—one amongst the hundreds that must have traveled public highways during the same time Skinner did—was somewhere on the road between Arizona and Tennessee.<sup>276</sup> The knowledge that a vehicle with a particular appearance would be traveling on certain roads at a certain time is precisely the information the police would need to tail a suspect.<sup>277</sup>

The majority in *Skinner* also attempted to diminish the DEA's lack of knowledge regarding Skinner's identity prior to his arrest by claiming that the point is irrelevant because the DEA could have discovered Skinner's identity by monitoring his co-conspirators, whose identity it did know.<sup>278</sup> That argument misses the point though because it is purely speculative, and what the DEA *might* have done does not justify a legal violation.<sup>279</sup> The Supreme Court rejected the same type of argument in *Kyllo* where the dissent claimed that observers could have perceived the heat of the home involved by means other than the thermal imaging employed.<sup>280</sup> The Court stated that "[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment."<sup>281</sup> The truth of the matter is that the Sixth Circuit's suggested method of following Skinner's co-conspirators is not a parallel form of investigative methods, and—due to factors such as added time and cost—it may or may not have succeeded in revealing Skinner's identity.<sup>282</sup>

The Sixth Circuit's reasoning contains further error in its claim that Skinner had no reasonable expectation of privacy in the GPS data from his cell phone because he traveled on public roads.<sup>283</sup> That situation in *Skinner* is comparable to *Kyllo* where the Court refused to distinguish between intimate and nonintimate areas in the home, in part because police officers would not know which areas their through-the-wall surveillance would pick up in advance.<sup>284</sup> The DEA in *Skinner* did have knowledge that Skinner would be traveling during a particular period, but it was not certain that he was on public roads when it began tracking him.<sup>285</sup> The *Kyllo* Court's concern with allowing searches of nonintimate areas when police would not know whether a search would reveal an intimate area in advance is applicable to *Skinner* because the DEA's cell phone tracking could have easily revealed Skinner's movements within a private place—a hotel room or the private residence of a friend, for example.<sup>286</sup> This additional problem with the DEA

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274. *Id.* at 779.

275. *See id.* at 786 (Donald, J., concurring).

276. Sanchez, *supra* note 10.

277. *See id.*

278. *Skinner*, 690 F.3d at 779.

279. Sanchez, *supra* note 10.

280. *Kyllo v. United States*, 533 U.S. 27, 33 n.2 (2001).

281. *Id.*

282. *See* Sanchez, *supra* note 10.

283. *See Skinner*, 690 F.3d at 778.

284. *Kyllo*, 533 U.S. at 38-39.

285. *See Skinner*, 690 F.3d at 775-76.

286. *See id.* at 776.



not knowing what precise vehicle it was looking for became moot when the pinging revealed that Skinner traveled on public roads, but prior to the initial ping it was essentially looking at a U.S. map—containing both public and private areas—and guessing that Skinner was in a public area.<sup>287</sup>

A final error in the Sixth Circuit’s reasoning is found in its characterization of Skinner’s phone as a tool that “gives off” location data.<sup>288</sup> The majority referenced the *Knotts* Court’s discussion of *Smith v. Maryland*<sup>289</sup> as a comparison to Skinner’s situation because no reasonable expectation of privacy existed in that case where a phone gave off the numbers it dialed to a phone company.<sup>290</sup> The problem with that analogy is that nearly everyone realizes that dialed numbers give off information that is then contained in phone records, but a phone company must command a cell phone to send it GPS signals.<sup>291</sup> The pinging process

is not the passive process the Sixth Circuit assumed it to be. GPS-capable phones do not normally record location data; when asked by the government to obtain these records, cell service providers send a signal to—or ping—the phone, ordering it to transmit its location without alerting its user. In short, pinging is active, outside interference with and control over a phone’s function without the owner’s consent. To revise one of the Sixth Circuit’s analogies, it was as if the police could somehow remotely force an otherwise odorless suspect to create a scent for the dogs to follow.<sup>292</sup>

This is especially concerning when one considers that the initial court order “authorized *real time* tracking based on a provision of the Stored Communications Act . . . .”<sup>293</sup> Surely a societal expectation of privacy exists in data that is not automatically sent by a cell phone, but is only created at law enforcement’s command.<sup>294</sup>

### B. *Practical Problems Moving Forward*

The Sixth Circuit’s holding in *Skinner* that there is no expectation of privacy in cell phone GPS data provides the potential for many negative consequences—the first being that law enforcement is now able to use such data without any involvement of the courts.<sup>295</sup> Law enforcement would ideally only use this type of surveillance when evi-

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287. See *United States v. Skinner*, No. 3:06-CR-100, 2007 WL 1556596, at \*4 (E.D. Tenn. May 24, 2007). The factual background in this trial court opinion provides a more detailed look at the pinging process conducted by the DEA agents in the case.

288. *Skinner*, 690 F.3d at 777.

289. *Smith v. Maryland*, 442 U.S. 735, 744-45 (1979).

290. See *Skinner*, 690 F.3d at 778.

291. Jennifer Granick, *Updated: Sixth Circuit Cell Tracking Case Travels Down the Wrong Road*, STANFORD L. SCH. CTR. FOR INTERNET & SOC’Y (Aug. 14, 2012, 9:24 PM), <http://cyberlaw.stanford.edu/blog/2012/08/updated-sixth-circuit-cell-tracking-case-travels-down-wrong-road#.UCsknnDKN1U.twitter>.

292. *Criminal Procedure*, *supra* note 213, at 806.

293. Granick, *supra* note 291.

294. See *id.*

295. *Skinner*, 690 F.3d at 777.

dence of criminal activity is clear, but—as pointed out by Justice Sotomayor in *Jones*—GPS technology is highly susceptible to police abuse.<sup>296</sup> The *Skinner* decision invites a slippery slope for law enforcement uses of GPS data because when given the chance, law enforcement will push the line, absent guidance of the courts.<sup>297</sup>

The Sixth Circuit's vague opinion gives justification for law enforcement to push that narrow line that separates the use of GPS tracking as tool to catch criminals, or a tool to monitor innocent individuals.<sup>298</sup> There was nothing uniquely criminal about Skinner's cell phone data—it is the same kind of data that law enforcement could draw from any GPS enabled phone.<sup>299</sup> The *Skinner* majority rationalized its decision by focusing on Skinner's criminal behavior; but free from the eye of the courts, law enforcement may now track any phone it pleases and selectively bring awareness to that tracking only when it discovers evidence of crime.<sup>300</sup>

Another danger of free-reign GPS tracking is that its efficient and cost-effective characteristics invite use beyond necessary means.<sup>301</sup> The ease of using such tracking allows the government the capability of amassing substantial electronic records on individuals that reveal all kinds of private information about a person—and who would know if these actions did take place, or are taking place?<sup>302</sup> If such records can be kept, it allows the government to “use computers to detect patterns and develop suspicions” about one's likelihood of turning to criminal activity, associations with certain people or groups, or private social interactions, amongst other things.<sup>303</sup> During only a one-year period including parts of 2008 and 2009, Sprint provided law enforcement with GPS location data over *eight million times*, and that was only one service provider.<sup>304</sup> Those requests continued to grow so dramatically that wireless companies now provide web interfaces that allow law enforcement agents to access real time location tracking services for as little as thirty dollars per month for each phone number at one company.<sup>305</sup>

### C. *Methods for Countering the Skinner Decision*

Despite the troubling nature of the Sixth Circuit's holding in *Skinner*, it presents a

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296. *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

297. See April A. Otterberg, *GPS Tracking Technology: The Case for Revisiting Knotts and Shifting the Supreme Court's Theory of the Public Space Under the Fourth Amendment*, 46 B.C. L. REV. 661, 693-94 (2005).

298. See Orin Kerr, *Sixth Circuit Rules that Pinging a Cell Phone to Determine its Location is Not a Fourth Amendment “Search,”* VOLOKH CONSPIRACY (Aug. 14, 2012, 2:02 PM), <http://www.volokh.com/2012/08/14/sixth-circuit-rules-that-pinging-a-cell-phone-to-determine-its-location-is-not-a-fourth-amendment-search/> (criticizing the *Skinner* opinion for its vagueness on technology).

299. Noah Kaplan, *Supreme Court Needs to Answer Questions Dodged in U.S. v. Jones*, HARVARD CRCL (Oct. 12, 2012), <http://harvardcrcl.org/2012/10/12/supreme-court-needs-to-answer-questions-dodged-in-u-s-v-jones/>.

300. *Id.*

301. See *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring).

302. *United States v. Pineda-Moreno*, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, J., dissenting).

303. *Id.* at 1125.

304. Christopher Soghoian, *8 Million Reasons for Real Surveillance Oversight*, SLIGHT PARANOIA (Dec. 1, 2009), <http://paranoia.dubfire.net/2009/12/8-million-reasons-for-real-surveillance.html>.

305. Christopher Soghoian, *ACLU Docs Reveal Real-time Cell Phone Location Spying is Easy and Cheap*, SLIGHT PARANOIA (Apr. 3, 2012), <http://paranoia.dubfire.net/2012/04/aclu-docs-reveal-real-time-cell-phone.html>.

prime vehicle for the Supreme Court to answer the questions it left open in *Jones*.<sup>306</sup> Justice Sotomayor's belief expressed in *Jones* that the modern digital age might require new efforts to protect privacy provides ample reason for the Court to grant certiorari in the *Skinner* case.<sup>307</sup> In his concurrence in *Jones*, Justice Alito stated that in the absence of Congressional action, the best the Court can do is to determine whether reasonable expectations of privacy exist for GPS tracking in a particular case.<sup>308</sup> The Supreme Court can only give answers based on those cases presented to it, and the clear holding in *Skinner*—denying an expectation of privacy—offers the Court an opportunity to provide answers to some of the “vexing problems” presented by GPS monitoring.<sup>309</sup>

While a decision by the Supreme Court to reverse the Sixth Circuit's holding that there is no reasonable expectation of privacy in cell phone GPS data would be ideal, Professor Orin Kerr has suggested that the legislative branch “should create the primary investigative rules when technology is changing.”<sup>310</sup> Technology's rapid changes require rapid responses to protect privacy that the courts may be slow to implement effectively.<sup>311</sup> Legislation also allows lawmakers to provide rules that are more detailed and more capable of encompassing technological advances that will only continue to expand.<sup>312</sup> Justice Alito added to that sentiment in *Jones* when he stated that a “legislative body is well situated to . . . balance privacy and public safety in a comprehensive way.”<sup>313</sup> Regardless of whether the Supreme Court takes on the *Skinner* case, Congress should address the important privacy issues that cell phone GPS tracking presents.<sup>314</sup> It should explicitly require a warrant in order for the government to obtain GPS location data.<sup>315</sup>

## V. CONCLUSION

The information presented in Part IV revealed that millions of times a year, the government employs—without a warrant—GPS tracking technology that is capable of providing constant, detailed location information that can be stored and analyzed indefinitely.<sup>316</sup> Considering that information, it is hardly a stretch to claim that the “dragnet type law enforcement practices” that Justice Rehnquist referred to forty years ago—which currently include twenty-four hour surveillance of any cell phone without judicial knowledge—are now a reality.<sup>317</sup> By holding that no person has a reasonable expectation of privacy in cell phone GPS data, the Sixth Circuit endorsed the use of such practices.<sup>318</sup> While the Supreme Court acted well to ensure greater privacy in light of advancing tech-

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306. Kaplan, *supra* note 299.

307. See *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

308. See *id.* at 964 (Alito, J., concurring).

309. *Id.* at 954.

310. Kerr, *supra* note 119, at 806.

311. See *id.*

312. See *id.*

313. *Jones*, 132 S. Ct. at 964 (Alito, J., concurring).

314. See *United States v. Cuevas-Perez*, 640 F.3d 272, 285-86 (7th Cir. 2011) (Flaum, J., concurring).

315. *ECPA Reform: Why Now?*, DIGITAL DUE PROCESS, <http://digitaldueprocess.org/index.cfm?objectid=37940370-2551-11DF-8E02000C296BA163> (last visited Mar. 1, 2013) (providing one possible example of what this type of legislation could look like).

316. See Soghoian, *supra* note 304.

317. *United States v. Knotts*, 460 U.S. 276, 283-84 (1983).

318. See *United States v. Skinner*, 690 F.3d 772, 777 n.1 (6th Cir. 2012).

nology in *Jones*, the majority and both concurrences recognized that GPS technology would present Fourth Amendment concerns again.<sup>319</sup> In light of cell phone GPS technology that gives the government easy access to detailed information about a person's life, the Court should embrace "higher protections to help restore the prior level of privacy protection."<sup>320</sup> Justice Brandeis articulated the necessity for an action such as this when he stated that the drafters of the Constitution, in creating the Fourth Amendment, granted "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."<sup>321</sup>

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319. *See* *United States v. Jones*, 132 S. Ct. 945, 954-57, 962 (2012).

320. Kerr, *supra* note 179, at 480.

321. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).