Big Foot, Big Brother . . . and a Big Step Backwards for Your Fourth Amendment Rights?: The Sixth Circuit Approves Warrantless Cell Phone Tracking in *United States v. Skinner*

I. OVERVIEW

Big Foot had reason to worry that the government was watching him in 2006. Five years earlier, trucker Melvin Skinner, alias "Big Foot," had started his stint as a courier in a large-scale drug-trafficking operation under the direction of another man named James Michael West.[1] Skinner's job as a truck driver would come to an end on July 16, 2006, as he headed across Interstate 40 in Texas, his motorhome stocked with marijuana for delivery to West in Tennessee.[2] Unbeknownst to Skinner, police had been hot on his trail for days using a combination of cell-site information, GPS real-time location, and "ping"[3] data to home in on him, and they would soon end his drug-running days at a rest stop in Abilene, Texas.[4] The saga began in January 2006, when authorities from the Drug Enforcement Administration (DEA) stopped fellow courier Christopher Shearer en route to deliver $362,000 to West's marijuana supplier, Philip Apodaca, in Arizona.[5] From Shearer, authorities learned

1. It is not clear whether this was the nickname given, logically, by authorities, or just a terrific coincidence. *See, e.g.*, Greg Nojeim, *Tracking Big Foot: Why GPS Location Requires a Warrant*, CENTER FOR DEMOCRACY & TECH. (Aug. 17, 2012), https://www.cdt.org/blogs/greg-nojeim/1708tracking-big-foot-why-gps-location-requires-warrant.

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

3. "Pinging" is the digital process of determining the location of a cell phone at any given time, by sending a signal to the phone and having it respond with the requested data. *See* L. Scott Harrell, *Locating Mobile Phones Through Pinging and Triangulation*, PURSUIT MAG. (July 1, 2008), http://www.pursuitmag.com/locating-mobile-phones-through-pinging-and-triangulation/.

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

5. *Id.* at 775.

the details of the Arizona-Tennessee exchanges,[6] which were facilitated by the couriers' communication with pay-as-you-go or "burner" cell phones purchased by Apodaca.[7] Apodaca, unaware the cell phones were equipped with GPS technology, had provided false names and subscriber information for the phones.[8] Authorities subsequently obtained orders to intercept wireless calls between West and Shearer from two phones explicitly in West's name and learned that West was also communicating with an unidentified courier (Skinner) on another burner phone with the number (520) 869-6447 (6447 phone).[9] Additional intercepted calls revealed that Skinner would be paying off a drug debt in Arizona on July 11, 2006, and then driving to Tennessee in a motorhome with Southern plates and a cargo of drugs a few days later.[10] In attempts to determine Big Foot's exact location while he was in transit to deliver the drugs, authorities obtained an order "authorizing the phone company to release subscriber information: cell-site information, GPS real-time location, and 'ping' data for the 6447 phone."[11] By continuously pinging a different phone carried by Skinner,[12] law enforcement was able to track the courier's location to the Abilene rest stop, where officers entered the motorhome despite Skinner's protestation and discovered over 1100 pounds of marijuana in sixty-one bales, two cellular phones, and two semiautomatic handguns.[13]

Skinner was arrested and ultimately charged with conspiracy to distribute and possession with intent to distribute in excess of 1000 kilograms of marijuana, conspiracy to commit money laundering, and aiding and abetting the attempt to distribute in excess of 100 kilograms of marijuana.[14] His pretrial motion to suppress the search of his motorhome on a Fourth Amendment basis was denied, and following a ten-day trial, the jury found Skinner guilty on all counts.[15] He was sentenced to 235 months of imprisonment and appealed the decision to

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6. *Id.* ("Between 2001 and 2006, Apodaca would send marijuana that he obtained in Mexico to West in Tennessee via couriers.").

7. *See id.*; Hanni Fakhoury, *To Make Sure Criminals Get No Location Privacy, the 6th Circuit Kills It for Everyone Else Too*, ELEC. FRONTIER FOUND. (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.

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

9. *Id.*

10. *Id.* at 775-76.

11. *Id.* at 776.

12. Intercepted calls and phone records allowed agents to surmise that West and Skinner were also communicating using a different phone with the number (520) 869-6820. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 777.

the United States Court of Appeals for the Sixth Circuit.[16] In his appeal, Skinner argued that the authorities' use of GPS location information from his cell phone was a warrantless search in violation of the Fourth Amendment, "that there was insufficient evidence to find him guilty of conspiracy to commit money laundering," and that he was only a minor player in the conspiracy and as such was "entitled to a mitigating role reduction [of his sentence]."[17] Affirming the district court's judgment, the Sixth Circuit *held* that Skinner had no reasonable expectation of privacy in the location data broadcast from his phone, there was adequate evidence to convince a rational trier of fact to convict him of conspiracy to commit money laundering, and the district court did not abuse its discretion in determining that Skinner was not entitled to a mitigating role reduction. *United States v. Skinner*, 690 F.3d 772, 777, 780, 783 (6th Cir. 2012).

II. BACKGROUND

The Fourth Amendment of the United States Constitution guarantees that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[18] In the context of electronic surveillance cases, an individual has standing to invoke protection under the Fourth Amendment if he or she has a "constitutionally protected reasonable expectation of privacy."[19] This determination, as Justice Harlan aptly noted in his concurrence in *Katz v. United States*, is based on a two-prong test, assessing whether (1) the individual had a subjective expectation of privacy in the object of the challenged search and whether (2) that expectation is reasonable in society's estimation.[20]

This two-part test stems from Justice Harlan's concurrence in *Katz*, in which the United States Supreme Court deviated from an exclusively property-based Fourth Amendment jurisprudence in 1967.[21] The Court held in *Katz* that when the Federal Bureau of Investigation attached an electronic recording device sans warrant to the outside of a public telephone booth to monitor incoming and outgoing calls for illegally transmitted gambling information, including petitioner's calls, it violated

16. *Id.*
17. *Id.*
18. U.S. CONST. amend. IV.
19. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
20. Smith v. Maryland, 442 U.S. 735, 740 (1979) (quoting *Katz*, 389 U.S. at 361).
21. *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 950 (2012).

his constitutional rights.[22] In so concluding, the Court departed from the narrow view that "surveillance without any trespass and without seizure of any material object [falls] outside the ambit of the Constitution."[23] Justice Harlan's concurrence also provided the modern test for ascertaining when an act of electronic surveillance by the government constitutes a "search" under the Fourth Amendment.[24]

A. Reasonable Expectation of Privacy: Technological Change

Over the years, the Supreme Court has considered ever-evolving technologies in defining the existence and extent of Fourth Amendment privacy expectations for the second prong of the *Katz* test.[25] For instance, in 1979, the Supreme Court affirmed the Maryland Court of Appeals' ruling in *Smith v. Maryland* that the installation and use of a pen register to record all the phone numbers dialed from a robbery suspect's home did not constitute a search under the Fourth Amendment and that police committed no violation by installing the register without first obtaining a warrant or court order.[26] The Court rejected the petitioner's argument that the pen register was different from a live operator and that the petitioner should have a different expectation of privacy in revealing his phone number to the register.[27] Declining to find that the new technology warranted an alternative standard of review, the Court concluded that it was "not inclined to hold that a different constitutional result is required because the telephone company has decided to automate."[28]

Following the same line of thought in a beeper-assisted tracking case four years later, the Court held in *United States v. Knotts* that the scientific enhancement of officers' ability to monitor a five-gallon drum of chloroform did not raise any constitutional issues that visual surveillance alone would not have raised.[29] As in *Smith*, the Court reasoned that the respondent in *Knotts* lacked a legitimate expectation of privacy because not only had the government's beeper-assisted surveillance "amounted principally to the following of an automobile on

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22. *See Katz*, 389 U.S. at 348, 359.
23. *Id.* at 353.
24. *See Smith*, 442 U.S. at 740.
25. Brief for Center for Democracy & Technology et al. as *Amici Curiae* in Support of Respondent at 3, *Jones*, 132 S. Ct. 945 (No. 10-1259) (citing City of Ontario, Cal. v. Quon, 130 S. Ct. 2619, 2629 (2010)).
26. *Smith*, 442 U.S. at 737, 738, 745-46 ("Because there was no 'search,' . . . no warrant was needed.").
27. *Id.* at 745.
28. *Id.* at 744-45.
29. United States v. Knotts, 460 U.S. 276, 277, 285 (1983).

public streets and highways,"[30] but under current precedent, "One has a lessor expectation of privacy in a motor vehicle."[31] According to the Court, using the beeper revealed nothing more than what would have been possible with visual surveillance alone, and "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with [that kind of technological] enhancement."[32] The respondent's argument that a holding in favor of the Government might pave the way for unchecked, twenty-four-hour surveillance of any U.S. citizen also fell flat, the Court declaring, "We have never equated police efficiency with unconstitutionality, and we decline to do so now."[33]

The Sixth Circuit followed suit in *United States v. Forest* in 2004, holding that the Government did not violate the rights of two Ohio drug traffickers when it monitored their travel along public highways using intercepted cellular phone data.[34] Having identified the defendants as active cocaine traffickers, the DEA received authorization to intercept cell phone communications and obtain additional information from the defendants' service provider as part of an investigation.[35] Agents conducted physical surveillance of the defendants on May 31, 2001, but failed to maintain constant visual contact.[36] In order to reestablish contact, they acquired cell-site data by dialing the defendant's phone several times and referencing the service provider's data to locate its nearest cellular transmission tower.[37] Looking to the public-highways rationale in *Knotts* in considering the defendants' Fourth Amendment claim, the court held that that case compelled "the conclusion that [the defendant] had no legitimate expectation of privacy in the cell-site data because the DEA agents could have obtained the same information by following [his] car."[38] The court also found that the particular facts of the case created a distinction between a defendant's expectation of privacy in cell-site data, and his physical location.[39] The court reasoned that, because "the cell-site data is simply a proxy for [a] visually observable location," it should be treated similarly to movements along public

30. *Id.* at 281.
31. *Id.* (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion)).
32. *Id.* at 282.
33. *Id.* at 283.
34. United States v. Forest, 355 F.3d. 942, 946-47 (6th Cir. 2004).
35. *Id.* at 947.
36. *Id.*
37. *Id.*
38. *Id.* at 951.
39. *See id.*

highways.[40] Visual observation by the public was still possible at all times, ergo, according to this court, it was a constitutionally permissible sensory augmentation.[41]

Progressing from beepers to GPS surveillance in 2012, the Supreme Court in *United States v. Jones* held that police had crossed the Fourth Amendment line, reasoning that particular factual distinctions set this case apart from the aforementioned precedents.[42] In *Jones*, police had secretly placed a tracking device on the defendant's car eleven days after gaining authorization from a ten-day warrant, and then monitored the vehicle's movements for twenty-eight days on public streets.[43] The Court thus found that their actions constituted a search under the Fourth Amendment.[44] For the majority, the act of trespass—physical occupation of private property for the purpose of obtaining information—was key, and the Court relied on the trespass-focused Fourth Amendment jurisprudence of the past to determine that the Government had invaded a constitutionally protected area.[45] The Court deemed the *Katz* test inapplicable in *Jones*, noting that, although property rights are not the only measure of Fourth Amendment violations, *Katz* did not entirely displace the previously recognized protection for property.[46] Making trespass the dispositive factor in *Jones* allowed the Court to reject the Government's argument that the police only obtained information freely available on public roads.[47] By avoiding the *Katz* test, as applied in *Knotts* and *United States v. Karo*, another beeper surveillance case, the Court was not required to assess the reasonableness of the defendant's expectation of privacy in his car.[48]

The Court focused on the relation between the time of trespass and the defendant's possession of the tracked object, distinguishing the defendant's car in *Jones* from the containers in *Knotts* and *Karo*. In the latter cases, authorities added tracking devices to the containers before they were in the defendants' possession.[49] However, in *Jones*, the defendant "possessed the Jeep at the time the Government trespassorily

40. *See id.*
41. *Id.*
42. *See* United States v. Jones, 132 S. Ct. 945 (2012).
43. *Id.* at 948.
44. *Id.* at 949.
45. *See id.* at 949-53.
46. *Id.* at 951-52.
47. *See id.* at 953.
48. *See id.* at 951-53.
49. *Id.* at 951-52.

inserted the information-gathering device," thus the government officials encroached on an area that was already protected.[50]

In his concurrence, Justice Alito highlighted the difficulties that the majority's resolution in *Jones* creates for the future by applying "18th-century tort law" to a "21st-century surveillance technique."[51] Although Justice Alito agreed with the need to continue to protect the "degree of privacy against government that existed when the Fourth Amendment was adopted,"[52] he pointed out that the Court in *Jones* nonetheless faced a factual situation unimaginable in the eighteenth century.[53] In addition to disharmony with post-*Katz*, Fourth Amendment case law, Alito took issue with, among other potential problems, the implications of *Jones* for surveillance cases involving electronic, as opposed to physical, contact with the monitored item.[54] However, he conceded that the alternative *Katz* analysis has its flaws, given the public's changing expectations of privacy due to dramatic technological change and the lack of practical limits on the government's surveillance capabilities.[55]

Justice Sotomayor's concurrence likewise considered a number of digital-age complications, noting that "some technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test" by shaping society's privacy expectations, and that it is even possible that "long-term GPS monitoring in an investigation can impinge on privacy expectations."[56] With regard to the reasonableness of privacy expectations, given that in the digital age people regularly reveal personal information to third parties in their everyday lives, Sotomayor suggested that individuals can "attain constitutionally protected status [according to the *Katz* analysis] only if Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy."[57]

B. Reasonable Expectation of Privacy: Criminal Activity

While the Sixth Circuit itself lacks any analogous case law, courts in other circuits have held that reasonable "privacy expectations are not

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50. *Id.* at 952.
51. *Id.* at 957 (Alito, J., concurring).
52. *Id.* at 958 (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)).
53. *Id.*
54. *Id.* at 962.
55. *See id.* at 962-64 ("Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken. The surveillance at issue in this case . . . would have required a large team of agents, multiple vehicles, and perhaps aerial assistance.").
56. *Id.* at 955 (Sotomayor, J., concurring).
57. *Id.* at 957.

diminished by the criminality of a defendant's activities."[58] For instance, the United States Court of Appeals for the Second Circuit disagreed in its 1980 decision, *United States v. Taborda*, "that the amount of Fourth Amendment recognition accorded to a person's privacy expectations may vary solely on the basis of whether his activity is criminal or innocent."[59] Reaffirming that notion in 1997, the Second Circuit rejected in *United States v. Fields* "the government's argument that the illegal nature of Fields' activities made any expectation of privacy regarding the premises unreasonable."[60] Similarly, the United States Court of Appeals for the Seventh Circuit declared in *United States v. Pitts*, "We may not justify the search after the fact, once we know illegal activity was afoot; the legitimate expectation of privacy does not depend on the nature of the defendant's activities, whether innocent or criminal."[61]

Courts have "declined to recognize a 'legitimate' expectation of privacy in contraband and other items the possession of which are themselves illegal, such as drugs and stolen property."[62] Nonetheless, the Sixth Circuit drew a line in *United States v. Bailey* between items that are illegal to possess (e.g., contraband), and goods that might be used in a criminal context.[63] The court acknowledged in *Bailey* that failing to draw that line "would authorize warrantless . . . surveillance of laboratory equipment, handguns, or any other legitimately owned item the Government suspected would be used to commit a crime," and held that "[t]he fourth amendment contains no such exception."[64]

III. THE COURT'S DECISION

In reviewing the district court's decision in *Skinner*, the Sixth Circuit determined whether the government's use of GPS information from the defendant's pay-as-you-go phone was carried out in violation of the Fourth Amendment.[65] However, the court skipped over the first prong of the test concerning the defendant's subjective expectation of privacy, simply holding that an expectation of privacy in the defendant's data

58. *See* United States v. Skinner, 690 F.3d 772, 785 (6th Cir. 2012) (Donald, J., concurring in part and concurring in the judgment) (citing United States v. Hicks, 59 F. App'x 703, 706 (6th Cir. 2003) ("[I]t is far from clear that the legitimacy of one's privacy expectation can be made to depend on the nature of his activities—innocent or criminal.")).

59. United States v. Taborda, 635 F.2d 131, 138 n.10 (2d Cir. 1980).

60. United States v. Fields, 113 F.3d 313, 321 (2d Cir. 1997).

61. United States v. Pitts, 322 F.3d 449, 458 (7th Cir. 2003).

62. *Skinner*, 690 F.3d at 785.

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

64. *Bailey*, 628 F.2d at 944.

65. *Skinner*, 690 F.3d at 777-81.

would be unreasonable, and thus there was no constitutional violation given this failure on the second prong.[66] The court justified its finding declaring, "The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools" and that if such devices give off a traceable signal, police should be allowed to track that signal in pursuit of a criminal.[67]

According to the Sixth Circuit, this result falls squarely within the Supreme Court's precedent in *Knotts*.[68] Citing the Court's finding in *Knotts* of a lack of a reasonable expectation of privacy in a drum of chloroform, which was tracked by beeper and followed on public streets, the Sixth Circuit reasoned that, just as "there [was] no indication that the beeper [in *Knotts*] was used in any way to reveal information . . . that would not have been visible to the naked eye," the cell site information from Skinner's phone as he traveled public highways was no different from the "information authorities could have obtained through visual surveillance alone."[69] Echoing the Supreme Court's opinion in *Knotts*,[70] the Sixth Circuit asserted: "There is no inherent constitutional difference between trailing a defendant and tracking him via such technology. Law enforcement tactics must be allowed to advance with technological changes . . . ."[71]

The court also compared *Skinner* to *Forest*, in which agents pinged the defendant's cell phone in order to ascertain its physical location when they lost visual contact.[72] Just as they had declined to find a Fourth Amendment violation in *Forest*—because DEA agents could have simply followed the defendants car—the Sixth Circuit determined in *Skinner* that this kind of technological augmentation of the officers' sensory capabilities, previously permissible under *Knotts* and again under *Forest*, was once again allowed in the noted case.[73]

The court also rejected Skinner's attempt to distinguish the present case from *Knotts* and *Forest* on the basis that the DEA not only had never established visual contact with Skinner, but had never been certain of his identity or the make of his vehicle.[74] Skinner argued that in these

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66. *See id.* at 777.

67. *Id.* ("Otherwise, dogs could not be used to track a fugitive if the fugitive did not know that the dog hounds had his scent. A getaway car could not be identified and followed based on the license plate number if the driver reasonably thought he had gotten away unseen.").

68. *Id.*

69. *Id.* at 777-78 (citing United States v. Knotts, 460 U.S. 276, 285 (1983)).

70. *Knotts*, 460 U.S. at 284.

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

72. *Id.*

73. *See id.* at 778-79.

74. *Id.* at 779.

circumstances technology did not function as an augmentation of the authorities' sensory capabilities, but instead allowed them to locate him in a way that would not otherwise have been possible.[75] According to the court, this detail made no difference: in this case, as in the court's case precedent, the defendant's movements could have been observed by anyone at any point.[76] Pinging the defendant's cell phone only increased the efficiency of the process, and as had been previously established, an increase in efficiency did not automatically make for a Fourth Amendment violation where one would not previously have been found.[77]

The court also distinguished the noted case from *Jones*, which had turned on the trespassory act of placing a tracking device on the defendant's car.[78] Because no physical occupation of Skinner's property had taken place, and the trespass test "provides little guidance 'on cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property,'" the Sixth Circuit held that *Jones* neither overruled *Knotts*, nor was relevant to the resolution of the noted case.[79] Further, the court explained, the questions raised by Justice Alito's concurrence in *Jones* played no role in this case.[80] Citing Justice Alito's concerns about the novel capability of comprehensive and long-term tracking—which could at some point have the potential to become unreasonable for Fourth Amendment purposes—the court pointed out that in *Skinner*, agents only tracked Skinner's movements for a limited period of three days.[81]

In the sole concurrence in this opinion, Judge Donald disagreed with the majority on their resolution of the *Katz* test's second prong.[82] Unlike the majority, Donald addressed both prongs of the test, concluding that Skinner had a subjective expectation of privacy in his GPS location, which he likely did not anticipate was trackable.[83] With regard to the second prong, Donald took issue with the majority's view that "Skinner lacked an expectation of privacy in data from his cell phone because he was using it in the context of a crime," noting that such

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75. *Id.*
76. *See id.* at 778-79.
77. *See id.*
78. *Id.* at 779.
79. *Id.* at 780 (citing United States v. Jones, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring)).
80. *Id.*
81. *Id.*
82. *Id.* at 784-85 (Donald, J., concurring in part and concurring in the judgment). Judge Donald nonetheless agrees with the majority's judgment on the basis of a good faith exception. *Id.*
83. *Id.*

reasoning is "in direct conflict with" the Sixth Circuit's assertion in *Bailey* that there is no Fourth Amendment exception for items suspected to be used in committing a crime.[84] Donald also disagreed with the majority's finding that the use of GPS in this instance merely supplemented the officers' existing sensory capabilities, and considered *Skinner* distinguishable from *Knotts* and *Forest*, wherein authorities had already established visual contact with their targets at an earlier point.[85] On the contrary, in *Skinner*, "[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," making GPS more than an augmentation of visual surveillance.[86]

Finally, Donald articulated the point that critics of the majority's decision have since lamented as *Skinner*'s unfortunate legacy for the Sixth Circuit.[87] Acknowledging that "the same constitutional protections apply to criminals and the law-abiding public alike," he recharacterized the majority's question about expectations of privacy "in the GPS data emitted from a cell phone used to effectuate drug trafficking" as one about expectations of privacy "in the GPS data emitted from any cell phone."[88]

IV. ANALYSIS

In the middle of a major drug-trafficking operation and with his freedom on the line, Big Foot had reason to worry that the government was watching. But do we?

Does it matter that GPS monitoring (or any technology that allows for comprehensive, remote surveillance) "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations" that can be stored and mined for information in the future?[89] As Justice Sotomayor previously suggested in *Jones*, "[a]wareness that the Government may be watching chills associational and expressive freedoms,"[90] but what other potential for abuse of such detailed profiles might be possible in the future?

The majority's analysis in *Skinner* has certainly been criticized as "shallow," "lazy," and "results-oriented" by digital liberties advocates

84. *Id.* at 785.
85. *Id.* at 786.
86. *Id.*
87. *See, e.g.*, Fakhoury, *supra* note 7.
88. *Skinner*, 690 F.3d at 786.
89. United States v. Jones, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring).
90. *Id.* at 956.

who worry about its implications for privacy protections for the general public.[91] The Electronic Frontier Foundation, for one, has summarized the Sixth Circuit's reasoning as harmfully denying an expectation of privacy in cell phones for the reason that they could conceivably be used by criminals to commit crimes.[92] In other words, the court's objective was to make sure criminals can still be caught as the age-old cat-and-mouse game continues to escalate, with each side using more and more sophisticated tools against the other. It may have been a mistake, however, to assume such a narrow focus in the current technological climate.

In addition to highlighting the Sixth Circuit decision's potential ramifications for law-abiding citizens, these groups have also suggested that the court essentially misconstrued the technology at hand in *Skinner*.[93] They point out that the court based its legal conclusion on the assumption that Skinner's phone ordinarily emits GPS location information,[94] while, in fact, that data does not even exist until the device receives a prompt from the provider—e.g., at the behest of law enforcement—to deliver the information so it can be accessed.[95]

Now, as the American Civil Liberties Union, Electronic Frontier Foundation, Center for Democracy and Technology, and the Electronic Privacy Information Center ask the Sixth Circuit to reconsider its decision in light of that mistake and the concurrences seen earlier in *Jones*,[96] the Fifth Circuit is preparing to consider a new cell-phone-tracking case. This case concerns a magistrate judge's refusal to approve government requests "to cell phone companies for 60 days of cell phone records as part of a routine law enforcement investigation."[97] Oral arguments in that case began on October 2, 2012, in New Orleans, Louisiana, for those interested in tracking the progress of this issue.[98]

Alessandra Suuberg*

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91. *See, e.g.*, Fakhoury, *supra* note 7; Nojeim, *supra* note 1.

92. *Id.*

93. *Id.*

94. *See* Greg Nojeim, *Reconsidering Location Tracking*, CENTER FOR DEMOCRACY & TECH. (Sept. 5, 2012), https://www.cdt.org/blogs/greg-nojeim/0509reconsidering-location-tracking.

95. *Id.* No information, then, is voluntarily provided to any third party.

96. *Id.*; *see also* Brief of the American Civil Liberties Union et al. as *Amici Curiae* in Support of Petition for Rehearing *En Banc*, United States v. Skinner, 690 F.3d 772 (6th Cir. 2012) (No. 09-6497).

97. *Fifth Circuit Cell Phone Tracking Case*, ELEC. FRONTIER FOUND., https://www.eff.org/cases/fifth-circuit-cell-phone-tracking-case (last visited Nov. 19, 2012).

98. *Id.*

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