

# PROBABLE CAUSE

I can't say I'm surprised by this news—that some courts are approving government use of cell phone GPS data without first requiring the government to demonstrate probable cause.

Federal officials are routinely asking courts to order cellphone companies to furnish real-time tracking data so they can pinpoint the whereabouts of drug traffickers, fugitives and other criminal suspects, according to judges and industry lawyers.

In some cases, judges have granted the requests without requiring the government to demonstrate that there is probable cause to believe that a crime is taking place or that the inquiry will yield evidence of a crime. Privacy advocates fear such a practice may expose average Americans to a new level of government scrutiny of their daily lives.

But I invite you to consider the implications of this legal logic:

And in December 2005, Magistrate Judge Gabriel W. Gorenstein of the Southern District of New York, approving a request for cell-site data, wrote that because the government did not install the "tracking device" and the user chose to carry the phone and permit transmission of its information to a carrier, no warrant was needed.

Let's see. It looks like this:

Gov't did not install tracking device >  
User chose to use cell phone with tracking device > No need for the government to get a warrant to ask the telecom company for data on the tracking

device

That looks frighteningly like this logic:

Gov't did not install telecommunications  
fiber > User chose to use  
telecommunications fiber to make a  
call/send an email > No need for the  
government to get a warrant to ask the  
telecom company for data on the private  
citizen's use of the telecom fiber

It's the same logic Donald Kerr, Principal  
Deputy National Intelligence Director uses when  
he says we shouldn't expect anonymity  
anymore—that we sacrifice all of that when we  
avail ourselves of neat telecommunications or  
Toobz tools.

**Update:** LHP sent this link along, which provides  
much further detail on this. The short story: a  
number of the government's requests for cell  
phone location have been rejected, but the  
government never has those decisions reviewed,  
thereby leaving the whole thing in legal  
neverland.

Almost all of these cases have another  
similarity. In each case, the magistrate  
judge issuing the opinion denying the  
government's request has invited the  
government to seek review of the denial  
so that the magistrate judges will have  
guidance as they continue to encounter  
this issue. The government has not yet  
seen fit to seek review of any of these  
cases. As the government appears ex  
parte in each case, and the individual  
never even knows he is being tracked,  
there is no one else to seek review.  
Thus, the government seems willing, and  
able, to deprive the courts of any higher  
level guidance of the required showing it  
must make to receive the cell location  
information it seeks.