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 cellphonecompanies to furnish real-time tracking data so they can pinpoint thewhereabouts of drug traffickers, fugitives and other criminal suspects, according to judges and industry lawyers.

In some cases, judges have granted the requests without requiringthe government to demonstrate that there is probable cause to believethat a crime is taking place or that the inquiry will yield evidence of a crime. Privacy advocates fear such a practice may expose averageAmericans 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 thegovernment did not install the "tracking device" and the user chose tocarry the phone and permit transmission of its information to acarrier, 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

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, themagistrate judge issuing the opinion denying the government's requesthas invited the government to seek review of the denial so that themagistrate judges will have guidance as they continue to encounter thisissue. The government has not yet seen fit to seek review of any ofthese cases. As the government appears ex parte in each case, and theindividual never even knows he is being tracked, there is no one elseto seek review. Thus, the government seems willing, and able, todeprive the courts of any higher level guidance of the required showingit must make to receive the cell location information it seeks.