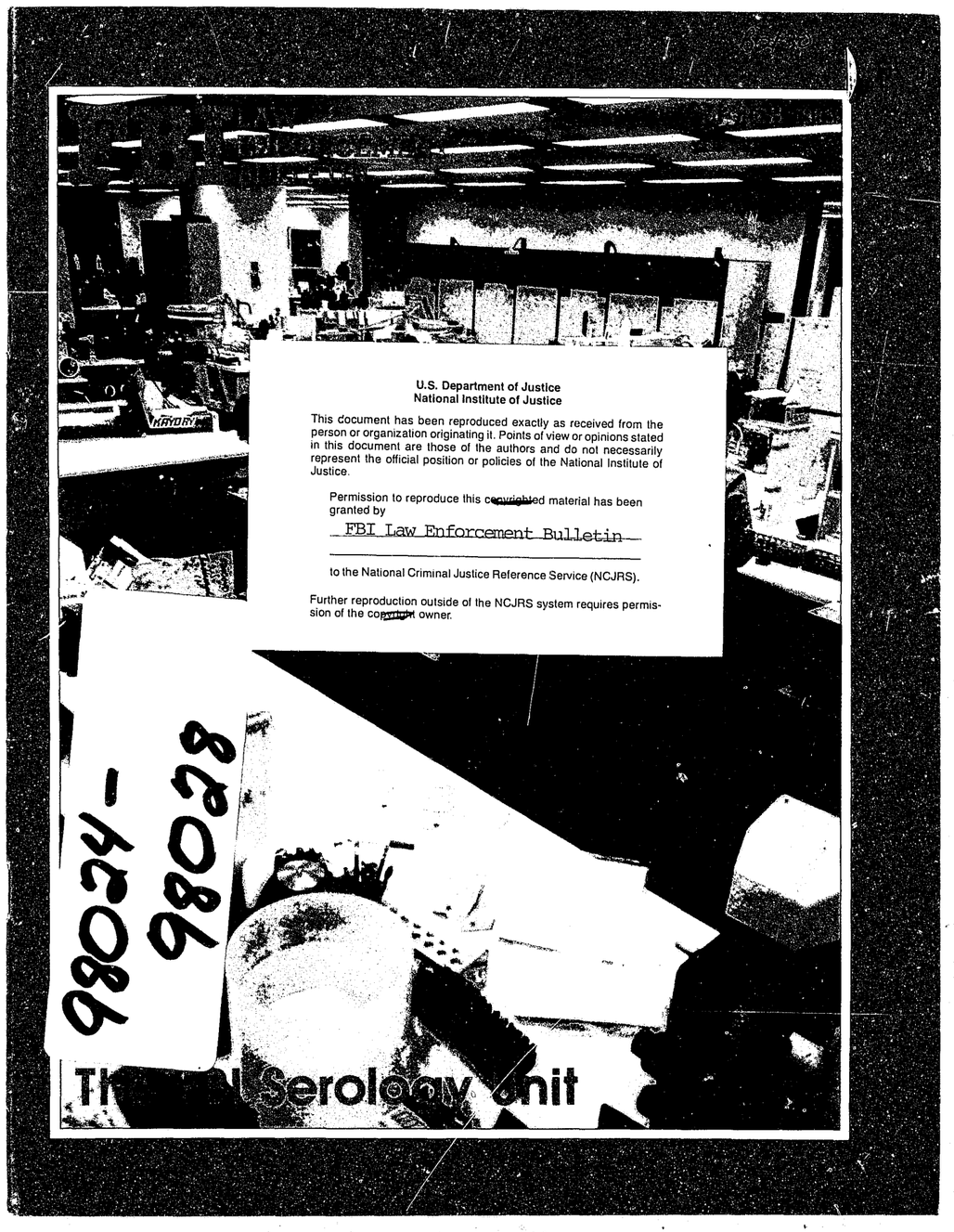

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Electronic Tracking Devices

Following the Fourth Amendment (Conclusion)

". . . the nature of the place or property into which the government intrudes can be highly significant in determining the extent to which fourth amendment protections are applicable."

By
JOHN C. HALL
Special Agent
FBI Academy
Legal Counsel Division
Federal Bureau of Investigation
Quantico, VA

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Part I of this article reviews and analyzes two recent Supreme Court cases, *United States* v. *Knotts*[30] and *United States* v. *Karo*,[31] in which the Court sought to determine and define the fourth amendment's application to the use of electronic tracking devices (beepers) by law enforcement. In *Knotts*, the Court held that monitoring a beeper in public places, or places open to visual observation, is not a fourth amendment search. On the other hand, the *Karo* Court held that monitoring a beeper inside private premises, a place not open to visual surveillance, is a search which, in the absence of an emergency, requires a warrant.[32]

Several significant questions were not clearly resolved by those two cases. Part II considers these remaining questions in light of the relevant caselaw and suggests guidelines for law enforcement agencies in the use of beepers.

REMAINING ISSUES

Installation of a Beeper

In *Karo*, a beeper was installed in a container which, at the time of installation, belonged to the government. The Supreme Court held that the defendants had no legitimate expectation of privacy in the property at that time. Further, the Court noted that the same would have been true had the property been in the possession of a consenting third party (an issue that had been left open in *Knotts*). In either event, there would be no fourth amendment intrusion of which the defendants could complain.

However, the Court did not have occasion to consider the applicability of the fourth amendment to the installation of a beeper inside or on property which, at the time, may belong to a nonconsenting party. If the installation of a beeper under these circumstances is a search, the manner in which it is accomplished could affect the admissibility of evidence derived therefrom. The nature of the property may be an important factor in resolving this question.

In *Katz* v. *United States*,[33] the Supreme Court held that the fourth amendment protects people and not places. It is nevertheless true that the nature of the place or property into which the government intrudes can be highly significant in determining the extent to which fourth amendment protections are applicable. And so it is that a residence, because of the traditionally high expectations of privacy associated with private dwellings, is accorded the highest level of fourth amendment protection—the warrant requirement—while "open fields" are accorded none at all.[34] Between these two extremes are found the three general types of property to which beepers are most frequently applied—movable containers, vehicles, and aircraft.

Special Agent Hall

Containers

The Supreme Court has held that because of the high level of privacy generally associated with personal luggage and other movable containers whose contents are concealed from observation, searches of such containers must be authorized by a warrant.[35]

It seems clear that the installation of a beeper inside a personal container to which that level of protection attaches will likewise, in the absence of an emergency, require a warrant for its justification. Apart from an emergency, there may be special circumstances which give the government lawful access to the container and its contents. For example, in *United States* v. *Sheikh*,[36] during a lawful border search, a beeper was attached to a package of contraband for the purpose of determining its destination. Citing the long-established authority for the conduct of border searches,[37] the Federal appellate court held that the installation was lawful, even without a warrant.[38]

Vehicles

The Supreme Court has not yet decided whether the installation of a beeper in or on a vehicle constitutes a fourth amendment search, and the lower Federal court holdings have been inconclusive. Although one Federal appellate court has held that the mere installation of a beeper on the exterior of a vehicle is not a search,[39] and at least one Federal district court has taken the opposite view,[40] most of the remaining courts have skirted the issue. For example, in *United States* v. *Michael*,[41] the court declined to decide whether the installation of a beeper to the exterior of a vehicle was a search, concluding that in any event the diminished expectation of privacy in the vehicle, coupled with the minor intrusion necessary to attach the beeper, rendered the warrantless installation reasonable based on reasonable suspicion. Other courts have taken a similar approach, although some would require probable cause to justify the warrantless installation.[42]

The Supreme Court has traditionally viewed vehicles as being distinct from other kinds of property. The nature of vehicles and their use in our society serve to reduce the level of privacy normally associated with other property and create a corresponding reduction in fourth amendment protection.[43] Thus, warrantless searches of vehicles have been upheld by the Court based on probable cause[44]—a circumstance that would not ordinarily allow the warrantless search of other kinds of property. It is unlikely, therefore, that courts will require a warrant for the mere attachment of a beeper to the exterior of a vehicle. It should be noted if the installation involves an intrusion into the interior of a vehicle, there is a greater likelihood that courts will consider the installation to be a fourth amendment search[45] requiring a warrant or, at the very least, probable cause.

"... probable cause is the requisite standard to support a beeper warrant."

Aircraft

Aircraft have been treated by the courts in much the same manner as automobiles and other vehicles for fourth amendment purposes, and the installation of a beeper *inside* an aircraft has generally been treated as a search.[46] This is perhaps reflected in the fact that in the cases to date, installations of beepers inside aircraft have usually been accomplished under the authority of a court order or with the consent of an appropriate party.[47] Attachment of a beeper to the exterior of an aircraft should not require a warrant.

Effect of Illegal Installation

A significant question remaining with regard to the installation of a beeper is whether an invalid installation—assuming the installation to be a fourth amendment search—should result in suppression of evidence located as a result of subsequent monitoring. In *Karo,* the Supreme Court held that a court order is required to monitor a beeper which has been taken inside private premises and it is clear that an invalid court order, or none at all, would taint the subsequent monitoring under those circumstances. The same approach has apparently been assumed by the lower Federal courts even when the subsequent monitoring occurs in public places—i.e., places where the Supreme Court in *Knotts* held there is no fourth amendment search. These courts have viewed the subsequent monitoring, even in public places, as potentially tainted by an initial illegal installation.[48]

At least one case suggests a different result. In *United States* v. *Butts,*[49] monitoring of a beeper which had been installed inside an aircraft under the authority of a court order was continued for a short period after the court order had lapsed. Noting that the Supreme Court in *Knotts* had left unanswered the questions whether installation of the beeper violated the fourth amendment, and if so, how such allegations should be dealt with, the court concluded:

> "The action of the officer in installing the beeper did not result in discovery of any evidence at issue. Both the installation of and the failure to remove the beeper were unknown to Butts; therefore, neither . . . could have influenced Butts' decision to fly the aircraft in the public airspace. The signal from the then unwarranted beeper did nothing more than enhance the customs officials legal right to observe the aircraft's public movements. No Fourth Amendment right was infringed." [50]

It was perhaps significant in *Butts* that the court did not consider the failure to remove the beeper to be a deliberate or "bad faith" action. The court noted that the failure could have been attributed to "illness, accident, inadvertence, or bureaucratic bungling." [51] A deliberate action of that kind might have been treated differently.

Notwithstanding the divergence of views among the courts regarding the fourth amendment's application to beeper installations, two considerations suggest the wisdom of assuming that such installations are, as a rule, fourth amendment searches necessitating acquisition of a warrant. First, as noted herein above, some courts consider any evidence acquired as the result of using an improperly installed beeper as having been tainted by the initial illegality and subject to exclusion. And second, as the Supreme Court noted in *Karo,* even when a warrantless installation is permissible, it cannot always be anticipated when the vehicle or other property to which the beeper is affixed will be moved into private areas where warrantless monitoring is prohibited. Thus, what begins as a lawful, warrantless surveillance can quickly become an unconstitutional search. The government recognized this risk in *Karo* and contended that requiring a warrant to monitor a beeper once it has been withdrawn from public view would have the practical effect of requiring a warrant in every case. The Court responded:

> "The argument that a warrant requirement would oblige the Government to obtain warrants in a large number of cases is hardly a compelling argument against the requirement." [52]

The Warrant Requirement

Having established the necessity for a warrant to monitor a beeper withdrawn into private areas, the Court in *Karo* offered some advice as to the point in time at which the warrant should be obtained. After holding that the installation of a beeper in a container of chemicals with the consent of the owner is not a fourth amendment search with respect to a prospective owner, the Court stated:

> "Despite this holding, warrants for the *installation and monitoring* of a beeper will obviously be desirable since it may be useful, even critical, to monitor the beeper to determine that it is actually located in a place not open to visual surveillance." [53] (emphasis added)

Acquisition of a warrant to install and monitor a beeper raises several significant questions regarding the characteristics of such a warrant. What is the appropriate standard for issuance? How can the particularity requirement of the fourth amendment be satisfied? What, if any, time constraints are applicable? And finally, what if the beeper is monitored beyond the territorial jurisdiction of the court which authorized the surveillance? These questions will now be considered.

The Standard for Issuance

The standard established by the fourth amendment for the issuance of a warrant is probable cause, although the Supreme Court has approved the issuance of warrants on a lesser standard for certain kinds of administrative searches.[54] In *Karo* the government suggested that reasonable suspicion, rather than probable cause, should be adopted for installation and monitoring of beepers. The Supreme Court declined to decide whether a lesser standard than probable cause would suffice to support a beeper warrant, but noted that even under the facts of *Karo* probable cause had apparently existed.[55]

The Federal appellate courts have consistently used probable cause as the appropriate standard.[56] One case which provides an illustration of probable cause for a beeper warrant is *United States* v. *Ellery.*[57] DEA agents were notified by the proprietor of a chemical company that he had received an order to ship 5 kilograms of norephedrine hydrocholoride (HCL) to a residential apartment. An affidavit was filed seeking a warrant to install a beeper in the package. Included in the affidavit were statements to the effect that (1) the affiant had substantial experience in investigations involving illegal manufacturing of controlled substances; (2) no legitimate laboratory, manufacturing, or business enterprise appeared to exist at the mailing address; (3) HCL lacked any common household use; and (4) HCL could be used to manufacture amphetamine, a controlled substance. The affidavit also asserted that a high risk of detection existed if normal surveillance techniques were used. The magistrate issued a warrant which the Federal appellate court upheld as "founded on sufficient probable cause." [58]

In view of the specific admonition of the fourth amendment that "no Warrants shall issue but upon probable cause" and the general adoption of this standard by the lower courts which have considered the issue, it is safe to assume that probable cause is the requisite standard to support a beeper warrant.

Particular Descriptions

In *Karo,* the government argued that it would be impossible to meet the particularity requirement of the fourth amendment by describing in a beeper warrant the "place" to be searched, because that is precisely the information sought to be discovered by the surveillance. The Supreme Court resolved the issue by declaring:

> ". . . it will still be possible to describe *the object into which the beeper is to be placed.* . . ." [59] (emphasis added)

The Court concluded that "this information will suffice to permit issuance of a warrant authorizing beeper installation and surveillance." [60]

The Court's willingness to accept what can be viewed as a reduced standard of "particularity" may have been prompted by a desire to bring within judicial control an investigative technique that while "less intrusive than a full scale search" [61] nevertheless presents "far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." [62]

Time Limits

The fourth amendment does not specifically impose a time limit on the lifespan of a search warrant. However, in its interpretation of the fourth amendment, the Supreme Court has viewed the imposition of time constraints on search warrants as an additional protection—along with the explicit requirements of probable cause and particularity—against the issuance of "general warrants."

For example, in *Berger* v. *New York,*[63] the Court struck down a New York wiretap statute as violative of the fourth amendment based, in part, on the absence of a termination date to the electronic interception. The statute authorized a court-ordered wiretap for up to 2 months with the possibility of further extensions on a showing that such extensions were in the "public interest." The Court viewed the 2-month authorization as "the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." [64]

The recognition that some time restriction is essential in the execution of search warrants may also be seen in the fact that a search authorized under a standard Federal search warrant issued pursuant to Rule 41 of the Federal Rules of Criminal Procedure must be executed within "a specified period of time not to exceed 10 days . . . ." Similarly, a court-ordered wiretap under Federal law may not

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exceed 30 days, unless an extension is authorized by a further showing of probable cause.[65]

The Supreme Court in *Karo* indicated that a warrant to install and monitor a beeper should indicate the length of time that such surveillance is requested.[66] Unfortunately, the Court did not suggest what might constitute a reasonable length of time, and so some reference to lower Federal court cases becomes necessary.

Significantly, none of the Federal courts to date has suggested that the 10-day limit for a standard Federal search warrant should be applied to a warrant authorizing beeper installation and monitoring. A review of cases involving beeper warrants discloses authorizations ranging from 72 hours[67] to 90 days.[68] Rather than applying a fixed standard, the courts have chosen to consider the time limits in the context of the facts which arise in specific cases.

For example, in *United States* v. *Cady,*[69] instead of focusing on the 90-day outer limit established in the beeper warrant, the court chose to consider the *actual* time that the monitoring occurred (17 days) and concluded that it was reasonable. The court concluded:

> "Seventeen days within which to locate a movable conveyance, to enter it surreptitiously and install a beacon, and to monitor its movements . . . is clearly not an unreasonable time allowance or one within which the probable cause underlying the warrant became stale." [70]

The same approach was taken by a different court in *United States* v. *Long,*[71] wherein a warrant authorized the beeper surveillance for 90 days when in fact the actual surveillance spanned 1 week. Focusing on the *actual* rather than the *potential* surveillance, the court upheld the warrant.

It is perhaps noteworthy that both *Cady* and *Long* involved beepers which had been installed inside aircraft and which were under surveillance in public airspace. It seems reasonable to assume that stricter standards for beeper warrants may be applied when the surveillance intrudes into private dwellings.

An application for a beeper warrant should incorporate a specific time frame during which the warrant will be executed. In the absence of a clearly established standard, a time frame not to exceed 30 days may be a good rule of thumb to follow for the initial execution of the warrant. Specific circumstances may suggest the need in a given case for a longer period of time, and obviously extensions of the original warrant could be obtained when justified. The 30-day rule corresponds to the accepted standard for court-ordered wiretaps—a far more intrusive search—and reduces the risk that the warrant will be struck down for failure to establish reasonable time constraints.

Jurisdiction of a Beeper Warrant

It is a generally accepted rule that search warrants are to be executed within the territorial jurisdiction of the issuing court. For instance, Rule 41 of the Federal Rules of Criminal Procedure states in pertinent part:

> "A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record *within the district wherein the property or person sought is located* . . . ." (emphasis added)

This language of Rule 41 has generally been construed to mean that a "search warrant can only be operative in the territory in respect to which the issuing officer is clothed with judicial authority." [72] Because beepers are affixed to movable containers or conveyances, there is always a risk that the surveillance may move beyond the territorial jurisdiction of the issuing court, which raises a question regarding the authority of the warrant.

In light of the unique problems associated with beeper surveillance, the courts have declined to hold that the authorizing court orders are subject to all of the same procedural requirements as standard search warrants. In *United States* v. *Lewis,*[73] a warrant was obtained from a magistrate in Houston, TX, to install a beeper inside a container of chemicals. The beeper was then monitored as it moved from Houston to Livingston Parrish, LA, a different judicial district. The Federal appellate court rejected a defense contention that the original warrant was invalidated as the result of the travel. The court stated:

> "To require a warrant from each jurisdiction into and through which the drum might travel or come to rest, would be to put an almost impossible burden upon the government for no valid purpose. This objection is devoid of merit." [74]

It is unclear in *Lewis* whether the court viewed the territorial limitation as inapplicable or simply concluded that failure to comply did not rise to the level of a constitutional violation.[75] In any event, it does not appear likely that monitoring a beeper which has been moved beyond the jurisdiction of the court that issued the authorizing warrant will present any significant legal problems for law enforcement.

CONCLUSION

In *Knotts* and *Karo,* the Supreme Court effectively answered most of the questions regarding the application of the fourth amendment to the installation and monitoring of beepers. To the extent that some questions remain, their answers cannot change the ultimate conclusion to be drawn by law enforcement. In *Karo,* the government contended that requiring a warrant to monitor a beeper which has been removed from public view will have the practical effect of requiring a warrant in every case. The point is well taken.

However, recognizing the need for flexibility in applying the warrant requirement to this unique investigative technique, the courts have declined to impose the same strict standards ordinarily associated with the traditional search warrant. The apparent object is to establish some degree of judicial control over this form of electronic surveillance without unreasonably hindering legitimate law enforcement activity. Accordingly, application of the warrant requirement to the monitoring of beepers which have been removed from public view should not deprive law enforcement officers of this highiy effective—and frequently essential—investigative tool.

FBI

Footnotes

[30] 75 L.Ed.2d 55 (1983).
[31] 82 L.Ed.2d 530 (1984).
[32] Id. at 543-544.
[33] 389 U.S. 347 (1967).
[34] *United States* v. *Oliver,* 80 L.Ed.2d 214 (1984).
[35] *See, e.g., United States* v. *Chadwick,* 433 U.S. 1 (1977); *Arkansas* v. *Sanders,* 442 U.S. 753 (1979).
[36] 654 F.2d 1057 (5th Cir. 1981), *cert. denied,* 455 U.S. 991 (1982).
[37] *See, e.g., Torres* v. *Puerto Rico,* 442 U.S. 465 (1979); *United States* v. *Ramsey,* 431 U.S. 606 (1977); *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973).
[38] *Supra* note 36, at 1071.
[39] *United States* v. *Moore,* 562 F.2d 106 (1st Cir. 1977), *cert. denied,* 435 U.S. 926 (1978).
[40] *United States* v. *Neet,* 504 F.Supp. 1220 (D. Col. 1981).
[41] 645 F.2d 252 (5th Cir.) *en banc, cert. denied,* 454 U.S. 950 (1981); *see also United States* v. *Strmel,* 574 F.Supp. 793 (E.D. La. 1983).
[42] *See, e.g., United States* v. *Shovea,* 580 F.2d 1382 (10th Cir. 1976), *cert. denied,* 440 U.S. 908 (1979); *United States* v. *Frazier,* 538 F.2d 1322 (8th Cir. 1976), *cert. denied,* 429 U.S. 1046 (1977).
[43] *See, e.g., Carroll* v. *United States,* 267 U.S. 132 (1925); *Chambers* v. *Maroney,* 399 U.S. 42 (1970); *United States* v. *Ross,* 456 U.S. 798 (1982).
[44] *Id.*
[45] *See, e.g., United States* v. *Martyniuk,* 395 F. Supp. 42 (D. Oregon, 1975), *modified on other grounds, United States* v. *Hufford,* 539 F.2d 32 (9th Cir.), *cert. denied,* 429 U.S. 1002 (1976); *United States* v. *Strmel,* 574 F.Supp. 793 (E.D. La. 1983).
[46] *See, United States* v. *Butts,* 729 F.2d 1514 (5th Cir.1984); *United States* v. *Bruneau,* 594 F.2d 1190 (8th Cir.), *cert. denied,* 444 U.S. 847 (1979); *United States* v. *Miroyan,* 577 F.2d 489 (9th Cir.), *cert. denied,* 439 U.S. 896 (1978).
[47] *See, United States* v. *Erickson,* 732 F.2d 788 (10th Cir. 1984); *United States* v. *Long,* 674 F.2d 848 (11th Cir.), *cert. denied,* 455 U.S. 919 (1982); *United States* v. *Cady,* 651 F.2d 290 (5th Cir.), *cert. denied,* 455 U.S. 919 (1981); *United States* v. *Bruneau, supra* note 46; *United States* v. *Miroyan, supra* note 46.
[48] *See, e.g., United States* v. *Taylor,* 716 F.2d 701 (9th Cir. 1983); *United States* v. *Cooper,* 682 F.2d 114 (6th Cir. 1982) (*per curium*), *cert. denied,* 103 S. Ct. 112 (1983); *United States* v. *Ellery,* 678 F.2d 674 (7th Cir. 1982), *cert. denied,* 103 S. Ct. 150 (1983).
[49] 729 F.2d 1514 (5th Cir. 1984).
[50] *Id.* at 1518.
[51] *Id.* footnote 5, at 1518.
[52] *Supra* note 31, at 543.
[53] *Id.* footnote 3, at 540.
[54] *See, e.g., Marshall* v. *Barlow's Inc.,* 436 U.S. 307 (1978); *Michigan* v. *Tyler,* 436 U.S. 499 (1978); *Camara* v. *Municipal Court,* 387 U.S. 523 (1967).
[55] *Supra* note 31, footnote 5 at 544.
[56] *See, e.g., United States* v. *Butts,* 729 F.2d 1514 (5th Cir. 1984); *United States* v. *Cooper,* 682 F.2d 114 (6th Cir. 1982) (*per curiam*); *cert. denied,* 103 S. Ct. 112 (1983); *United States* v. *Ellery,* 678 F.2d 674 (7th Cir. 1982), *cert. denied,* 103 S.Ct. 150 (1983); *United States* v. *Taylor,* 716 F.2d 701 (9th Cir. 1983); *United States* v. *Erickson,* 732 F.2d 788 (10th Cir. 1984); *United States* v. *Long,* 674 F.2d 848 (11th Cir.), *cert. denied,* 455 U.S. 919 (1982).
[57] 678 F.2d 674 (7th Cir. 1982), *cert. denied,* 459 U.S. 868 (1983).
[58] *Id.* at 678.
[59] *Supra* note 31, at 543.
[60] *Id.* at 543.
[61] *Id.* at 541.
[62] *Id.* at 542.
[63] 388 U.S. 41 (1967).
[64] *Id.* at 59.
[65] Title 18 U.S.C. § 2518 (5).
[66] *Supra* note 31, at 543.
[67] *United States* v. *Cooper,* 682 F.2d 114 (6th Cir. 1982) (*per curiam*), *cert. denied,* 103 S. Ct. 112 (1983).
[68] *United States* v. *Cady,* 651 F.2d 290 (5th Cir.), *cert. denied,* 455 U.S. 919 (1981).
[69] *Id.*
[70] *Id.* at 291-292.
[71] 674 F.2d 848 (11th Cir.), *cert. denied,* 455 U.S. 919 (1982).
[72] *United States* v. *Strother,* 578 F.2d 397, at 399 (D.C. Cir. 1978).
[73] 621 F.2d 1382 (5th Cir. 1980), *cert. denied,* 450 U.S. 1981 (1980).
[74] *Id.* at 1389.
[75] *See, e.g., United States* v. *Cassidy,* 532 F. Supp. 613 (M.D. N.C., 1982) (court held that violation of the territorial jurisdiction limits in Rule 41 is not by itself of constitutional magnitude requiring suppression of evidence.

END