

# JOURNAL of LAW REFORM ONLINE

COMMENT

## THE LATEST 4<sup>TH</sup> AMENDMENT PRIVACY CONUNDRUM: “STINGRAYS”

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*Wired* is reporting renewed hubbub regarding statutory and Fourth Amendment protections of individuals’ privacy in the digital age. This time, it comes in the form of federal officers using a fake cellphone tower (called a “stingray”) to locate their suspect, Mr. Rigmaiden, by tracking the location of his cellphone.

According to an affidavit submitted to the court, the stingray only captures the equivalent of header information – such as the phone or account number assigned to the aircard as well as dialing, routing and address information involved in the communication.

In interpreting the Fourth Amendment, the Supreme Court has held<sup>1</sup> that police may make use of a “pen register” without obtaining a warrant.<sup>2</sup> To regulate use of this tool, Congress enacted the Pen Register statute, which requires a court order before the installation of a pen register. However, it is currently unclear whether using a stingray to track people by their cellphones should be governed like a pen register.

The Court in *In re Application for Pen Register and Trap/Trace Device with Cell Sit Location Authority*,<sup>3</sup> argued that the collection of this sort of data is more invasive than the data gathered by a pen register and should not be governed by the Pen Register Act because “the traditional pen register was triggered

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1. Smith v. Maryland, 442 U.S. 735 (1979).

2. A pen register is “a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, ... that such information shall not include the contents of any communication.” 18 U.S.C. §3127(3).

3. 396 F.Supp.2d 747, 761-62 (S.D. Tex. 2005).

only when the user dialed a telephone number; no information was recorded . . . unless the user attempted to make a call.” Though the Patriot Act extended the scope of the Pen Register Act by including electronic communications, it also specified that the added information must be “generated by, and incidental to, the transmission of ‘a wire or electronic communication.’”<sup>4</sup> Because stingrays gather information from the phone which is not generated by the transfer of communication, such as location data, maybe tracking this way should not be governed by the Pen Register Act.

On the other hand, use of a stingray does not seem to intercept any *communication* at all. A police officer is free to follow a suspect, conducting surveillance. Tracking by cellphone clearly saves enormous amounts of resources. And if an individual thinks they are being followed, they can try to shake a tail. The digital version of shaking a tail in this case is fairly simple: turn off your cell phone.

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4. 18 U.S.C. §3127(3).