September 1, 2013 Edition

IN THE SUPREME COURT
OF THE UNITED STATES

No. 2013–2014

Chester Comerford, Petitioner-Appellant

vs.

United States of America, Respondent-Appellee

On Writ of Certiorari to the Court of Appeals for the Fourteenth Circuit

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ORDER OF THE COURT ON SUBMISSION

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral argument on the following issues:

1. Whether the warrantless tracking of the defendant's location through a cell phone violated the Fourth Amendment to the United States Constitution?

2. Whether the President exceeded his authority when he ordered the indefinite detention of an American citizen?

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT No. 01–76318

CHESTER COMERFORD, PETITIONER-APPELLANT

vs.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

United States Court of Appeals for the Fourteenth Circuit

Before KRUGER, Chief Circuit Judge, LOHMAN and KAYE, Circuit Judges.

OPINION BY Chief Judge Kruger, with Judge Peter Kaye concurring:

I

Overview of the Facts: Enactment of Federal Law

In September of 2001, Congress enacted the Authorization for Use of Military Force (AUMF). (See Appendix I.) § 2(a) of the AUMF authorized the President of the United States to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." In 2011, Congress enacted House Resolution 1540, "The National Defense Authorization Act for Fiscal Year 2012." P.L. 112-81 (NDAA). President Obama signed H.R. 1540 into law on December 31, 2011. § 1022 of that resolution stated that the military "shall hold a person . . . who is captured in the course of hostilities authorized by the Authorization for Use of Military Force (Public Law 107-40) in military custody pending disposition under the law of war." § 1022 authorized the President to "waive the requirement . . . if the President submits to Congress a certification in writing that such a waiver is in the national security interests of the United States." The statute did not expressly forbid the President from detaining Americans indefinitely. Rather, § 1022(b)(1) and § 1022(b)(2) stipulated, respectively, "[t]he requirement to detain a person in military custody under this section does not extend to citizens of the United States" and "[t]he requirement to detain a person in military custody under this section does not extend to a lawful resident alien of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States." Prior to its enactment, the Senate debated amending the NDAA to forbid the President from detaining Americans indefinitely. That effort failed. Thus, while the President was not required to detain Americans indefinitely, he was not forbidden to do so. To that end, § 1021(d) stated, "Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force." (See Appendix III) § 1021(e) stated, "Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured

or arrested in the United States." Persons susceptible to indefinite detainment are termed "unprivileged enemy belligerents" under the Military Commisions Act (See Appendix II.) They are to be tried under federal law by military courts. § 1022. (See Appendix IV) Federal law does not compel the United States to charge unprivileged enemy belligerents. Efforts to pass laws expressly forbidding the President to detain Americans indefinitely failed in both houses of the Congress. When the President signed the National Defense Authorization Act for Fiscal Year 2012, he issued a signing statement that stated his concerns that the law did not expressly confirm his inherent power as Commander-in-Chief to order the indefinite detainment of "unprivileged enemy belligerents" regardless of their citizenship. Prior presidents, including George W. Bush, had asserted a similar power. In response, the Senate again debated, and again failed to pass a resolution that would have forbidden the President from detaining Americans indefinitely. The House Committee on the Judiciary passed a resolution that expressly authorized such detainments, but the full House did not take up the resolution.

II

The Use of the IMSI-Catcher and the Application of Federal Law to Petitioner

Petitioner Chester Comerford, an American citizen by birth, is a licensed attorney and a former law professor who operates a website for a group that he founded in 2008 known as the Guardians. The Guardians question President Obama's citizenship. In 2011, Comerford was convicted of aiding and abetting threats on the President of the United States. The Supreme Court of the United States reversed Comerford's conviction in 2012.[1]

Shortly after his conviction was reversed, Comerford resumed living in Olympus. Comerford acquired a smart-phone from a local merchant. Comerford knew that the phone could be tracked via GPS technology and that the GPS-tracking capability could be disabled. He went on-line and found instructions, which he successfully performed, for "how to disable GPS-tracking on a smart-phone." As an attorney, he had heard rumors about cell phone tracking technology from other attorneys and private investigators, however, he had not heard of any models or read about the subject. He knew every phone has an international mobile subscriber identity (IMSI) that could be tracked, but mistakenly thought such tracking captured a phone's GPS. Thus, he was unaware that data revealing the IMSI associated with his phone and its location could be obtained even if the GPS-tracking was disabled and if his phone was not being used but was powered on. He knew about changing SIM cards to avoid detection, but mistakenly thought his IMSI changed when he changed phone numbers. Some phones come with manuals that disclose that they include an IMSI. The manual for Comerford's phone did not disclose that the phone includes an IMSI. Trial testimony reveals that many websites, including that of the phone's manufacturer, report the existence of an IMSI. His manual included the address for that website.

On March 17, 2012, the Federal Bureau of Investigation (FBI) received an anonymous tip that Comerford was involved in selling or dealing drugs. The source stated that "Comerford had people arriving at his home at odd hours, and he would come and go in the middle of the night." The caller provided Comerford's cell phone number and wireless provider in the message. It is unclear how the tipster obtained that data. The FBI decided to investigate and to corroborate the

[1] *Comerford v United States*, ___ U.S. ____ (2012). Comerford's alleged accomplices, Casey Ryder, Timothy Pegg, and William Thomas, pled guilty to threatening the President and remain in prison.

anonymous tip. The investigation, led by Special Agent Carmen Pettitte, made use of recently purchased surveillance technology known as "the Chum" that captures the IMSI of cellphones.

The FBI office in Olympus, after hearing about its effectiveness, purchased the Chum from a private retailer for $85,000 on February 14, 2012. The technology is pricey and portable. It can be purchased directly from manufacturers or private retailers. Although chiefly used by the military or law enforcement, IMSI-catchers such as the Chum are available to the general public. There are media reports that some criminals have procured or even built their own IMSI-catchers. IMSI-catching technology enables its users to obtain data from cell phones that reveals a phone's location and IMSI as well as that of third parties. It does so by masquerading as a cell phone tower. Cell phones, as long as they are powered on, constantly search for and send signals to cell towers. The Chum cell phone tower receives signals from all cell phones on the same network and responds to them every 7-15 seconds. Cell phones initiate this contact. IMSI-catchers such as the Chum receive these signals and then respond. In doing so, they trick cell phones into connecting with them. This technology enables operators to be in constant contact with the cell phone they seek to track. Some IMSI-trackers available on the market are capable of capturing and recording the content of communications, *i.e.*, record conversations or copy text messages. The Chum cannot record or intercept the content of the devices. It is capable of distinguishing an individual cell phone from other cell phones by identifying and recording the phone's IMSI. Every cell phone has its own unique IMSI. Cellular networks rely on IMSIs to determine if a cell phone user subscribes to their network. Tracking an IMSI makes it possible to covertly determine, capture, and record a phone's location. The Chum can track all cell phone and wireless devices on a given network in a given area with remarkable specificity. This is true so long as the cell phone or wireless device is powered on, even if the person possessing the cell phone or wireless device is not operating the device. This can be done without trespassing onto or into a target's property. The Chum forces cell phones that connect to it to reveal their IMSI. Presently, no cell phones are immune to IMSI-catchers, though some will warn its user if its encryption protection has become inoperable. Comerford's phone did not have that function.

Law enforcement does not like to reveal much about IMSI catchers and their capabilities or use because of concerns that such information will hamper future and/or on-going investigations. In fact, few law enforcement agencies or departments will identify the models they use, let alone confirm that they deploy such technology. Thus, it is unknown how many are being utilized, how frequently, or what percentages of investigations utilize them. What is known is that the FBI has used the technology since the 1990s. The American media reports that the United States Secret Service and a growing number of municipal police forces, including those in California, Arizona, Florida, and Texas, have borrowed (from the FBI) or purchased and deployed IMSI-catching technology. The media reports that it appears that these devices have been used in routine investigations (i.e., drugs) as well as extraordinary investigations (i.e., terrorism); however, that is unconfirmed. These purchases have been from vendors (e.g., E-Bay) as well as manufacturers. Some of these devices, including the Chum, have been mentioned by name in these articles. Some of the money for the purchase of this technology by municipal police forces has come from federal anti-terrorism grants. The FBI is reported to have used the technology in virtually every region, if not state, of the country. A search of the Internet identifies numerous stories about IMSI-catching technology and there have been many references to it in television shows and major Hollywood films. Several have referred to specific models by name –

including episodes of "The Closer" and "Leverage." IMSI-catchers are fairly small – they can be held in a hand or mounted to a car – and thus are quite portable. Their successful use does not require much training or any information or assistance from cell phone providers.

Without a warrant, or court order, the FBI set up a single fake cell phone tower in a field near Comerford's home and monitored his wireless activity. The tower was not on his property. The FBI knew his phone number and when a cell phone with that number communicated with the fake tower. The FBI identified Comerford's IMSI. The FBI did not know Comerford's whereabouts when his phone initially connected with the fake cell tower. Unlike most IMSI-catchers, the Chum enables operators to narrow their surveillance to a specific IMSI. Thus, after initially capturing the IMSIs of non-targets, the FBI was able to focus on Comerford's cell phone alone. The FBI captured and retained the location data emitting from Comerford's cell phone to the exclusion of others. It did not monitor any other wireless activity nor did it set foot on or in his tangible property. The Chum's range was wide enough that it allowed the FBI to monitor Comerford's movements to and from his home to other locations outside of his home so long as he carried his cell phone and it was powered on. On occasion he powered it off. As a result, the FBI did not visually surveil Comerford until April 8, 2012. Some IMSI-catchers enable operators to determine a subject's location within two meters. Others are far less accurate and can be off the mark by as much as 100 meters. The Chum lies in the middle of the precision spectrum. According to the FBI, it could determine if and when Comerford left his home and where he went provided he carried his cell-phone and it was powered on. The FBI, however, was unable to track Comerford's location or movements inside his home.

The data revealed that Comerford traveled from his home at 18 Wheeler Road to a downtown warehouse district located at 89 New Road every evening at 11:30 p.m. for a period of twenty-three days starting on March 17, 2012 and ending on April 8, 2012. On April 8, 2012, the FBI physically followed Comerford to the warehouse district with the aid of the Chum. Officers saw Comerford meet with William DeNolf and Matthew Costello. DeNolf and Costello have a documented history of participating in the illegal sale of military-grade arms (both have served prison sentences for violating federal laws prohibiting the sale of military-grade arms), and both have been suspected by federal agents to have ties to international terrorist organizations, including al-Qaeda (both have been questioned by the FBI on two previous occasions about their respective connections to such organizations). As soon as Agent Pettitte observed DeNolf and Costello, she contacted Assistant U.S. Attorney Ashley McHale. Agent Pettitte and McHale drafted a search warrant for the warehouse to search for evidence of suspected domestic terrorism and for Comerford's automobile and home to search for evidence related to drug possession. They woke the on-call judge, Peter Kemper, who authorized the warrants after the Government disclosed its evidence and how it was obtained. Special Agent Pettitte continued to monitor the meeting as DeNolf, Costello, and Comerford remained at the warehouse.

As soon as the warrants were granted on April 9, 2012, Pettitte and her team moved in and executed them. The police found documents in the warehouse indicating that Comerford had arranged to purchase a dirty bomb from DeNolf. Cocaine, razor blades, scales, zip-lock bags, and a log of drug sales were discovered in Comerford's home. The police searched Comerford's automobile pursuant to their warrant. This search revealed cocaine and zip lock bags. No narcotics were found at 89 New Road. The FBI apprehended all three men. A grand jury indicted Comerford for possession of cocaine with intent to distribute. It did not indict any of the

three men in connection with the discovery of the documents pertaining to a dirty bomb. None of the three men would admit any violations of the law or any plans to violate the law.

Before trial, Comerford moved to suppress the tracking data obtained from using the Chum and the narcotics found in his car and home. Comerford alleged that the use of the Chum and the collection of the location data from his cell phone was a warrantless search in violation of the Fourth Amendment and that the evidence seized was the fruit of an unconstitutional search. U.S. District Judge Rachel Daniel determined that Comerford did not have a reasonable expectation of privacy in his movements tracked using the emitted cell phone data and denied Comerford's motion, determining that the cellphone evidence was admissible. On the eve of trial, Comerford agreed to plead guilty to the reduced charge of drug possession. The Government agreed to recommend a three-to-five year sentence. At that time, Comerford reserved his right to appeal the denial of his suppression motion. Assistant U.S. Attorney McHale agreed that the evidence was dispositive. Comerford now appeals, arguing that the use of the location data emitted from his cell phone and captured by the IMSI-catcher without a warrant violated his Fourth Amendment rights. Comerford did not challenge the search of the warehouse.

On July 6, 2012, the President ordered that Comerford, who was in federal custody, be transferred into military custody outside the United States under § 1021(c)(1) and that he be held "indefinitely" under § 1021 as well as under Article II of the United States Constitution. The President's order declared Comerford an "unprivileged enemy belligerent." Federal law enforcement officials surrendered custody to military authorities on July 7, 2012, and the military transported Comerford to Guantanamo Bay, Cuba. Costello and DeNolf, who have separate counsel, were also transferred into military custody outside the United States. They are being held indefinitely under § 1021(c)(1).

While in custody outside the United States, Comerford was permitted administrative review by a review tribunal of his detention as an unprivileged enemy belligerent. This tribunal operated under procedures established by the Obama Administration in 2010. Previous review tribunals, established by President Bush, were found to be inadequate substitutes to meet the habeas corpus standards. *Boumediene v. Bush*, 553 U.S. 723 (2008). The new tribunals allow the accused to be represented by counsel, to have access to evidence against them, and to receive disclosures of relevant exculpatory evidence. Comerford's tribunal stated that "if Comerford found evidence to prove his innocence he would be able to present it to a court." This tribunal affirmed the constitutionality of the process afforded to Comerford insofar as access to counsel, access to evidence, and disclosure of relevant exculpatory evidence were concerned. This affirmation is not before us because Comerford has not challenged this determination. Nor has he challenged any issues relating to a speedy trial or a right to bail or his ability to introduce evidence that might establish his innocence. His sole challenges are to his denial of habeas corpus, and to the power of the President to have detained him pursuant to the president's statutory powers under the AUMF (2001) and the NDAA (2011), and his constitutional powers under Article II.

Counsel for Comerford unsuccessfully sought a writ of habeas corpus from the appropriate district court. When that failed, counsel sought a writ of habeas corpus from the U.S. Court of Appeals for the Fourteenth Circuit. Both sides stipulated that this body has jurisdiction because Comerford was apprehended by civilian authorities in its jurisdiction. At his hearing, Comerford argued that his indefinite detainment exceeded the President's authority, and that the United States violated his Fourth Amendment rights when it tracked his location through his cell phone

without a warrant. Comerford argued the tracking was unreasonable and that his conviction, resulting from the illegally obtained evidence, should be overturned. The United States did not assert that it had probable cause to obtain a warrant without the data obtained from tracking Comerford's cell phone; that issue was not preserved and is not before this court. By a 2-1 vote, we refuse Comerford's motions for the reasons to follow. No statutes or treaties or protocols or other international agreements are before this court other than those cited in the appendices. The parties to this case have stipulated to the aforementioned facts. Accordingly, all issues raised are legal. We review all questions *de novo.* We AFFIRM the ruling of the district court.

III

Fourth Amendment Analysis

In many ways this is a case about one side claiming foul because the other side was more technologically savvy. Such is no basis for a Fourth Amendment challenge. Consequently, Comerford's conviction must stand.

The FBI did not violate Comerford's Fourth Amendment rights because he did not have a reasonable expectation of privacy in the data emitted by his cell phone. It is of no moment that the police used a high-tech cell phone tracking device to track Comerford's cell phone. Simply put, one cannot rely on the expected untraceable nature of the tools that one uses to commit a crime. If that were true, then the police could not wiretap phones or employ dogs trained to ferret out contraband. The dissent's reliance on *Kyllo v. United States*, 533 U.S. 27 (2001), is misplaced. The legitimate expectation that information about perfectly lawful activity will remain private is distinguishable from Comerford's hopes or expectations concerning the non-detection of contraband in his car or his home. Likewise, Comerford was not entitled to an expectation of privacy in his illegal, public travels. Moreover, the device in question in this case is in "general public use," and thus law enforcement need not obtain a warrant to employ it.[2]

We arrive at this conclusion after reviewing a number of Supreme Court rulings. Perhaps most on point is *United States v. Knotts*, 460 U.S. 276 (1983). In that case, the police, with the consent of a business, placed a beeper in a five-gallon drum of chloroform in order to track the movements of a defendant and discover the location of a secret drug laboratory. This device sent a signal that enabled the police to track the location of the drum. In addition, the police relied upon visual surveillance. *Knotts* held this monitoring did not violate the Constitution because "[t]he governmental surveillance conducted by means of the beeper in this case amounted principally to the following of an automobile on public streets and highways. . . . A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281. Also significant is the fact that:

> [A] police car following [a defendant] at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin . . . . [T]here is no indication that the beeper was used in any way to reveal information . . . that would not have been visible to the naked eye.

[2] We do not suggest that there was no reasonable expectation of privacy *because* Comerford's phone was used in the commission of a crime or that the cell phone was illegally possessed. On the contrary, an innocent actor would lack a reasonable expectation of privacy if the external location of the tool that he or she bought was inherently locatable.

Id. at 285. *Knotts* is very analogous to the present case. Both Knotts and Comerford traveled on public roads, and law enforcement officers monitored their travels. It is true that the Chum, like the beeper, aided the police. However, the data that the police acquired was obtainable in both cases via visual surveillance. That using the cell tower was simply more efficient does not provide adequate grounds to penalize the police or make them fight crime with a figurative arm tied behind their backs. Such a ruling will cause great harm to society and we risk becoming a haven for criminals who will take advantage of what will almost certainly be a technologically-challenged police force. To quote the Supreme Court in *Knotts*, "[i]nsofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now." *Id.* at 284. A similar point of view was expressed in *Smith v. Maryland*, 442 U.S. 735 (1979). In that case, Smith lacked a reasonable expectation of privacy in the numbers he dialed on his phone. Those numbers were captured by the phone company as part of its standard procedure. Justice Harry Blackmun, writing for a 5-3 Court, reasoned that the police did not need a warrant in that case to access the numbers Smith dialed in part because "[a]ll telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills." *Smith* at 742. In that case, the Court refused to "hold that a different constitutional result is required because the telephone company has decided to automate." *Id.* at 745. We arrive here at a similar refusal. The fact is that the FBI, like the police in *Knotts* and *Smith,* could have obtained the same information by following Comerford. Although the agents would not have been able to maintain visual contact with Comerford at all times, visual observation was *possible* by any member of the public or by a member of the public using an IMSI-catcher. The agents simply used the cell tower device to "augment the sensory faculties bestowed upon them at birth," which is constitutionally permissible. *Knotts.* at 282. Similar reasoning compels the conclusion that Comerford did not have a reasonable expectation of privacy in the location of his cell phone while traveling on public roads.

Comerford asserts that he has a reasonable expectation of privacy in his cell data. He terms his cell data, which disclosed his location to the police, as a proxy for visual surveillance. Comerford asserts that, unlike in *Knotts*, the FBI could not discover where he was without the use of extra-sensory technology. We are not persuaded for the same reasons that the Supreme Court rejected such analysis in *Knotts.* The fact is that Comerford's movements across town could have been observed by any member of the public because he travelled on public roads. Additionally, using a more efficient means of discovering this information does not amount to a Fourth Amendment violation. In any event, we determine whether a defendant's reasonable expectation of privacy has been violated by looking at what the defendant is disclosing to the public, not what information is known to the police.

The dissent correctly notes that the Supreme Court has recently breathed new life into the trespass doctrine. See *United States v. Jones,* 132 S. Ct. 945 (2012) and *Florida v. Jardines* ___ U.S. ___ (2013). These cases are easily distinguished from the facts of the immediate case. Simply put, neither *Jones* nor *Jardines* apply here because they involved surveillance that depends on physical trespass. A further point of significance is that the tower was placed in a

field. There is no reasonable expectation of privacy in an open field under *U.S. v. Oliver,* 466 U.S. 170 (1984). Justice Samuel Alito, in his concurrence to *Jones*, asserts that there may be situations where police, using otherwise legal methods, so comprehensively track a person's activities that the very comprehensiveness of the tracking is unreasonable. *Jones* at 957–64 (Alito, J., concurring). Justice Alito recognized that in prior eras "practical" considerations often offered "the greatest protections of privacy." *Id.* at 963. For instance, prior to GPS tracking, "constant monitoring of the location of a vehicle for four weeks . . . would have required a large team of agents, multiple vehicles, and perhaps aerial assistance." *Id.* The advance of technology has made it possible to conduct a level of extreme comprehensive tracking, "secretly monitor[ing] and catalogu[ing] every single movement," that the defendant made over four weeks that previously would have been impossible. *Id*. at 964. The Framers did not know of such technology, however, they certainly would have been concerned that it not be abused. At the same time, the Framers would want the police to be able to protect society. Thus a serious effort to balance both liberty and security must be performed. We perform such here with the concerns of the Framers and Justice Alito in mind. Our analysis finds that the circumstances that would have troubled the Framers, or more presently Justice Alito, are not present.

We find it dispositive that the Government never had physical contact with Comerford's cell phone. The fact that he was unaware that his location data could be tracked even when his phone, while powered on, was not in use for communicating is of no moment. In essence, Comerford put his faith in the wrong technology -- or at least in a cloud of ignorance -- which is the rough equivalent of misplaced trust. *See Smith.* Further, ignorance that one's contraband is visible or that the police or the public may be watching does not make a search unlawful. *See California v Ciraolo,* 476 U.S. 207 (1986).

Because authorities tracked a known cell phone device that was voluntarily carried while traveling on public thoroughfares, Comerford did not have a reasonable expectation of privacy in the data and location of his cell phone. Therefore, suppression is not warranted and the district court correctly denied Comerford's motion to suppress.

IV

Article II Analysis

The question before this court is whether the President of the United States exceeded his authority when he ordered the indefinite detention of an American citizen who had planned to buy a dirty bomb from well-known arms dealers with ties to al-Qaeda. Because the President has no greater responsibility than protecting the safety of the American people, and he had the legislative backing of Congress, we see no constitutional obstacle to the detention of Comerford.

As an unprivileged enemy belligerent, Comerford was susceptible to indefinite detainment. The President's power to detain "unprivileged enemy belligerents" is derived from Article II of the Constitution as well as several legislative acts enacted after the September 11, 2001 attacks. The President is charged with the responsibility to protect the nation under Article II of the Constitution. As Commander-in-Chief, the President is bound to protect the American public from imminent threats. *See generally, The Prize Cases,* 67 U.S. 635 (1863); *see also* U.S. Const., Art. II, Sec. 2, Cl. 1. Although the Supreme Court recognized in *United States v. Curtiss-*

Wright Export Corp. 299 U.S. 304 (1936), that the President possesses sole authority under Article II to make decisions regarding the country's external relations, we need not reach the question whether Article II alone authorizes him to detain an American citizen as an unprivileged enemy belligerent. We need not do so because the President is acting pursuant to explicit congressional authority. That is required by *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

The Court has long held that the federal government, as a whole, must be permitted great leeway in protecting the nation's national security, especially when the political branches of government are working together. In Justice Jackson's famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 635 (1952), he observed that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possess in his own right plus all that Congress can delegate." When the President designated Comerford as an unprivileged enemy belligerent, he did so with the full force of the federal government behind him.

Public Law 112-81 § 1021 applies to people who are "part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported hostilities in aid of such enemy forces." P.L. 112-81, § 1021(b)(2). A person deemed an "unprivileged enemy belligerent" is subject to "detention under the law of war until the end of hostilities." Authorization for Use of Military Force, P.L. 112-81, § 1021(c)(1) (2001). The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are important incidents of war. *See Ex Parte Quirin*, 317 U.S. 1, 28-30 (1942).

That Comerford is a citizen of the United States does not "relieve him from the consequences of a belligerency which is unlawful." *Id.* § 1022(b)(1)-(2) states that the "requirement" to detain an individual in military custody does not "extend to citizens of the United States." But the law does not expressly forbid military authorities from detaining American citizens indefinitely as unprivileged enemy belligerents either. In fact, congressional efforts to expressly forbid such detention failed. Such legislative failure or inaction "creates a presumption in favor of the administrative interpretation, to which we should give great weight." *See Costanzo v. Tillinghast*, 287 U.S. 341 (1932). § 1021(e) specifically states that nothing in the law is meant to limit or expand the authority of the President. In *Hamdi,* a plurality of the Court opined that individuals, including American citizens, who fall within the scope of the AUMF are authorized to be detained indefinitely as such regular incidents of waging war. *See Hamdi*, 542 U.S. at 519-520. The *Hamdi* plurality opinion is limited to the particular circumstances of that case. Public Law 112-81, however, suggests the AUMF is not limited to the use of force against the Taliban or to the battlefield of Afghanistan alone. Some of the 9/11 hijackers resided in the United States for considerable periods of time prior to the attacks; this fact alone demonstrates that the AUMF necessarily covers activities both in the United States and abroad.

Comerford, who has previously been arrested and charged with aiding and abetting threats against the President, hoped to purchase a radiological weapon from well-known arms dealers with suspected ties to al- Qaeda. The President determined that Comerford fits under the accepted definition of unprivileged enemy belligerent, is subject to trial by military commission, and thus should be held in military custody. The judicial branch simply lacks the expertise and

capacity to second-guess the political branches of government that make such decisions. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (Thomas, J., dissenting).

The legislation in question before us today put the President within the first prong of Justice Jackson's *Youngstown* framework. Although P.L. 112-81 suggests that the detention of American citizens in military custody is not required, it does not prohibit such detention. Furthermore, there is ample precedent for allowing a broad Presidential prerogative in regard to national security concerns. When national security and the lives of American citizens are at stake, the President simply must be given wide latitude. For the above reasons, the Constitution allows the President to continue to hold Comerford as an unprivileged belligerent.

The dissent charges that we overlook "the controlling" cases. This misses the mark. The dissent fails to appreciate that there are significant factual differences between the record before us today and *Hamdi*, which lacked a majority, and *Boumediene v. Bush*, 553 U.S. 723 (2008). The President's actions are most appropriately handled under Justice Jackson's *Youngstown* framework. This is the controlling case both given the nature of the action taken and the initial location of the parties.

The judgment of the district court is AFFIRMED.

Aaron Lohman, Circuit Judge, Dissenting:

I dissent because Comerford had a reasonable expectation of privacy in the location data emitted from his cellular phone and, further, because the President exceeded his authority.

I

Fourth Amendment Analysis

When resolving Fourth Amendment disputes, courts are instructed to determine whether a person has an actual or subjective expectation of privacy that society is objectively willing to accept as reasonable. *Katz v. U.S., 389 U.S. 347, 360 (1967) (Harlan, J. Concurring).* Applying this analysis, the state needed a warrant.

The majority, almost certainly unintentionally, establishes that Comerford has a subjective expectation of privacy. It does so when it notes that Comerford erroneously believed that his phone was untrackable. It also establishes his general ignorance of the phone's IMSI and its ability to be tracked. These findings support the conclusion that Comerford had a subjective expectation of privacy in this information.

This leads to the second question: whether society is prepared to recognize Comerford's expectation of privacy as reasonable or legitimate. The answer to this question must be yes. That the majority answers in the negative is a travesty. The majority equates criminal conduct with a lack of a reasonable expectation of privacy. The fact is that society would find it unreasonable that the police are tracking persons within their jurisdiction without a warrant. It is made even more so when the police do so by mimicking a cell phone tower. We expect some basic level of privacy from police surveillance. Anyone in our society would expect that and thus the state needed a warrant.

The majority misapplies *U.S. v. Oliver,* 466 U.S. 170 (1984) and *California v Ciraolo,* 476 U.S. 207 (1986) and it appears almost oblivious to *Kyllo v. United States*, 533 U.S. 27 (2001) and *Karo v. United States,* 468 U.S. 705 (1984).

Here, an unlawful search occurred. The government, using the Chum, was able to track the movements of Comerford into his home and in his car. Although visual surveillance is unquestionably lawful and does not constitute a search, this case involves more than “naked-eye surveillance.” *Kyllo*, 533 U.S. at 33. Like *Kyllo*, this case concerns the possible shrinking of privacy because of the expanding power of technology. The majority improperly weighed that balance. Like the use of thermal-imaging device, which was not available for general use by the public, the use of the cell phone tower technology allowed the tracking of Comerford’s person, his car, and his movements into his home (any time he carried his cell phone). The police are guilty of a kind of physical trespass in this case. Under the Supreme Court’s most recent case law a warrant is required in such instances. See *United States v. Jones,* 132 S. Ct. 945 (2012) and *Florida v. Jardines* ___ U.S. ___ (2013). The majority’s reliance on *United States v. Knotts*, 460 U.S. 276 (1983) is misplaced. In that case, the police merely saw what any member of the public might have seen. In the present case, however, there is no way that any member of the public could make some visual observations of Comerford, he could not observe everything law enforcement did in this case. Only members of the public who purchase a cell phone tower device could access Comerford’s international mobile subscriber identity (IMSI) and monitor all of his movements twenty-four hours a day, including when he was in the privacy of his own home. The fact is that the record and *Knotts* are easily distinguished. The cases that are truly analogous are *Katz, Kyllo, Karo, Jones,* and *Jardines.*

It is important to note that in the case before us today, the FBI performed more than visual, public surveillance. We must look beyond Comerford. Today’s case raises the question of the constitutionality of long-term technological surveillance without a warrant and without an “accompanying trespass.” *Jones v. United States*, 132 S. Ct. at 954 (Sotomayor, J., concurring). Here, the government conducted surveillance of Comerford’s movements, without a warrant, for twenty-three days. No other legitimate governmental source of surveillance could provide exposure to an individual’s every movement, route, and location over a month. This is akin to the “extrasensory device” present in *Kyllo. Jones*, 132 S. Ct. at 954 (Sotomayor, J., concurring). Moreover, the technology the FBI employed is an unconstitutional trespass onto Comerford’s digital property. Such is the rough equivalent of the trespass implicated in *Jones* and *Florida v. Jardines*, ___ U.S. ___ (2013). It is a new world in which we live – one that must keep pace with such new forms of technology and recognize that police behavior may violate privacy rights in ways not readily apparent to even the most gifted of begetters, such as those who wrote the Fourth Amendment, as well as the most brilliant of legal minds, such as my brethren in the majority today. Today’s decision would allow almost limitless warrantless surveillance of suspects. The larger implication of warrantless, around the clock surveillance is that law enforcement officials can determine real-time locations of people, resembling the dragnet-type of surveillance rejected by the *Knotts* Court. Our constitutional heritage rebels at such unfettered power in the hands of the State. Simply put, the warrantless use of the Chum was unreasonable.

II

Article II Analysis

Decisions related to conducting a war are left to the branches of government that possess the wisdom, foresight, and institutional capacity to address them. Yet, the constitutional protection of individual rights does not automatically vanish just because the war-making branches of government say "war." As poignantly expressed by Justice O'Connor in *Hamdi v. Rumsfeld*, courts, in balancing governmental and individual interests, must remember that:

> [I]t is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004) (internal citation omitted). It is this calculus, which is outlined in *Hamdi,* that sets the parameters of our inquiry. Our task is to weigh "'the private interest that will be affected by the official action' against the Government's asserted interest . . . and the burdens the Government would face in providing greater process." *Id.* at 529.

However, this court's analysis should not be limited to the single inquiry required by *Hamdi*. The issue here is whether the President exceeded his authority when he ordered the indefinite detention of an American citizen. Thus, we are compelled to expand our analysis more broadly, considering the overlay of the wartime powers of the Executive Branch.

We would do well to remember the analysis of Justice Jackson in *Youngstown Sheet & Tube. Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring), which begins by noting, "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." Justice Jackson describes the zones of executive wartime power:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possess in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A [detention authorized] by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite,

> measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. (internal citations omitted). Thus, an appropriate analysis will require a two-part inquiry, addressing: (1) the Article II powers of the President in ordering the indefinite detention of Comerford, and (2) the balance between national security and Comerford's individual rights.

Article II, § 2 of the Constitution provides that the President "shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." U.S. Const., art. II, § 2, Cl. 2. Nowhere does the Constitution expressly authorize the President to detain a U.S. citizen for a potentially indefinite period of time. Nor does it allow the Executive to deny an individual the constitutional privilege of the writ of habeas corpus.

At first blush, the collective legislative acts of Congress, including the 2001 Authorization for the Use of Military Force (AUMF) and P.L. 112-81 may give the appearance that President Obama's actions would fall within the first zone of presidential wartime power. However, a closer look at the language of H.R. 1540 compels a different result.

§§ 1022(b)(1)-1022(b)(2) provide: "The requirement to detain a person in military custody under this section does not extend to citizens of the United States" and "[t]he requirement to detain a person in military custody under this section does not extend to a lawful resident alien of the United States." Further, § 1021(d) states that nothing within P.L. 112-81 should be read to limit or expand the authority of the President under the AUMF, § 1021(e) also provides that nothing within the body of the Resolution shall be construed as effecting existing law or authorities relating to the detention of United States citizens. P.L. 112-81 §§ 1021(e) and 1022(b)(2011).

In my view, previous holdings of the Supreme Court with respect to the AUMF can be understood to allow the capture and detention of those individuals deemed lawful enemy combatants. *See Hamdi v. Rumsfeld,* 542 U.S. at 518 (2004) (citing *Ex Parte Quirin*, 317 U.S. 1, 28 (1942)). However, this has been qualified to limit the application of the AUMF. The Court had held that "there can be no doubt that individuals who fought against the United States in Afghanistan *as part of the Taliban*, an organization known to have supported the al Qaeda network responsible for those attacks, are individuals Congress sought to target in passing the AUMF." *Hamdi*, 542 U.S. at 518 (emphasis added).

At best, the actions of President Obama in detaining Comerford fall within the second zone of twilight. At worst, they fall into the lowest ebb of executive wartime power. Although the Supreme Court's precedent indicates that a detention under the AUMF is constitutional,

subsequent legislation and cases suggest that the AUMF does not extend to the detention of U.S. citizens in military custody. H.R 1540 §1022(b)(2). Additionally, the statute does not suggest that the President may detain persons in Comerford's position for an indefinite period. The Constitution expressly forbids such an indefinite detention by the President, because such a detention deprives individuals of the writ of habeas corpus. *Ex parte Milligan,* 71 U.S. 2 (1866).

The Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." U.S. Const., art I, §9, cl. 2. Given that Congress and the Supreme Court have put limitations on the Executive Branch's authority to detain, the President does not have unchecked authority to detain in a military jurisdiction whomever he pleases.

The Supreme Court has taken considerable steps to prevent unchecked detentions by the Executive Branch. In a line of enemy combatant cases decided between 2001 and 2008, the Court has repeatedly struck down the President's overreaching actions. Although the exigencies of the Civil War or World War II justified extreme measures, the exigency of the "War on Terror" has long since passed. Additionally, even when the U.S. was conducting a two-front war with al-Qaeda and the Taliban, the Supreme Court took considerable measures to ensure that constitutional protections would still be afforded. The Court, for example, *Hamdi v. Rumsfeld*, and *Boumediene v. Bush*, 553 U.S. 723 (2008), rejected precedent from World War II and moved forward to rewrite the rights of both citizens and noncitizens alike during wartime. These are the controlling cases. Yet, the majority fails to square its ruling today with these two cases. The majority ignores the fact that these two cases reaffirmed the individual right of habeas corpus and the right not to be detained for an indefinite period. *Hamdi*, for instance, expressly held that although the AUMF authorized detention, this authorization did not grant the President the power to indefinitely detain an individual petitioner. *Hamdi*, 542 U.S. at 583. Additionally, the majority overlooks the Constitution itself, which states that the writ of habeas corpus cannot be suspended *unless* Congress properly invokes the Suspension Clause of the Constitution. U.S. Const., art. I, Sec. 9, cl. 2. Most critically, the Court made it quite clear to the war-making branches of government (more specifically to the Bush Administration) that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Id.* at 535.

Between 2001 and 2009, the President ran roughshod over the due process rights of unprivileged enemy belligerents in its custody. It did so in the name of national security. *Hamdi* sought to curb that power despite the fact that we were engaged in a multi-front war with a non-state actor. Without proper invocation of the Suspension Clause and without proper concurring authority from Congress, the President cannot take unilateral action to deprive an individual of his constitutional rights or detain the individual in military custody indefinitely. The importance of national security does not justify the wholesale abandonment of one of our most basic liberties.

The majority should call the indefinite detention of an American citizen what it is – an egregious violation of American law and constitutional tradition. This court should not be a party to this Administration's willful destruction of and disdain for the Constitution it is sworn to uphold. I therefore respectfully dissent from the majority reasoning. In doing so, I note that I agree with the majority that the constitutionality of the review tribunals and any issues relating to bail or a speedy trial are not before this court today.

List of Fourth Amendment Cases Cited:

Katz v. United States, 389 U.S. 347 (1967)

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

United States v. Knotts, 460 U.S. 276 (1983)

U.S. v. Oliver, 466 U.S. 170 (1984).

U.S. v. Karo, 468 U.S. 705 (1984)

California v. Ciraolo, 476 U.S. 207 (1986)

Kyllo v. United States, 533 U.S. 27 (2001)

United States v. Jones, 132 S. Ct. 945 (2012)

Florida v Jardines, ___ U.S. ___ (2013).

List of Article II Cases Cited:

The Prize Cases, 67 U.S. 635 (1863)

Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866)

Costanzo v. Tillinghast, 287 U.S. 341 (1932)

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)

Ex Parte Quirin, 317 U.S. 1 (1942)

Youngstown Sheet & Tube, Co. v. Sawyer, 343 U.S. 579 (1952)

Hamdi v. Rumsfeld, 542 U.S. 507 (2004)

Boumediene v. Bush, 553 U.S. 723 (2008)

Appendix I

Authorization for Use of Military Force, Public Law 107-40 (2001)

§ 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Appendix II

Military Commissions Act

10 U.S.C. § 948a(7)

In this chapter:

(7) Unprivileged enemy belligerent.— The term "unprivileged enemy belligerent" means an individual . . . who—
(A) has engaged in hostilities against the United States or its coalition partners;
(B) has purposefully and materially supported hostilities against the United States or its coalition partners;
(C) was a part of al Qaeda at the time of the alleged offense under this chapter; or
(D) has previously been defined as "enemy combatant."

Appendix III

Public Law 112-81 (2012)

§ 1021. AFFIRMATION OF AUTHORITY OF THE ARMED FORCES OF THE UNITED STATES TO DETAIN COVERED PERSONS PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.

(a) In General.--Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.

(b) Covered Persons.--A covered person under this section is any person as follows:

(1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.

(2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

(c) Disposition Under Law of War.--The disposition of a person under the law of war as described in subsection (a) may include the following:

(1) Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force.

(2) Trial under chapter 47A of title 10, United States Code (as amended by the Military Commissions Act of 2009 (title XVIII of Public Law 111-84)).

(3) Transfer for trial by an alternative court or competent tribunal having lawful jurisdiction.

(4) Transfer to the custody or control of the person's country of origin, any other foreign country, or any other foreign entity.

(d) Construction.--Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.

(e) Authorities.--Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.

Appendix IV

Public Law 112-81 (2012)

§ 1022. MILITARY CUSTODY FOR FOREIGN AL-QAEDA TERRORISTS

(a) Custody Pending Disposition Under Law of War.--

(1) In general.-- Except as provided in paragraph (4), the Armed Forces of the United States shall hold a person described in paragraph (2) who is captured in the course of hostilities authorized by the Authorization for Use of Military Force (Public Law 107-40) in military custody pending disposition under the law of war.

(2) Covered persons.-- The requirement in paragraph (1) shall apply to any person whose detention is authorized under section 1021 who is determined--

(A) to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda; and

(B) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.

(3) Disposition under law of war.-- For purposes of this subsection, the disposition of a person under the law of war has the meaning given in section 1021(c), except that no transfer otherwise described in paragraph (4) of that section shall be made unless consistent with the requirements of section 1028.

(4) Waiver for national security.-- The President may waive the requirement of paragraph (1) if the President submits to Congress a certification in writing that such a waiver is in the national security interests of the United States.

(b) Applicability to United States Citizens and Lawful Resident Aliens.--

(1) United states citizens.-- The requirement to detain a person in military custody under this section does not extend to citizens of the United States.

(2) Lawful resident aliens.-- The requirement to detain a person in military custody under this section does not extend to a lawful resident alien of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States.