ARTICLES

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Fourth Amendment Privacy Rights at Sea and Governmental Use of Vessel Monitoring Systems: There's Something Fishy About This

Fishers in the United States and around the world are watching the health of marine fisheries spiral into decline.[1] Reduced fish harvests impact American fishing businesses, both large and small. A 2002 report to Congress by the National Marine Fisheries Service (NMFS) identified sixty-five over-fished species within the waters of the United States.[2] A fishery is defined as "overfished" when harvest takes place at a rate "that jeopardizes the capacity of a fishery to produce the maximum sustainable

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[1] Jonathan H. Adler, *Legal Obstacles to Private Ordering in Marine Fisheries*, 8 ROGER WILLIAMS U. L. REV. 9, 9-10 (2002).

[2] NAT'L MARINE FISHERIES SERV., TOWARD REBUILDING AMERICA'S FISHERIES: ANNUAL REPORT TO CONGRESS ON THE STATUS OF U.S. FISHERIES—2001 11-12 (2002), *available at* http://www.nmfs.noaa.gov/sfa/reg_svcs/statusostocks/Status02.pdf.

yield on a continuing basis."[3] Maximum sustainable yield (MSY) means "the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions."[4] The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) is the primary means of protecting, conserving, and managing the many commercial and recreational fisheries within the waters of the United States.[5]

Through the provisions of the Magnuson-Stevens Act, Congress delegated NMFS the authority to manage fishery resources within the United States.[6] NMFS must promulgate rules and regulations that balance the economic benefits of commercial fishing with the environmental impacts of the industry.[7] Congress also created eight regional fishery management councils to develop fishery management plans for species within their respective regions.[8] Despite these individual councils' differing regional approaches, their management plans have often led to a similar failure to contain fishing capacity or limit fishing pressure by industry participants.[9] To address these unsatisfactory results, NMFS has designated several "closed" and/or "restricted" fishing areas within the waters of the United States as part of the overall fishery management plan.[10]

In 1996, Congress made substantial changes to the original Magnuson-Stevens Act in response to mounting data that fisheries management was not achieving the Act's overall goals.[11] With those changes, Congress renamed the Act the Sustainable Fisheries Act (SFA).[12] The SFA's new provisions required: (1) development of objective and measurable overfishing definitions for all fish populations under management; (2) cessation of overfishing; (3) rebuilding of all overfished populations within a

[3] 16 U.S.C. § 1802(34) (2006).

[4] 50 C.F.R. § 600.310(c)(1)(i) (2007).

[5] *See* 16 U.S.C. §§ 1801-1883.

[6] *See id.*

[7] *Id.* § 1851.

[8] *Id.* § 1852. The regional fishery management councils are discussed in further detail in Part III of this Article.

[9] Susan S. Hanna, *The Magnuson Fishery Conservation and Management Act: Retrospect and Prospect*, 9 TUL. ENVTL. L.J. 211, 212 (1996).

[10] *See* 50 C.F.R. §§ 622.30, 622.32-.36 (2007).

[11] *See* Sustainable Fisheries Act, Pub. L. No. 104-297, § 101, 110 Stat. 3559, 3560-61 (1996) (codified as amended at 16 U.S.C. §§ 1801-1883 (2006)).

[12] *Id.* § 1(a), 110 Stat. at 3559.

strict timeframe; (4) monitoring and avoidance or minimization of bycatch of non-targeted marine species; and (5) protection of essential fish habitat.[13] Most recently, the 2006 reauthorization of the Magnuson-Stevens Act required NMFS to monitor and protect essential fish habitat and to end all overfishing by the year 2011.[14]

One method of monitoring the fisheries and fishery resources of the United States is through increased use of Vessel Monitoring Systems (VMS). VMS are electronic transmitting devices placed on vessels to intermittently transmit information via satellite link to a land-based receiver.[15] The transmitted information includes the vessel's location, speed, and direction of movement.[16] VMS also have the capability to send and receive emails and to send distress signals in the event of an emergency at sea.[17] Federal enforcement agencies such as the National Oceanic and Atmospheric Administration (NOAA) have used VMS to monitor the locations of U.S.-registered commercial fishing vessels in various fisheries since the late 1990s.[18] VMS are used because they permit agencies to monitor intrusions in areas of the ocean where commercial fishing has been closed or restricted by federal regulation.

Prior to the use of VMS, the government could only monitor these areas for intrusion by conducting overflights.[19] This

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[13] 16 U.S.C. §§ 1801-1883.

[14] Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, § 104, 120 Stat. 3575, 3584-85 (2007) (to be codified as amended at 16 U.S.C. § 1853 (Supp. 2007)).

[15] Nat'l Marine Fisheries Serv., Vessel Monitoring System Program–Gulf of Mexico Commercial Reef Fish Frequently Asked Questions 1 (Apr. 2007), http://sero.nmfs.noaa.gov/vms/VMSFAQs041707_2.pdf.

[16] GULF OF MEXICO FISHERY MGMT. COUNCIL, FINAL AMENDMENT 18A TO THE FISHERY MANAGEMENT PLAN FOR THE REEF FISH RESOURCES OF THE GULF OF MEXICO 187 (2005), *available at* http://www.gulfcouncil.org/beta/GMFMCweb/downloads/Amendment_18A_Final.pdf [hereinafter FINAL AMENDMENT 18A].

[17] Vessel Monitoring Systems; Approved Mobile Transmitting Units for use in the Reef Fish Fishery of the Gulf of Mexico, 71 Fed. Reg. 54,472, 54,473 (Sept. 15, 2006).

[18] NOAA Fisheries: Office for Law Enforcement, Leveraging Technology and the Vessel Monitoring System, http://www.nmfs.noaa.gov/ole/vms.html (last visited Oct. 23, 2007). The governments of several foreign countries, including Portugal, Australia, New Zealand, and French Polynesia also make use of VMS as a fishery monitoring/enforcement tool. ERIK JAAP MOLENAAR & MARTIN TSAMENYI, SATELLITE-BASED VESSEL MONITORING SYSTEMS: INTERNATIONAL LEGAL ASPECTS & DEVELOPMENTS IN STATE PRACTICE 32-39 (FAO 2000), *available at* http://193.43.36.103/legal/prs-ol/lpo7.pdf.

[19] Fisheries Amendment 18A, 71 Fed. Reg. 45,428, 45,429 (Aug. 9, 2006).

method proved to be an inefficient means of enforcement due to the closed areas' collective size and great distance from shore.[20] In the event that an overflight detected a vessel in a closed area, the Coast Guard would be dispatched to find the vessel and determine whether any fisheries violations had occurred.[21] Use of VMS allows the government to know exactly when and where a vessel enters a closed area, thereby avoiding the need for an overflight and increasing the efficiency of at-sea enforcement.[22] The idea is that if the government knows where federally licensed commercial vessels are at all times, then every intrusion by such vessels into restricted areas will be known. Accordingly, the nation's natural resources will be more effectively and efficiently protected from illegal poaching in remote areas of the ocean.

In early 2007, Congress passed, and the President subsequently signed into law, the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006.[23] Included in the reauthorization were several amendments to the Act.[24] Among those amendments is a requirement that the government improve the sharing of VMS data among relevant state and federal agencies.[25] While the government's use of VMS to protect marine resources has been generally applauded, the constitutionality of such 24-hour surveillance deserves further scrutiny.

This Article examines the real-life situation unfolding within the Gulf of Mexico's reef fish fishery in order to highlight the privacy issues arising from the government's 24-hour surveillance of commercial vessels. Part I takes a historical look at the evolution of Fourth Amendment jurisprudence as it relates to technological advances employed by governmental entities over the past century. Part II explores the constitutionality of the government's 24-hour VMS surveillance by analyzing a not-so-hypothetical scenario in the Gulf of Mexico. Parts III and IV analyze the scenario presented in Part II and conclude that the govern-

[20] *Id.*

[21] *See* FINAL AMENDMENT 18A, *supra* note 16, at 3.

[22] *See* NOAA Fisheries: Office for Law Enforcement, *supra* note 18.

[23] Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3575 (2007) (to be codified as amended at 16 U.S.C. §§ 1801-1883 (Supp. 2007)).

[24] *See id.*

[25] *See id.* § 111, 120 Stat. at 3596-97.

ment's current VMS requirements may already infringe upon the constitutionally protected privacy rights of commercial fishers.

I

EVOLUTION OF TECHNOLOGY UNDER THE FOURTH AMENDMENT

The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.[26]

The Fourth Amendment protects private citizens from arbitrary government surveillance.[27] For the last several decades, the United States Supreme Court has ensured that "Fourth Amendment rights . . . retain their vitality as technology expand[s] the Government's capacity to commit unsuspected intrusions into private areas and activities."[28] Accordingly, Fourth Amendment jurisprudence has evolved and adjusted as new technology has enhanced the government's ability to monitor the actions of individual citizens.[29]

The permissibility of ordinary visual surveillance of a home used to be clear. Well into the twentieth century, Fourth Amendment jurisprudence was tied to common law trespass doctrine. In 1928, the Court in *Olmstead v. United States* held that the wiretapping of a defendant's private telephone line did not violate the Fourth Amendment because the wiretapping had been effectuated without any physical trespass on the government's part.[30] However, even at the beginning of the twentieth century, mem-

[26] U.S. CONST. amend. IV.

[27] Dow Chem. Co. v. United States, 476 U.S. 227, 240 (1986) (Powell, J., concurring in part and dissenting in part).

[28] *Id.*

[29] *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001) (use of thermal imaging system to monitor heat in defendant's house intruded on the defendant's expectation of privacy); *Dow Chem. Co.*, 476 U.S. at 239 (aerial photographs from high powered lens permissible over chemical company's plant); United States v. Cheshire, 569 F.2d 887, 889 (5th Cir. 1978) (beeper placed on plane without a warrant justified by owner's consent).

[30] Olmstead v. United States, 277 U.S. 438, 464-65 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

bers of the Court recognized the need to expand Fourth Amendment protections beyond mere trespass and physical invasions of the home. In a stirring and passionate dissent, Justice Brandeis stated that:

> "Time works changes, brings into existence new conditions and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a Constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."
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> . . . The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. . . . Can it be that the Constitution affords no protection against such invasions of individual security?[31]

In 1967, the Court decided the landmark case of *Katz v. United States*, and Fourth Amendment judicial analysis began to shift its focus from common law residential trespass to a broader view of individual expectations of privacy.[32] *Katz* involved eavesdropping by means of an electronic surveillance device placed on the outside of a telephone booth, a site not within the traditional catalog of locations (persons, houses, papers, and effects) protected by the Fourth Amendment.[33]

The *Katz* Court held that the Fourth Amendment protected Katz from warrantless eavesdropping upon his telephone conver-

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[31] *Id.* at 472-74 (Brandeis, J., dissenting) (quoting, in part, Weems v. United States, 217 U.S. 349, 373 (1910)).

[32] *Katz*, 389 U.S. at 353.

[33] *Id.* at 348.

sation and that the Fourth Amendment's applicability "cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[34] In so holding, the Court concluded that the government's intrusion upon Katz's privacy rights constituted an unlawful search and seizure under the Fourth Amendment.[35] The fact that a surveillance device did not penetrate the phone booth wall was constitutionally irrelevant.[36]

To determine whether the governmental action encroached on an expectation of privacy, the *Katz* Court found that the Fourth Amendment's application depends upon whether the person invoking its protection could illustrate that a subjective or reasonable expectation of privacy was invaded by government action.[37] This inquiry raises two questions. The first is whether the individual exhibited a subjective expectation of privacy.[38] This determination focuses on whether the individual shows that he sought to preserve something as private.[39] The second question is whether the individual's subjective privacy expectation is one that is deemed reasonable by society.[40] To answer the societal question, the *Katz* Court analyzed whether the individual's expectation, viewed objectively, was justifiable under the circumstances.[41]

The next landmark Fourth Amendment case was *United States v. Knotts*.[42] In *Knotts*, the defendant claimed that the warrantless installation of a "beeper" monitoring device in a container of chemicals being transported to his cabin invaded his expectation of privacy.[43] In its analysis, the Court found that the defendant "undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned[,]" thus an-

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[34] *Id.* at 353.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 360-61 (Harlan, J., concurring) ("[A] person has a constitutionally protected reasonable expectation of privacy.") Although this inquiry is outlined in Harlan's concurrence, later Supreme Court decisions adopt this language in determining whether an individual's Fourth Amendment privacy rights have been violated. *See, e.g.*, United States v. Knotts, 460 U.S. 276 (1983); Dow Chem. Co. v. United States, 476 U.S. 227 (1986).

[38] *Katz*, 389 U.S. at 361.

[39] *Id.* at 351 (majority opinion).

[40] *Id.* at 361 (Harlan, J., concurring).

[41] *Id.* at 353 (majority opinion).

[42] *Knotts*, 460 U.S. 276.

[43] *Id.* at 278-79.

swering the first question of *Katz* in the affirmative.[44] However, when determining whether the defendant's expectation was objectively reasonable, the Court's analysis of how the government utilized the technology in question led to a very different result.[45]

In contrast to *Katz*, the *Knotts* Court found that the defendant's expectation to be free from technological surveillance by the government was unreasonable.[46] The beeper device, transported by an automobile traveling on public streets and highways to the defendant's house, was particularly pertinent to the outcome.[47] In finding that governmental surveillance conducted by means of a beeper amounted to the following of an automobile on public streets and highways, the Court determined that a person traveling in an automobile on public thoroughfares had no reasonable expectation of privacy in having his movements tracked from one place to another.[48]

The Court also commented that visual surveillance from public places adjoining Knotts' destinations would have revealed all of the facts Knotts sought to suppress.[49] Therefore, Knotts' expectation of privacy was fundamentally unreasonable because "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."[50] The Court emphasized that "there [was] no indication that the beeper was used in any way to reveal information as to the movement of the [evidence] within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin."[51] As a result, the Court concluded that use of the beeper by the police achieved nothing more than an individual could have accomplished on his own.[52] Moreover, a police car following the container at a distance throughout the journey could have also observed the container leaving the public highway and arriving at the cabin of the defendant with the evidence inside.[53]

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[44] *Id.* at 282.
[45] *See id.* at 281-82.
[46] *Id.* at 284.
[47] *Id.* at 284-85.
[48] *Id.* at 281-82.
[49] *Id.* at 282.
[50] *Id.*
[51] *Id.* at 285.
[52] *See id.* at 285.
[53] *Id.*

The Court arrived at a similar conclusion three years later when it decided *Dow Chemical Co. v. United States*.[54] In a declaratory action brought by the chemical company against the Environmental Protection Agency (EPA), Dow claimed that the aerial surveillance and photography utilized by the EPA in an enforcement action against the company amounted to an unconstitutional search.[55] As in both *Katz* and *Knotts*, the permissibility of EPA's actions turned on the reasonableness of Dow's expectation of privacy.[56]

After being denied a request for an on-site inspection of the chemical plant, the EPA hired a commercial aerial photographer to take photographs of the facility from various altitudes, all within lawful navigable airspace.[57] Echoing its earlier analysis of how beepers can enhance police surveillance, the Court found that "[i]n common with much else, the technology of photography has changed in this century. . . . [It has] also enhanced law enforcement techniques."[58] Relative to the inquiry in *Dow Chemical*, "Dow concede[d] that a simple flyover with naked-eye observation, or the taking of a photograph from a nearby hillside overlooking such a facility, would give rise to no Fourth Amendment problem."[59] Nevertheless, Dow argued that taking aerial photographs from the airspace above its facility constituted a violation of its Fourth Amendment right to privacy.[60]

In analyzing Dow's expectation of privacy, the Court first considered the open fields doctrine.[61] This doctrine generally states that "open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from governmental interference or surveillance."[62] In other words, an individual may not legitimately demand privacy for activities taking place outdoors in plain view, except in the area immediately surrounding the home.[63] In recognizing that Dow did have an expectation of privacy that society was willing to protect within the interior of its covered buildings, the Court com-

[54] Dow Chem. Co. v. United States, 476 U.S. 227 (1986).
[55] *Id.* at 229-30.
[56] *See id.* at 230-31.
[57] *Id.* at 229.
[58] *Id.* at 231.
[59] *Id.* at 234.
[60] *Id.* at 235.
[61] *Id.*
[62] *Id.* (quoting Oliver v. United States, 466 U.S. 170, 179 (1984)).
[63] *Id.* at 235-36 (citing *Oliver*, 466 U.S. at 178).

mented that "[a]ny actual physical entry by EPA into any enclosed area would raise significantly different questions" than those posed in the instant case.[64] Nevertheless, the Court still determined that Dow's expectation was unreasonable because "[t]he intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant."[65]

The *Dow* Court also emphasized a point that it made in *Donovan v. Dewey* by stating that "the Government has 'greater latitude to conduct warrantless inspections of commercial property' because the 'expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home.'"[66] Regarding regulatory inspections of commercial properties, the *Dow* Court opined that "'[w]hat is observable by the public is observable without a warrant, by the Government's inspector as well.'"[67]

In addition, the Court found that EPA's technology was not some unique sensory device that, for example, could penetrate walls of buildings and record conversations in Dow's plants.[68] However, the Court noted: "[A]s the Government concedes, surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant."[69] The Court concluded that the photographs challenged by Dow, although indisputably containing more detail than naked-eye views, were limited to the outline of the facility's buildings and equipment and did not give rise to constitutional problems.[70]

On the basis of the Court's open field analysis, its recognition that government has greater latitude to conduct warrantless searches of commercial property, and its opinion that the technology utilized by the EPA only enhanced what could be seen by the naked-eye, the Court did not find Dow's expectation of privacy regarding the outside of buildings and equipment to be ob-

[64] *Id.* at 237.
[65] *Id.* at 236.
[66] *Id.* at 237-38 (quoting Donovan v. Dewey, 452 U.S. 594, 598-99 (1981)).
[67] *Id.* at 238 (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 315 (1978)).
[68] *Id.* at 238-39.
[69] *Id.* at 238.
[70] *Id.*

jectively reasonable.[71] EPA's actions were therefore found to be permissible relative to Fourth Amendment jurisprudence.

In 2001, the Court shifted its stance on the government's use of surveillance-enhancing technology in *Kyllo v. United States*.[72] In that case, the Court held that police usage of a thermal imaging device to measure the levels of heat emanating from the defendant's home was unconstitutional.[73] Applying the rule enunciated in *Katz*, the *Kyllo* Court set out to ascertain whether Kyllo manifested a subjective expectation of privacy during a government search and if society was willing to recognize that expectation as reasonable.[74]

The government suspected Kyllo of using high-intensity lamps to grow marijuana plants in his home.[75] To determine whether an amount of heat consistent with these lamps was emanating from the home, an agent from the U.S. Department of the Interior used a thermal imager to scan Kyllo's residence.[76] The scan took only a few moments and showed that the roof area over his garage was hotter than other parts of the roof and noticeably warmer than surrounding homes.[77] The agent obtained a warrant to search Kyllo's home using the heat-sensing information, an informant's tip, and the defendant's utility bills.[78] Upon conducting the search, the agents found an indoor marijuana growing operation.[79]

When articulating whether the defendant had a reasonable expectation of privacy, the Court determined that "in the case of the search of the interior of homes . . . there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*."[80] Moreover, the Court held that the Fourth Amendment prohibits "obtaining by sense-enhancing technology [not in general public use] any information regarding the interior of the home that could not otherwise have been obtained without phys-

[71] *Id.* at 235-39.
[72] Kyllo v. United States, 533 U.S. 27, 40 (2001).
[73] *Id.*
[74] *Id.* at 32-33.
[75] *Id.* at 29.
[76] *Id.*
[77] *Id.* at 30.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 34.

ical 'intrusion into a constitutionally protected area.'"[81] As such, the use of thermal imagery was found to be an unconstitutional intrusion on the defendant's expectation of privacy.[82]

This evolution of Fourth Amendment jurisprudence will likely continue as more sophisticated and complex technological advances for surveillance and monitoring become available to, and are employed by, government personnel. Accordingly, a challenge to the government's increasing use of VMS to continuously track commercial fishing vessels seems imminent.

II

A Not-So-Hypothetical Hypothetical

The following hypothetical, which is based on actual events that took place within the Gulf of Mexico's reef fish fishery in 2006, will serve as the basis from which the legality of the government's 24-hour VMS surveillance of commercial fishers will be analyzed.

The Gulf of Mexico is home to a variety of ecologically and commercially important species including groupers, snappers, tilefishes, jacks, porgies, wrasses, and triggerfishes.[83] In June 1983, NMFS, acting pursuant to authority provided within the Magnuson-Stevens Act,[84] approved the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (Reef Fish FMP).[85] NMFS has implemented the Reef Fish FMP through a series of regulatory measures including the imposition of limitations on fishing equipment, data reporting requirements, quotas and bag limits, seasonal and size limitations, area limitations, and a permit system.[86] The Reef Fish FMP also contains

[81] *Id.* (citing Silverman v. United States, 365 U.S. 505, 512 (1961)).

[82] *Id.* at 40.

[83] 50 C.F.R. pt. 622, app. A, tbl.3 (2007).

[84] The Magnuson-Stevens Act divides the federal waters surrounding the United States (known as the Exclusive Economic Zone) into eight regions. 16 U.S.C. § 1852 (2006). Each region is overseen by a regional fishery council, which is charged with developing fishery management plans for fisheries within its jurisdiction and enacting regulations in furtherance of those fishery management plans to carry out the mandates of the Magnuson-Stevens Act. *Id.* NOAA and NMFS have been vested with the authority to enact and implement regulations in furtherance of the fishery management plans developed by each council. *See* Sustainable Fisheries Act, Pub. L. 104-297, § 108, 110 Stat. 3559, 3574-75 (1996) (codified as amended at 16 U.S.C. §§ 1801-1883 (2006)).

[85] *See* 50 C.F.R. § 622.1.

[86] *Id.* pt. 622.

numerous seasonal and area-specific regulations (often referred to as "closed" or "restricted" areas) in which some types of commercial and/or recreational fishing are limited or prohibited in an effort to protect habitat or spawning aggregations and to reduce fishing pressure in areas that are heavily fished.[87] However, the Reef Fish FMP and the regulations that have been enacted in furtherance thereof do not restrict a vessel's ability to transit through these closed or restricted areas, whether such transit is related to commercial and/or recreational fishing or not. Furthermore, some commercial fishing activities are not prohibited within these closed or restricted areas.[88]

On August 9, 2006, NMFS published Amendment 18A to the Reef Fish FMP.[89] Among other things, Amendment 18A requires all vessel owners holding a valid Gulf reef fish permit to outfit their vessels with an approved VMS unit.[90] The primary purpose of the VMS requirement is to "improve the enforcement of restricted fishing areas."[91] "Unlike size, bag, and trip limits, where the catch can be monitored onshore when a vessel returns to port, area restrictions require at-sea enforcement. However, at-sea enforcement . . . is difficult due to the distance from shore and limited number of patrol vessels."[92] Prior to the implementation of Amendment 18A, all area-restriction enforcements were carried out by overflights and at-sea interceptions by agency enforcement personnel.[93]

The VMS provision of Amendment 18A requires a NMFS-approved VMS on board all vessels having federal commercial permits for Gulf reef fish.[94] Amendment 18A also requires that VMS units remain turned on and transmitting 24 hours per day, regardless of the vessel's location and irrespective of whether the

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[87] *Id.* §§ 622.30, 622.32-.37.

[88] *Id.* § 622.34.

[89] Fisheries Amendment 18A, 71 Fed. Reg. 45,428, 45,428 (Aug. 9, 2006).

[90] *Id.* Amendment 18A also prohibits possession of Gulf reef fish under recreational regulations aboard vessels simultaneously possessing commercial quantities of Gulf reef fish; prohibits the use of Gulf reef fish as bait; and requires compliance with specific sea turtle and smalltooth sawfish release protocols. *Id.*

[91] *Id.* at 45,430.

[92] Fisheries Amendment 18A, 71 Fed. Reg. 28,842, 28,843 (May 18, 2006).

[93] *See* FINAL AMENDMENT 18A, *supra* note 16, at 3.

[94] Fisheries Amendment 18A, 71 Fed. Reg. at 45,428.

vessel is engaging in commercial fishing activities, unless a power-down exception is granted.[95]

Amendment 18A's power-down exceptions are granted in only two circumstances: when a vessel "is continuously out of the water for more than 72 consecutive hours, or a vessel [is] fishing with both a valid commercial and a valid for-hire reef fish permit."[96] In either of these situations, the owner can sign out of the VMS program for a minimum period of one month.[97] Commercial fishing operations cannot be resumed until the "VMS unit is reactivated and NMFS personnel verify consistent position reports."[98] Aside from these two situations, VMS units may not be turned off. Therefore, the government can continuously track each of the fishers subject to the VMS requirement of Amendment 18A.

At the time of Amendment 18A's promulgation, the Gulf reef fish fishery had a "total of 908 solely permitted commercial vessels, 1,337 solely permitted for-hire vessels, and 237 dually permitted commercial/for-hire vessels . . . ."[99] For the purposes of this hypothetical, suppose that a number of these vessels' owners and operators are members of a commercial fishing advocacy group known as the Commercial Reef Fishers Organization (CRFO). CRFO is a fictitious group that is used for illustrative purposes within this article; however, it is based upon an actual fishing rights advocacy group that represents the interests of many of the licensed commercial Gulf reef fish fishers throughout the Gulf of Mexico.

Members of CRFO make use of vessels that range from simple vessels, less than twenty feet in length, to technologically advanced vessels that are more than sixty feet in length. The majority of CRFO members, however, are small-time fishers with small vessels. Many of them keep their vessels on trailers at their homes and engage primarily in day trips where the vessel is taken by trailer to a boat ramp, launched for a day of fishing, and placed back on the trailer and taken home at the end of the day. Many of the fishers who do not keep their vessels on trailers

[95] *See* FINAL AMENDMENT 18A, *supra* note 16, at 188; *see also* Fisheries Amendment 18A, 71 Fed. Reg. at 45,430 (discussing the power-down exemption).

[96] Fisheries Amendment 18A, 71 Fed. Reg. at 45,430.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 45,432.

keep them in marinas and at docks where the vessels continuously remain in the water.

In addition, several of the small-time fishers make use of their vessels for other non-commercial fishing activities such as recreational fishing and family outings. Regardless of how the vessel is used, Amendment 18A requires the VMS to remain in operation even during such non-commercial fishing activities.

Members of CRFO are not pleased with Amendment 18A's VMS requirement and consider 24-hour surveillance of their vessels to be a violation of their privacy rights under the Fourth Amendment. In this context, the legality of the government's use of VMS as a monitoring tool within the commercial fisheries of the United States will be examined.

III

VIABILITY OF CRFO MEMBERS' PRIVACY CLAIMS

CRFO members, as a matter of law, cannot reasonably assert that they are entitled to the general expectation of privacy afforded by the Fourth Amendment while engaged in the activity of commercial fishing. The precedent cited in Part I demonstrates that such an expectation would not be found reasonable using the two-prong test articulated in *Katz*. However, because the VMS regulations require all commercial vessels to continuously broadcast their location, CRFO members may challenge the regulations for invading their privacy when the vessels are not engaged in the act of commercial fishing. This part addresses how and why CRFO members may assert that a reasonable expectation of privacy exists when they withdraw their vessel from public view. Should a court validate such an expectation of privacy, fishery management plans that call for 24-hour VMS monitoring could be found unconstitutional absent the issuance of a judicial warrant.

It would be unreasonable for CRFO members to claim that an expectation of privacy exists as to the location of their commercial fishing vessels at all times. All of CRFO members' commercial fishing activities take place in the Gulf of Mexico. These open jurisdictional waters of the United States are subject to the Reef Fish FMP, and the fish that are commercially harvested from these waters generate commercial profits for CRFO members. Nowhere within Fourth Amendment jurisprudence is a

blanket expectation of privacy in such commercial activities suggested. In fact, the case law discussed below suggests the opposite result: there is a lessened expectation of privacy in regulated industries such as fishing.

If CRFO members challenge the VMS requirement on Fourth Amendment grounds, it is likely that a court would examine any claimed expectation of privacy in open water under the open fields doctrine. Similar to the location of the Dow buildings on the chemical plant's compound, a vessel's location on the open ocean does not "provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance."[100] As the Court in *Oliver v. United States* recognized, the point of the open fields doctrine is not to mark the boundaries of what constitutes an open field, but to make clear that "the term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage."[101] Under this analysis, it would be unreasonable for challengers like CRFO to assert that its members have a privacy interest in the location of their vessels while they are in the undeveloped and unoccupied jurisdictional waters of the United States.

A court may also liken a vessel's navigation of open water to an automobile's movement on public thoroughfares and find that, like a car, a vessel "has little capacity for escaping public scrutiny . . . [when] travel[ing] on public thoroughfares where both its occupants and its contents are in plain view."[102] Furthermore, a court may follow the *Dow* Court's rationale and conclude that the nature of commercial fishing activities affords the government greater latitude to conduct warrantless surveillance of a vessel's location.[103] After all, fishers' expectation of privacy as owners of commercial property significantly differs from their expectation regarding their private homes. Using this rationale, the *Dow* Court noted that, with regard to regulatory inspections, "what is observable by the public is observable without a warrant, by the Government inspector as well."[104]

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[100] *See* Oliver v. United States, 466 U.S. 170, 179 (1984).

[101] *Id.* at 180 n.11.

[102] United States v. Knotts, 460 U.S. 276, 281 (1983) (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974)).

[103] *See* Dow Chem. Co. v. United States, 476 U.S. 227, 237-38 (1986) (quoting Donovan v. Dewey, 452 U.S. 594, 598-99 (1981)).

[104] *Id.* at 238 (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 315 (1978)).

United States v. Lee provides guidance on Fourth Amendment principles as they generally relate to vessels.[105] In *Lee*, the government used a searchlight to discover cases of liquor on the defendants' boat.[106] Though decided at a time when physical trespass was a prerequisite to Fourth Amendment application, the court stated that:

> [N]o search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches. For aught that appears, the cases of liquor were on deck and, like the defendants, were discovered before the motorboat was boarded. Such use of a searchlight is comparable to the use of a marine glass or field glass. It is not prohibited by the Constitution.[107]

Like the spotlight in *Lee*, VMS technology does not allow the government to monitor or explore activities taking place below decks or under hatches in CRFO fishing vessels. Nor does VMS have the ability to monitor what is taking place beyond what is happening in plain view. As a result, it is likely that asserting a broad expectation of privacy while in open water would not withstand constitutional scrutiny.

Moreover, the Fifth Circuit Court of Appeals has indicated that for Fourth Amendment purposes, the captain of a vessel does not have a reasonable expectation of privacy in public areas of the vessel since the Coast Guard is authorized to conduct administrative inspections of the public areas of vessels without a warrant and without any probable cause.[108] In *United States v. Freeman*, the defendants challenged the Coast Guard's search after agents discovered over 41,000 pounds of marijuana aboard the ship.[109] Before reaching the defendant, the Coast Guard located the vessel's position by the use of radar.[110]

In contrast to *Freeman*, the First Circuit has stated that a captain does have a reasonable expectation of privacy in public places on his or her vessel as this interest "derives from his custodial responsibility for the ship, his associated legal power to ex-

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105 United States v. Lee, 274 U.S. 559, 562-63 (1927).

106 *Id.* at 560-61.

107 *Id.* at 563.

108 *See* United States v. Freeman, 660 F.2d 1030, 1033-34 (5th Cir. 1981). The Coast Guard is authorized to inspect public areas of vessels, including the engine room, by 14 U.S.C. § 89(a) (2006).

109 *Freeman*, 660 F.2d at 1031-32.

110 *Id.* at 1031.

clude interlopers from unauthorized entry . . . and the doctrines of admiralty, which grant the captain (as well as the owner) a legal identity of interest with the vessel."[111] While there is some dispute among the circuits in this regard, they do agree that captains and crew members have a reasonable expectation of privacy in non-public areas of the ship, such as personal lockers.[112] Therefore, a reasonable expectation of privacy arguably exists when a vessel is located in a non-public area or is being used for a private, non-commercial activity.

Accordingly, 24-hour VMS surveillance seems susceptible to privacy challenges under at least two theories. First, challengers can claim that they have a privacy interest in being free from 24-hour monitoring by the government when their vessels are used for recreational or private activities unrelated to commercial fishing. The second, and perhaps stronger argument, is that the 24-hour monitoring system invades a protected privacy interest when the vessel is monitored while withdrawn from public view. Fourth Amendment jurisprudence suggests that such arguments may find traction if Amendment 18A and similar VMS regulations are challenged.

The Supreme Court and several different circuits have adopted a similar expectation of privacy related to Fourth Amendment issues. In *United States v. Michael*, the Fifth Circuit heard a case involving the police's use of a beeper, attached to the defendant's vehicle without a warrant, to locate a warehouse where the defendant was producing drugs.[113] The police monitored the beeper for four days, taking note of the defendant's movements until they located the warehouse containing the drugs.[114] The court employed the *Katz* rationale and determined that the installation of a beeper upon a vehicle, absent both probable cause and exigent circumstances, requires judicial authorization under the Fourth Amendment.[115] Though decided prior to *Knotts*, several of the court's considerations in deciding the *Michael* case are worth noting.

In addition to the Fourth Amendment considerations that are discussed in detail below, the *Michael* court used a footnote to

111 United States v. Cardona-Sandoval, 6 F.3d 15, 21 (1st Cir. 1993).

112 *See, e.g.*, United States v. DeWeese, 632 F.2d 1267 (5th Cir. 1980).

113 United States v. Michael, 622 F.2d 744, 744 (5th Cir. 1980), *reh'g granted*, 628 F.2d 931 (5th Cir. 1980), *rev'd*, 645 F.2d 252 (5th Cir. May 1981).

114 *Id.*

115 *Id.* at 752.

articulate its view that citizens have the right to be left alone by the government, whether or not an unlawful search has occurred.[116] The court based its viewpoint on the Ninth Amendment's intent that the specific constitutional rights contained within the first eight amendments would not be interpreted as a denial that other rights existed.[117] This reference to the "penumbras and emanations" clause of the Ninth Amendment[118] leaves the door open for a future litigant to assert that, before one even reaches a Fourth Amendment challenge, governmental surveillance of the type that took place in *Michael* is contrary to the privacy protections afforded to individuals pursuant to the Ninth Amendment.

Based upon the Fifth Circuit's analysis in *Michael*, commercial fishers who are subject to 24-hour VMS monitoring could argue that the reasonableness of their privacy claim is supported not only by the Fourth Amendment but also by the Ninth Amendment. After all, many fishing businesses are small family operations, and the vessels that are used serve both the business and private interests of the owner.[119] For example, owners who are required to carry a VMS must broadcast the coordinates of their vessels even if they are taking their family boating or using the vessel for some other recreational activity. The right to be free from government intrusion into family matters has been consistently upheld by the high Court.[120] Allowing the government to monitor these types of activities, which have no rational relation to the interest in protecting the Gulf reef fish resources, seemingly amounts to a violation of the constitutionally protected right to privacy.

However, challengers should be mindful that the judicially recognized privacy expectations have primarily dealt with intimate individual and family decisions such as whether to use birth control or how to raise children.[121] While the privacy expectation asserted may be within the same group of decisions related to family lifestyle, the decision to use a commercial fishing vessel to go on a recreational excursion is not an intimate decision that the

116 *Id.* at 748 n.10 (citing Griswold v. Connecticut, 381 U.S. 479, 488-90 (1965)).
117 *Id.* (citing *Griswold*, 381 U.S. at 488-90).
118 *Griswold*, 381 U.S. at 484.
119 *See* Fisheries Amendment 18A, 71 Fed. Reg. 28,842, 28,844-28,846 (May 18, 2006).
120 *See, e.g.*, *Michael*, 622 F.2d at 748 n.10.
121 *See id.*

above-referenced line of cases recognizes as deserving of privacy from governmental intrusion. Even if a reviewing court chooses not to employ a Ninth Amendment analysis, the Fourth Amendment considerations set forth in *Michael*, although struck down on rehearing,[122] would still provide a good-faith basis for asserting a claim that Amendment 18A's VMS regulations are unconstitutional in the absence of a warrant.[123]

While employing the framework enunciated in *Katz*, the *Michael* court recognized that technology was helping the government chip away at Fourth Amendment protections. In finding the beeper's placement unconstitutional, the court stated that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."[124]

In deciding the *Michael* case, the Fifth Circuit cited *Katz* and acknowledged that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all."[125] As a result, the *Michael* court found that "[a] person has a right to expect that when he drives his car onto a public street, the police will not attach an electronic surveillance device to his car in order to track him" and that a person "can reasonably expect to be 'alone' in his car when he enters it and drives away."[126] Similarly, commercial fishing business owners could argue that they can reasonably expect to be alone when using their vessels for non-fishing activities.

While the actual location of a fishing vessel may not technically be a private matter, *Michael* suggests that a reviewing court will entertain the idea that governmental surveillance of commercial fishing vessels used for recreation intrudes on private

122 *See* United States v. Michael, 645 F.2d 252 (5th Cir. May 1981).

123 Although the Fourth Amendment argument presented in *Michael* was ultimately struck down by the Court upon rehearing, such an argument could still be successfully argued by a challenger based upon the fact that nine of the justices who reheard the case filed or concurred in a dissenting opinion. This is a strong indication that, depending upon the make-up of the tribunal hearing the argument, such Fourth Amendment considerations may well carry the day.

124 *Michael*, 622 F.2d at 751 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

125 *Id.* at 750 (quoting Katz v. United States, 389 U.S. 347, 350 (1967)).

126 *Id.* at 752.

matters that the Fourth Amendment was meant to protect. Using very similar principles as those articulated in our evaluation of Ninth Amendment jurisprudence, CRFO members could assert that the government's monitoring of their recreational activities on a vessel equipped with VMS is not something the Constitution ever perceived as a justifiable and reasonable intrusion upon the individual citizen. Such a situation seems to be exactly what the *Michael* court sought to avoid when it stated that it was reasonable for a person to expect to be alone in his car when he enters and drives it.[127] The only difference here is that we are dealing with a vessel instead of an automobile.

The second argument available to CRFO members is that, by utilizing the 24-hour monitoring capability of VMS, the government is also able to obtain ancillary information concerning a particular commercial fisher's proprietary business practices. This information could include the companies from whom the fisher purchases gasoline, who the fisher uses to repair the vessel, and where the fisher's vessel is stored when it is not in use.

Remembering that the sole purpose of the required VMS is to improve the efficiency of at-sea enforcement of a fishery's closed areas, the ability to track the ancillary activities referenced above may lead a reviewing court to conclude that 24-hour VMS surveillance violates an expectation of privacy by CRFO members and fishers under similar VMS requirements. The reasonableness of this expectation would be supported by the fact that VMS "makes possible the continuous and indefinite tracing of the individual's movements, wherever he goes [and] permits surveillance far beyond any ordinary powers of observation about which citizens may reasonably know . . . ."[128] The Supreme Court's decision in *Knotts* that the warrantless placement of a beeper on a vehicle is constitutionally permissible does not change the above analysis.

Knotts does require a challenger to demonstrate a justifiable, reasonable, or legitimate expectation of privacy.[129] To make this showing under the *Katz* framework, CRFO members must first show they exhibited an actual expectation of privacy.[130] Accordingly, CRFO members must demonstrate that they seek to pre-

127 *Id.*

128 *See id.*

129 United States v. Knotts, 460 U.S. 276, 280 (1983).

130 *See id.* at 281 (quoting United States v. Katz, 389 U.S. 347, 361 (1967)).

serve the location of their vessels as private when not engaged in commercial fishing activities.[131] As referenced above, this showing can be substantiated by looking at the non-fishing activities for which the commercial vessels are used. CRFO members could assert that the location of their vessels while engaged in non-commercial pursuits is not publicly known. Similarly, the business decision to use one marine mechanic over another may be made on the basis of confidential considerations. While those considerations are not revealed to the government through the use of VMS, the location of the mechanic, and therefore the identity of the mechanic, are. In either example, it is possible to determine an aspect of a vessel's location that a commercial fishing business may wish to preserve as private.

In the year following the *Knotts* decision, the Supreme Court's ruling in *United States v. Karo* distinguished between monitoring in public spaces versus private locations.[132] As in *Knotts*, the defendant in *Karo* challenged the admissibility of evidence discovered by the use of an electronic tracking device.[133] The *Karo* Court distinguished data obtained while the tracking device was on public roads from information collected while the device was inside the private residence.[134] The former data was admissible, but the latter was not because the residents had a justifiable privacy interest within their own home.[135]

The Court in *Knotts* specifically noted that technology can provide the government with 24-hour surveillance of any citizen of this country without judicial knowledge or supervision and that should such "dragnet type law enforcement practices . . . eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable."[136] Of course, the facts of *Karo* and *Knotts* are readily distinguishable from those present in a potential VMS claim. Most importantly, the beeper that was utilized in *Karo* was installed in a can of ether that the defendant allegedly used to extract cocaine from clothing.[137] As a result, the monitored container entered the de-

131 *See id.* (quoting *Katz*, 389 U.S. at 351).

132 United States v. Karo, 468 U.S. 705, 714-15 (1984).

133 *Id.* at 710.

134 *See id.* at 714-15.

135 *Id.* at 715-16.

136 *Knotts*, 460 U.S. at 283-84.

137 *Karo*, 468 U.S. at 708.

fendant's private residence and allowed law enforcement to track its location therein.[138]

Many CRFO members with smaller vessels that are kept on trailers and housed inside garages and sheds of private residences will likely be able to reasonably assert that their vessels are within the private sanctity of their home. Therefore, the 24-hour VMS monitoring of such vessels is constitutionally prohibited by the protections afforded under the Fourth Amendment.

Furthermore, enclosed buildings that are used in the course of business, such as dry docks, have also been afforded Fourth Amendment protection from governmental intrusion.[139] Hence, CRFO members challenging VMS requirements could argue by analogy that the government's authority to surveil their vessels while in an enclosed, private area violates their expectation of privacy. After balancing the factors and precedent relative to whether CRFO members may assert a legitimate claim that the 24-hour surveillance of the VMS invades the private aspects of vessel use, a court should conclude that commercial fishers have sought to preserve and therefore have an actual expectation of privacy.

Once they have successfully demonstrated an actual expectation of privacy, CRFO members must then prove that society is prepared to recognize their expectation as objectively reasonable.[140] As in the first prong of the *Katz* analysis, the viability of such a claim rests on whether fishers can convince a court that society is prepared to accept as private the non-fishing activities conducted on CRFO members' vessels, the locations thereof, and the residual information attainable by the government via location. Several of the points and factual comparisons that have been addressed above are applicable to this inquiry. For example, the *Karo* Court determined that it was objectively reasonable for the defendant to expect to be free from government intrusion in his home and stated that "[i]ndiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight."[141] In light of this sentiment, several of the points that support

138 *Id.* at 708-10.

139 *See* Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1986).

140 *See* Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

141 *Karo*, 468 U.S. at 716.

CRFO members' argument for an actual expectation of privacy also affirm the reasonableness of the expectations.

In addition, CRFO members could establish the reasonableness of their expectation of privacy by referencing the following dicta from the *Knotts* decision: "[T]here is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the [defendant's] cabin, or in any way that would not have been visible to the naked eye from outside the cabin."[142] In the VMS situation, the government is able to do exactly what the *Knotts* Court distinguished as potentially unconstitutional—monitor the movement of individuals when they are outside the view of the naked eye and withdrawn from public view.

Dow provides additional support for an objectively reasonable argument. In *Dow*, the Court determined that the chemical company "plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe."[143] This precedent supports the argument that there is a recognized objective expectation of privacy inside enclosed buildings utilized by businesses, including commercial fishing businesses. For example, CRFO members dry docking their vessels or storing them in enclosed buildings could legitimately claim that the VMS signal, revealing the location of the vessel and tracking any movement within the building itself, violates their expectation of privacy. This point is buttressed by the *Dow* Court's statement that "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant."[144]

While Amendment 18A does have a specific power-down exception, the requirements of the power-down provisions do not address the privacy concerns raised in this Article. The first circumstance that allows for a power down requires that the vessel be out of the water for a period of more than seventy-two consecutive hours.[145] Clearly fishers who wish to take their family on a whale-watching trip, for example, do not remove the vessel

142 United States v. Knotts, 460 U.S. 276, 285 (1983).

143 *Dow*, 476 U.S. at 236.

144 *Id.* at 238.

145 Fisheries Amendment 18A, 71 Fed. Reg. 45,428, 45,430 (Aug. 9, 2006).

from the water at all, much less for the requisite time period. The second circumstance under which a power-down exception is granted does not address this privacy scenario either. Nor do these two circumstances allow CRFO members to protect other proprietary information through the use of the power-down exception. This is because the power down may only be applied for and granted under very specific circumstances that require owners to sign out of the VMS program, and the commercial fishery from which they derive their livelihood, for a minimum period of one calendar month.[146] In addition, the vessel would not be allowed to resume commercial fishing operations until the VMS unit is reactivated and NMFS personnel verify consistent position reports.[147] Many CRFO members would likely not be able to afford to refrain from conducting business for such a long time merely to take their family on a recreational boating trip or have their vessel quickly repaired by their mechanic.

CRFO members may also want to suggest that the specific satellite technology employed by the VMS is not something that is generally available to the public. While the prevalence of global positioning system (GPS) technology in our society is clear, the high cost of owning VMS technology is not something that the public at large can readily afford.[148] This lack of general availability contributes to the reasonableness of the expectation of privacy addressed here. It should also be noted that several state courts have found that people are entitled to an expectation of privacy with respect to the tracking of their vehicles.[149]

When addressing technology's role in the reasonableness inquiry, the *Kyllo* Court framed the issue somewhat differently from previous cases. It indicated that the real question involved confronting the technological limits "to shrink the realm of guaranteed privacy."[150] Since *Kyllo* involved the search of an individ-

146 *Id.*

147 *Id.*

148 *See* Fisheries Amendment 18A, 71 Fed. Reg. 28,842, 28,845-46 (May 18, 2006).

149 *See* State v. Jackson, 76 P.3d 217, 223-24 (Wash. 2003) (installation of a GPS tracking device constituted a search and seizure requiring the police to secure a warrant because the extent of possible intrusion into private affairs was extensive and the device was a technological substitute for traditional visual tracking); State v. Lacey, No. 2463N/02, 2004 WL 1040676, at *8 (N.Y. Nassau County Ct. May 6, 2004) (the use of a GPS tracking device requires a physical intrusion into an individual's personal effects and, therefore, requires the police to obtain a warrant).

150 Kyllo v. United States, 533 U.S. 27, 34 (2001).

ual's home, the court immediately recognized a distinction from a business-practice situation:

> While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes . . . there is a ready criterion . . . of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.[151]

The Court's admonishment that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search" supports the challenge outlined in this Article.[152] By analogy, and using the principles articulated by the Court in *Karo* and *Dow*, CRFO members could legitimately argue that the sense-enhancing technology of the VMS provides at least some information about their vessels when they are located in enclosed and constitutionally protected garages and business areas.

After balancing the factors and precedent relative to whether a privacy claim is something society is willing to accept as reasonable, sufficient facts exist to uphold CRFO members' claim that the 24-hour nature of the VMS surveillance invades a private aspect of vessel use. As a result, a reviewing court should find an objectively reasonable expectation of privacy in satisfaction of Fourth Amendment principles. Should that outcome occur, the monitoring practices of the government pursuant to Amendment 18A and the requirement that CRFO fishers comply with the VMS provision would then constitute a search under the Fourth Amendment.

IV

WARRANTLESS USE OF VMS BY NMFS

Fourth Amendment jurisprudence is relatively clear that absent a judicial warrant or consent, any search conducted by the

151 *Id.*

152 *Id.* (citing Silverman v. United States, 365 U.S. 505, 512 (1961)).

government is presumptively unreasonable.[153] However, issuing fishing permits on the condition that the permitee agrees to use VMS raises issues of consent as well as the pervasively regulated industry exception to the warrant requirement. In opposition to a judicial challenge of federal VMS requirements, the government may argue that these exceptions provide the constitutional basis for VMS requirements within NMFS' regulations.

In general, the government must have probable cause and obtain a warrant in order to conduct a constitutional search.[154] These conditions apply to searches of private residences as well as businesses.[155] The principle reason for the warrant requirement is to interpose a "neutral and detached magistrate" between the citizen and the "officer engaged in the often competitive enterprise of ferreting out crime."[156] Moreover, "[e]ven when there is a reasonable expectation of privacy triggering Fourth Amendment protections, there are several recognized exceptions" to the requirement of a judicially issued warrant.[157] In some situations, a valid consent legitimizes an otherwise unconstitutional search.[158]

In *United States v. Hajduk*, the government argued that the defendants consented to a search of their business when they agreed to a permit condition allowing the government to sample the company's wastewater.[159] The court held, in part, that the defendants consented to the search because the permit contained a section stating that an "'[u]nscheduled sampling, monitoring and/or inspections shall occur when deemed necessary by the (City).'"[160] In exchange for the privilege to discharge waste, the defendants "necessarily consented to application of the City Code and Permit requirements as a matter of law under the Fourth Amendment."[161] Though the district court found that the question presented a close case, it concluded that the defendants' agreement to place a sampling box outside its facility in accordance with the issuance of the permit constituted consent.[162] The

153 United States v. Karo, 468 U.S. 705, 717 (1984).
154 *See* U.S. CONST. amend. IV.
155 *See* See v. City of Seattle, 387 U.S. 541, 543 (1967).
156 *See* Johnson v. United States, 333 U.S. 10, 14 (1948).
157 *See* United States v. Hajduk, 396 F. Supp. 2d 1216, 1227 (D. Colo. 2005).
158 *See* Lenz v. Winburn, 51 F.3d 1540, 1548 (11th Cir. 1995).
159 *Hajduk*, 396 F. Supp. 2d at 1227.
160 *Id.* at 1228.
161 *Id.*
162 *Id.* at 1227.

court found the defendants' choice to acquire the permit without resistance, protest, or challenge to be particularly relevant.[163]

Fishers challenging VMS requirements may encounter a similar admonishment from a reviewing court. A court could find that in return for the privilege of harvesting a fishery resource, commercial fishers necessarily consented to the 24-hour VMS requirements by acquiring a particular commercial fishing permit. However, as mentioned above, challengers may distinguish between consenting to a search while conducting fishing activities and consenting to a search during the non-fishing examples identified in Part III above. While consenting to the VMS search during commercial fishing activities pursuant to a fishing permit may be viewed as consideration for the privilege of commercial fishing in a regulated fishery, no such privilege exists in exchange for the VMS search while the vessels are engaged in non-fishing activities or are withdrawn from the view of the general public. *Hajduk* and similar cases can be distinguished from the VMS situation presented here because the desired search area was in a fixed location and not subject to uses that were unrelated to the defendants' business activities. After all, the search that occurred in *Hajduk* was the monitoring of the business's wastewater, not locating the automobile of the president of the company.[164] Additionally, challenging a proposed VMS regulation before any permits are applied for would suggest that a challenger has demonstrated "resistance, protest or challenge."[165] Thus, the close call articulated by the court in *Hajduk* may favor a commercial fisher in this situation.

In *Palmieri v. Lynch*, the Second Circuit addressed the issue of whether submitting a permit to a regulatory agency necessarily translates to the individual consenting to a warrantless search.[166] In *Palmieri*, the plaintiff contested the Department of Environmental Conservation's (DEC) warrantless entry onto his premises to attempt a regulatory inspection in furtherance of a permit application filed by the plaintiff.[167] The plaintiff submitted an application to the DEC to extend his ninety-two foot dock by an

163 *Id.*

164 *See id.* at 1223.

165 *Id.* at 1227.

166 Palmieri v. Lynch, 392 F.3d 73, 75-77 (2d Cir. 2004).

167 *Id.* at 76-77.

additional fifty feet, and the DEC agent subsequently entered his property to conduct an inspection relative to that request.[168]

The court found in favor of Palmieri and, in his concurring opinion, Judge Straub made clear that the government could not rely on any allegation that Palmieri somehow consented to the search through the submission of a permit application.[169] "As a threshold matter, nothing in the permit application could be construed as any form of acceptable consent. The permit application was entirely silent as to the need for any inspection of the property."[170] In so concluding, Judge Straub cited another Second Circuit decision, *Anobile v. Pelligrino*.[171] There the court held that the plaintiffs' signatures on horse-racing license applications, which contained an express waiver of the right to object to searches conducted at the raceway, did not constitute an effective consent to residential searches.[172]

Based on the above logic, fishers could assert that their consent to be tracked by VMS while commercially fishing does not extend to the monitoring of their vessels while they are docked, in repair, or being used for non-fishing activities. Much like the raceway waiver in *Pelligrino* did not constitute an effective consent to residential searches, the VMS requirement should not be interpreted as an effective consent to 24-hour surveillance of private activities. The primary purpose of VMS requirements is at-sea enforcement of closed areas, and challengers would likely be able to successfully assert that they only consented to monitoring when their vessels are either in close proximity to closed areas or while commercially fishing within the fishery.

Some states require that consent be free and unconstrained. In Florida, for example, where state and federal enforcement agencies monitor the Gulf of Mexico fishery, both consent and the question of voluntariness are questions of fact to be determined by a totality of the circumstances.[173] In making such a determination, the following factors are relevant:

> (1) whether the individual was aware that his conduct would subject him to a search[;] (2) whether a vital interest supports the search; (3) the apparent authority of the officer to conduct

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168 *Id.* at 76.
169 *Id.* at 89 n.10 (Straub, J., concurring in part and dissenting in part).
170 *Id.*
171 *Id.* (citing Anobile v. Pelligrino, 303 F.3d 107, 123-25 (2d Cir. 2002)).
172 *Id.* (citing *Anobile*, 303 F.3d at 124).
173 *See* Shapiro v. State, 390 So. 2d 344, 348 (Fla. 1980).

> the search; (4) whether the individual was advised of his right to refuse; and (5) whether refusal would result in a deprivation of a benefit or right.[174]

In *Johnston v. Tampa Sports Authority*, the plaintiff brought suit against the public authority operating a stadium, claiming that requiring all spectators to submit to pat-down searches violated his Fourth Amendment rights.[175] In that case, the court examined the totality of the circumstances in determining whether the plaintiff's consent was voluntarily given through his mere purchase of a ticket.[176]

A commercial fisher utilizing Florida precedent could focus on the second and fifth factors referenced above in challenging federal VMS requirements. Simply stated, the only interest supported by 24-hour VMS monitoring is the interest in preventing fishing in closed areas. No interest is supported by a search of the vessel's location when not engaged in commercial fishing activities. Additionally, a commercial fisher's refusal to apply for a commercial fishing permit because of the warrantless VMS requirement would directly result in the deprivation of a benefit: the ability to commercially fish in the regulated fishery. Should these arguments find footing with a court, the logical conclusion is that a commercial fisher could not voluntarily consent to the 24-hour monitoring requirement by Amendment 18A and similar VMS regulations.

It is also likely that the government would raise the pervasively regulated industry exception to the warrant requirement of the Fourth Amendment. If a challenger were not to prevail on this issue, it may be a result of the Supreme Court's decisions in *Donovan v. Dewey* and its progeny.[177] In essence, the pervasively regulated industry exception stands for the proposition that:

> When a person chooses to engage in a closely regulated industry and to accept a license which is conditioned upon such warrantless intrusion and inspection, he does so with full knowledge of the restrictions on his privacy. He is also free

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174 *See* Johnston v. Tampa Sports Auth., 442 F. Supp. 2d 1257, 1272 (M.D. Fla. 2006) (quoting State v. Iaccarino, 767 So. 2d 470, 476 (Fla. Dist. Ct. App. 2000)), *rev'd on other grounds*, Johnston v. Tampa Sports Auth., 490 F.3d 820, 825 (11th Cir. 2007).

175 *Id.* at 1259-60.

176 *Id.* at 1272.

177 *See* Donovan v. Dewey, 452 U.S. 594, 600 (1981) (citing United States v. Biswell, 406 U.S. 311, 316 (1972)).

> not to submit to such regulation and warrantless inspection by declining to seek a federal permit.[178]

Commercial fishing has a long history of being a closely regulated industry, and such regulation began as early as 1793.[179]

In *Dewey*, the Supreme Court found constitutional a provision of the Mine Safety and Health Act of 1977, which allowed for warrantless inspections of underground and surface mines.[180] The provision of the Mine Safety and Health Act challenged by the defendant granted mine inspectors "a right of entry to, upon, or through any coal or other mine" and stated that "no advance notice of an inspection shall be provided to any person."[181]

Citing *Biswell v. United States*, the Court stated that:

> The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.[182]

However, the most telling piece of the *Dewey* holding, relative to any potential challenge to a VMS requirement, lies in what the Court commented on directly after the above-referenced language. Citing Congress' broad authority to regulate businesses engaging in interstate commerce and commenting that "an inspection program may in some cases be a necessary component of federal regulation," the Court nevertheless stated that the Fourth Amendment still protects the interests of business owners in being free from unreasonable intrusions by the government.[183]

The Court then presented two situations where governmental intrusion through warrantless inspection would be contrary to the protections of the Fourth Amendment. Referencing its earlier holding in *Colonnade Catering Corp. v. United States*, the Court indicated that a governmental inspection not authorized by law or unnecessary to further a federal interest could be found

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178 Balelo v. Baldrige, 724 F.2d 753, 765 (9th Cir. 1984) (citing United States v. Biswell, 406 U.S. 311, 315-16 (1972)).

179 *See id.* (citing United States v. Raub, 637 F.2d 1205, 1208-09 & n.5 (9th Cir. 1980)).

180 *See Dewey*, 452 U.S. at 596.

181 *Id.* (citing 30 U.S.C. § 813(a) (2006)).

182 *Id.* at 598-99 (citing *Biswell*, 406 U.S. at 316).

183 *Id.* at 599.

unreasonable under Fourth Amendment analysis.[184] Similarly, the court stated that "warrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials."[185]

As related to the CRFO hypothetical, a challenge to Amendment 18A or another similar VMS regulation may be based upon both of the exceptions to the pervasively regulated industry exception set forth in *Dewey*. Although monitoring the location of CRFO fishing vessels while they are engaged in commercial fishing activities clearly furthers the federal interest of ensuring that there are no unlawful commercial fishing activities taking place in closed or restricted areas, no federal interest is furthered by monitoring these vessels while they are on recreational boating excursions or are removed from the commercial fishery. It is illogical to suggest that broadcasting the coordinates of a vessel whose leisure passengers are swimming while the boat is anchored off the west coast of Florida furthers any federal interest related to enforcing the closed fishing areas. To suggest otherwise would seemingly constitute the type of unreasonable intrusion that the *Dewey* Court sought to prevent. Moreover, it is unlikely that the government can demonstrate that monitoring commercial vessels while they are not engaged in commercial fishing activities is necessary to further any federal interest, much less one related to the commercial fishing industry.

Alternatively, challengers to the VMS regulations can reasonably assert that they have no expectation of when or how they will be monitored by NMFS. While it is clear that the fishing industry is a pervasively regulated business, fishers engaged in commercial fishing can legitimately argue that there is no regulatory scheme that creates the expectation on the part of the business owner that the *Dewey* Court thought necessary. While the government presence may be predictable insofar as vessel owners know that their coordinates are being monitored by VMS, fishers are still left to wonder how often their vessel will be monitored by the government when the boat is not near a closed fishing area. Because of this lack of predictability, vessel owners

184 *Id.* (citing Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970)).
185 *Id.* (citing Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978)).

necessarily lack a reasonable expectation as to when or where a search has occurred. As the *Dewey* Court stated, "[i]n such cases, a warrant may be necessary to protect the owner from the 'unbridled discretion [of] executive and administrative officers.'"[186]

The Supreme Court extended the pervasively regulated industry exception to industries without a long tradition of regulation where frequent unannounced inspections are essential to further an important governmental interest.[187] The Court justified this extension by commenting that where the regulation involves a comprehensive and predictable governmental presence, the owner "is not left to wonder about the purposes of the inspector or the limits of his task."[188]

The *Biswell* Court held that a treasury agent may undertake a warrantless search of the premises of a licensed gun dealer.[189] Although firearms traffic did not have as long a history of government control as the liquor industry, for example, the Court found that an important federal interest in preventing violent crime was at stake and that close scrutiny through inspection was a crucial part of the regulatory scheme.[190] The Court recognized that a dealer engaged in such a pervasively regulated business did so with the knowledge that his business records and inventory would be subject to inspection.[191] The Court also noted that where the industry is closely regulated, the owner cannot help but be aware that the government will conduct periodic inspections for specific purposes.[192] In determining whether warrantless searches in a closely regulated industry are reasonable, a court must decide whether the regulatory scheme "in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant."[193] As referenced above, inspections of commercial property may be unreasonable if they are not authorized by law or are unnecessary for the furtherance of a federal interest.[194]

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186 *Id.* (citing Marshall v. Barlow's, Inc., 436 U.S. at 323).
187 *Biswell*, 406 U.S. at 315-16.
188 *Id.* at 316.
189 *Id.* at 315-17.
190 *Id.* at 315.
191 *Id.* at 316.
192 *Id.*
193 *See* Donovan v. Dewey, 452 U.S. 594, 603 (1981).
194 *See* Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970).

The facts and privacy interests sought to be protected in *Colonnade*, *Biswell* and *Dewey* are readily distinguishable from the privacy interests that CRFO members would seek to preserve by challenging the VMS requirement of Amendment 18A. In each of the cases referenced by the pervasively regulated industry exception, the challengers were objecting to the search of their business directly related to the furtherance of a federal interest.[195] For example, in *Biswell*, the government agents were inspecting the premises of a gun collector.[196] It was not, by contrast, inspecting the firearms that the defendant may have kept in his vehicle for recreational hunting activities. Similarly, the defendant in *Dewey* objected to the search of his mining operation, not a collection of prospecting equipment that the defendant used for his personal hobby.

These two examples may seem extreme, but they illustrate why a challenge to Amendment 18A and other VMS regulations stands to survive Fourth Amendment scrutiny. The continuous nature of the surveillance in the regulation that will take place when vessels are engaged in non-commercial fishing activities is the essence of the constitutional flaw in the regulation. Unless and until Amendment 18A and similar regulations containing VMS requirements are amended to reflect the multiple uses of these vessels and to allow for more instances to power down and/or cease broadcasting vessel coordinates, such broad and undefined surveillance will trigger Fourth Amendment discussion and potential litigation.

V

CONCLUSION

There can be little doubt that our oceans and the fishery resources that were once thought to be inexhaustible now require preservation and conservation merely to maintain minimum population levels of some of the world's most important and diverse marine species. Numerous governmental and non-governmental organizations, scholars, and scientists throughout the world are calling for more effective means of protecting and monitoring fishery resources.[197] In reaction to these calls for increased pro-

195 *See, e.g.*, *Dewey*, 452 U.S. at 596; *Biswell*, 406 U.S. at 315-17.

196 *Biswell*, 406 U.S. at 312.

197 *See* NAT'L MARINE FISHERIES SERV., *supra* note 2, at 11-12; *see generally* PEW OCEANS COMMISSION, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA

tection, the United States government is increasingly mandating the use of VMS on commercial fishing vessels as a means of monitoring potential fishery violations in restricted areas within the waters of the United States.

Through its analysis of the constitutionality of VMS, this Article has illustrated that the Fourth Amendment will likely provide members of the commercial fishing community with well-founded arguments against 24-hour monitoring of their activities. Chief among the arguments herein are: (1) commercial fishers can expect to be free from governmental surveillance when engaging in non-regulated, personal activities and when their vessels are removed from the public realm and are housed within the confines of their private businesses and homes; and (2) in the absence of a warrant, continuous 24-hour surveillance of commercial fishing vessels should be struck down as unconstitutional.

Fourth Amendment jurisprudence has evolved throughout our nation's history as our government has developed increasingly sophisticated means of surveilling its citizens. Fourth Amendment protections moved into the electronic age at the beginning of the twentieth century and have continued to develop ever since. It seems inescapable that these protections will continue on their evolutionary track as satellite surveillance systems, such as VMS, increasingly become the tool of choice for the government to monitor and enforce its fishery regulations.

CHANGE (2003), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/env_pew_oceans_final_report.pdf.