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Recent Developments

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Recent Developments

BANKRUPTCY — DISCHARGE — ANALYSIS OF "ACTUAL INTENT" TEST AS APPLIED TO SECTION 14c(4) OF THE BANKRUPTCY ACT.

I. INTRODUCTION

The determination of a bankrupt’s right to a discharge from his indebtedness is one of the final steps in the bankruptcy process. Under section 14 of the Bankruptcy Act (Act), a discharge is automatically granted unless, upon objection by one of the parties in interest, the court is satisfied that the bankrupt has committed one of the enumerated acts prohibited by section 14c. Section 14c(4) specifically provides a ground for denying a discharge if the bankrupt has “at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, any of his property with intent to hinder, delay, or defraud his creditors.”

A showing of this “intent to hinder, delay, or defraud [a bankrupt’s] creditors” is essential for a section 14c(4) denial. In construing this phrase, courts have required that “actual,” as opposed to “constructive,” intent on
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the part of the bankrupt be demonstrated. Although the "actual intent" requirement of section 14c(4) is firmly established, confusion has developed with regard to its meaning and scope and to its application. This discussion includes a statement of the policy behind the actual intent test and a description of the situations to which it applies. Cases which have employed the actual intent test will be examined as well as the evidentiary and judicial review problems encountered therein.

II. THE POLICY AND SCOPE OF THE "ACTUAL INTENT" TEST

The "actual intent" requirement of section 14c(4) has evolved from judicial construction of the phrase "intent to hinder, delay, or defraud his creditors." It reflects the courts' recognition that the purpose of the Act is to allow a debtor to obtain a fresh start through relieving him of his debts, and that absent dishonest actions by the bankrupt he is entitled to be discharged; section 14c has consequently been construed liberally in favor of the bankrupt and strictly against the objecting party.

A bankrupt's dishonesty can be determined only by considering the intent with which the bankrupt acts. As a means of distinguishing the honest bankrupt from the dishonest, the "actual intent" test is used to determine whether the bankrupt acted with the intent to hinder, delay, or defraud his creditors. This test requires a court to examine the actions of the bankrupt and the circumstances surrounding those actions to determine whether the bankrupt had the intent to hinder, delay, or defraud his creditors.

The "actual intent" requirement of section 14c(4) has been firmly established, but confusion has developed with regard to its meaning and scope and to its application. This discussion includes a statement of the policy behind the actual intent test and a description of the situations to which it applies. Cases which have employed the actual intent test will be examined as well as the evidentiary and judicial review problems encountered therein.

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dishonest bankrupt, the requirement of specific, actual intent has become
the backbone of section 14c(4).\textsuperscript{15}

Despite the disjunctive nature of section 14c(4)\textsuperscript{16} — intent to hinder or
delay or defraud — only a few courts have denied a discharge when all that
was shown was an actual intent to hinder or delay.\textsuperscript{17} Most courts have

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\item \textsuperscript{15} To further clarify the rationale underlying the “actual intent” test, it is helpful
to compare section 14c(4) with similar provisions of the Act. In section 3a(1), 11 U.S.C.
\textsection 21a(1) (1970), the same act described in section 14c(4) constitutes an act of
bankruptcy which entitles parties other than the bankrupt to file a petition and
commence bankruptcy proceedings. 11 U.S.C. \textsection 21(b) (1970). Unlike section 14c(4),
however, actual intent is not an essential element. Instead, the act of bankruptcy in
section 3a(1) may be satisfied by demonstrating either that the debtor had the intent
to hinder, delay, or defraud his creditors or that he “made or suffered a transfer of any
of his property, fraudulent under the provisions of section 67 or 70 of this act.” Id.
These transfers include those which are deemed fraudulent, notwithstanding a lack of
actual intent on the part of the bankrupt. See, e.g., Bankruptcy Act \textsection 67d(2)(a), 11
U.S.C. \textsection 107d(2)(a) (1970) (transfer made without fair consideration by debtor who is
or will thereby be rendered insolvent is fraudulent). A distinction that can be drawn
between section 3 and section 14 is that the rationale behind the former is to make
bankruptcy available to the bankrupt’s creditors, notwithstanding the bankrupt’s
honesty or lack thereof, whereas the rationale behind the latter is to extricate the
bankrupt from bankruptcy. Thus, while both honest and dishonest bankrupts may be
forced to participate in bankruptcy proceedings, only the honest bankrupt will receive
the benefit of a fresh start that section 14 of the Bankruptcy Act provides. See notes
11 & 12 and accompanying text supra.
\item One court has concluded that the requirement of actual intent in section 14 is
“buttressed by a comparison of the discharge provisions of the Bankruptcy Act with
the provisions . . . relating to setting aside conveyances which are deemed fraudulent
as to creditors.” In re Nemerov, 134 F. Supp. 678, 680 (S.D.N.Y. 1955). Although
section 67d(2)(a) uses the language, “without regard to his actual intent,” section
\textsection 107d(2)(a). The Nemerov court therefore reasoned that “if Congress had intended to
foreclose proof of intent in dealing with fraudulent transfers which bar discharge, it
would have used more specific language.” 134 F. Supp. at 680. This may be a logical
approach, but it must also be noted that section 67d(2)(d) deals with transfers made
“with actual intent as distinguished from intent presumed in law, to hinder, delay, or
defraud . . . creditors.” 11 U.S.C. \textsection 107d(2)(d) (1970). With this in mind, the
Nemerov court’s reasoning may be countered by arguing that if Congress desired actual intent
 to be shown under section 14c(4), it would have used specific language, i.e., the word,
“actual.”
\item See text accompanying note 6 supra.
\item 17. See In re Rowe, 234 F. Supp. 114, 116 (E.D.N.Y. 1964); In re Perlmutter, 256 F.
In Perlmutter, the court stated: “It is not necessary that intent to defraud be proved. If
the intent to hinder and delay exists, it is sufficient.” Id. (emphasis added). This
quoted statement was adopted by the court in Rowe. 234 F. Supp. at 116. One
authority has applied this interpretation to a section 3a(1) act of bankruptcy which
employs the same language. H. BLACK, BANKRUPTCY \textsection 82, at 195 (3d ed. 1922).
Although Black believed that intent to hinder or intent to delay was sufficient for
purposes of section 3a(1), he apparently did not feel this interpretation could extend to
section 14c(4), for he stated that the latter section required “fraudulent intent on the
part of the bankrupt.” Id. \textsection 70 at 1341, & n.95. See note 15 supra.
\item In Coder v. Arts, 213 U.S. 223 (1909), the United States Supreme Court held
that this same language, as used in a former fraudulent conveyance section of the
Act, was aimed at those conveyances intended to defraud. Id. at 224. See also 1 G.
GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES \textsection 195, at 348 (rev. ed. 1940).
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required that actual fraudulent intent be established. As the language of section 14c(4) delineates, this intent to defraud must be directed toward the creditors of the bankrupt. Examples of this fraudulent intent include the transfer, removal, or destruction of the bankrupt's property for the purpose of keeping it out of the creditor's reach. Such action may result in an "unjust diminution" of his estate and may be sufficient to bar his discharge.

Defining the policy behind the "actual intent" test is necessary in order to understand its scope. However, a full comprehension of the test can be achieved only by undertaking a case analysis to see how the test has been applied and what evidence has been found sufficient and insufficient to prove actual intent.

III. THE APPLICATION OF THE "ACTUAL INTENT" TEST

A. Types of Evidence

The best evidence an objector can produce to establish the actual intent of the bankrupt is naturally direct evidence. Such evidence is rarely, if ever, available to the objecting party, however, because actual intent relates to the bankrupt's state of mind when he committed the act or acts in question and, hence, cannot be proved directly by objective evidence. Consequently, courts have often had to infer the existence of actual intent from the factual circumstances.

18. See Minnick v. Lafayette Loan & Trust Co., 392 F.2d 973, 977 (7th Cir. 1968) (actual intent to defraud); In re Pioch, 235 F.2d 903, 905 (3d Cir. 1956) (actual fraudulent intent to hinder, delay, or defraud); Arenz v. Astoria Sav. Bank, 281 F. 530, 532 (9th Cir.), cert. denied, 260 U.S. 740 (1922) (fraudulent intent); Fedex v. Goetz, 264 F. 619, 624-25 (2d Cir. 1920) (actual fraudulent intent); In re Nemerov, 134 F. Supp. 678, 680 (S.D. N.Y. 1955) (actual intent to defraud); In re Sandler, 26 F. Supp., 841, 842 (D. Md. 1939) (actual intent to defraud). See note 12 and accompanying text supra.

19. 11 U.S.C. §32c(4) (1970). For the pertinent portion of this section, see text accompanying note 6 supra. For a discussion of the treatment rendered by the proposed Bankruptcy Acts with respect to whom the intent to defraud must be directed, see note 6 supra.

20. See H. Black, supra note 17, §670, at 1341. The author stated: "[A]n intention to dispose of his property in such a way as to keep it beyond the reach of his creditors is an intention to hinder, delay, and defraud them, and will bar the discharge." Id. See also Arenz v. Astoria Sav. Bank, 281 F. 530, 532 (9th Cir.), cert. denied, 260 U.S. 740 (1922); In re Hirsch, 4 F. Supp. 708 (S.D.N.Y. 1933).

21. See In re Freudmann 362 F. Supp. 429, 433 (S.D.N.Y. 1973), aff'd, 495 F.2d 816 (2d Cir.), cert. denied, 419 U.S. 841 (1974). But see In re Adman 541 F.2d 999, 1004 (2d Cir. 1976) (mere transfer of nonexempt assets into exempt assets does not show actual intent to defraud). It is important to note, however, that section 14c(4) is not satisfied by a mere showing of a fraudulent conveyance unless the fraud relating to the conveyance "includes the specific intent to defraud creditors." Hayslip v. Long, 227 F.2d 550, 553 (5th Cir. 1955).

22. Such an inference of actual intent must be distinguished from a presumption of intent which arises as a matter of law. The latter is considered by most courts to be an improper basis for finding actual intent under section 14c(4) since it is essentially the equivalent of constructive or implied intent. See In re Adman, 541 F.2d 999, 1003 (2d Cir. 1976); In re Lupo, 101 F. Supp. 499, 501–02, 502–03 (N.D. Ohio 1951). But see notes 41–48 and accompanying text infra.
In *In re Freudmann*, the Second Circuit found that a clear "pattern of purposeful conduct" on the part of the bankrupt fully supported a finding of actual intent to defraud.\(^2\) In that case, a diamond merchant pursued a plan whereby he purchased diamonds on credit and immediately sold them for cash, at prices below cost.\(^2\) Although there was no direct evidence of actual intent to defraud the bankrupt's creditors, the Second Circuit concluded that the bankruptcy judge's finding of actual intent was justified.\(^2\) The circuit court, apparently influenced by the bankrupt's pattern of purposeful conduct, likewise inferred that he had actually intended to defraud his creditors.

Many cases deal with only a single disfavored act by the bankrupt;\(^2\) in such instances the inference of actual intent is more difficult to make. One method of discerning actual intent is through a comparison of the value of the asset transferred with the value of the consideration received by the bankrupt. If a valuable asset is transferred for insufficient consideration, an inference of actual intent to hinder, delay, or defraud creditors may be warranted.\(^2\) Conversely, a court has refused to infer actual intent from the transfer of an asset of minimal value absent other evidence.\(^3\)

\(^2\) *In re Freudmann*, 235 F.2d 903, 908 (3d Cir. 1956). (bankrupt transferred automobile to employer who completed payments on loan); *In re Woods*, 71 F.2d 270, 271 (2d Cir.), cert. denied, 293 U.S. 601 (1934) (assignment of stock); *In re Richter*, 57 F.2d 159, 160 (2d Cir. 1932) (bankrupt withdrew $3000 to give to wife); *In re Rice & Reuben*, 43 F.2d 378, 378 (S.D. Me. 1930) (bankrupt partnership gave automobile to partner's wife).

\(^3\) *In re Woods*, 71 F.2d 270 (2d Cir.), cert. denied, 293 U.S. 601 (1934). *Woods* involved an assignment by the bankrupt within 12 months of bankruptcy of all stock in a corporation which owned a valuable 99-year lease on a hotel and theatre. The assignment was made to second mortgagees in consideration for a six-month option to reacquire the leasehold upon payment of the outstanding mortgage; however, this option could only be exercised if the assignees acquired the first mortgage, and they were under no obligation to do so. *Id.* at 271. Since the court considered the option to be inadequate consideration for the stock transfer, it concluded that prima facie grounds existed for finding an intent to hinder, delay, or defraud the bankrupt's creditors. *Id.* at 272. The bankrupt, not being able to carry the burden of rebutting this prima facie case, was denied a discharge. *Id.* at 272–73. See generally C. NADLER, BANKRUPTCY § 756, at 627 (2d ed. 1972). But see *Minnick* v. Lafayette Loan & Trust Co., 392 F.2d 973 (7th Cir. 1968). In *Minnick*, the bankrupts, husband and wife, sold their home for $500 in cash and the cancellation of $250 indebtedness, although their equity therein was at least $2,500. *Id.* at 974–76. The court rejected the creditor's argument that the substantial variation in equity value of the home and the resulting sale price manifested an intent to defraud and granted the bankrupts a discharge, concluding that an inference of actual intent from these facts would involve indulging in "speculation and surmise." *Id.* at 976. The bankrupt's open disclosure of the conveyance and the terms of the sale appeared to have influenced the court in reaching its decision. See *id.*

\(^3\) See *In re Rice & Reuben*, 43 F.2d 378 (S.D. Me. 1930). In *Rice*, the court held that a gift by an insolvent partnership of an old, relatively worthless automobile to the wife of one of the partners was not transferred with actual intent to defraud. *Id.* at 378–79.
Actual intent may also be inferred from what the bankrupt did with money he possessed during the twelve-month period preceding bankruptcy. 31 For example, if the bankrupt withdrew a substantial sum of money from his business or the bank and gave it to his spouse or family without any consideration in exchange, or if he used it for his own pleasure, an inference of actual intent may be appropriate. 32 Such an inference may not be drawn, however, when the bankrupt converts money he possesses into property which is exempt from creditors' access. 33 It is well settled that a conversion of nonexempt property into exempt property does not constitute sufficient evidence to deny the bankrupt's discharge. 34 In In re Adlman, 35 the bankrupt repaid loans and prepaid premiums on insurance policies owned by her and exempt under state law, even though she was under no personal obligation to do so. 36 Even though it was clearly her intention to convert the money into exempt property, the court held that this evidence was insufficient to infer actual intent to defraud, absent extrinsic evidence of fraud. 37 The court determined that no extrinsic evidence of fraud was shown and granted the bankrupt her discharge. 38 The refusal to infer actual

31. Section 14c(4) denials apply only to transfers made within 12 months preceding the filing of the petition in bankruptcy. 11 U.S.C. § 32c(4) (1970). For the text of this section, see text accompanying note 6 supra.
32. See Losner v. Union Bank, 374 F.2d 111 (9th Cir. 1967). In Losner, the court held that the bankrupt concealed property with the intent to hinder, delay, or defraud his creditors when he withdrew $1,000 from his checking account, carried the money on his person, and later used the money to purchase money orders with which he made payments to several of his creditors. Id. at 112. See also In re Finder, 61 F.2d 960, 961–62 (2d Cir. 1932), cert. denied, 289 U.S. 736 (1933) (bankrupt withdrew $107 from bank to purchase round trip ticket to Florida); In re Richter, 57 F.2d 159, 160 (2d Cir. 1932) (bankrupt partner withdrew $3,000 from partnership funds for his wife to use to finance her mother’s trip to Europe).
33. Section 6 of the Bankruptcy Act, 11 U.S.C. § 24 (1970), provides that the “Act shall not affect the allowance to bankrupts of the exemptions which are prescribed” by state law. Id.
34. See In re Adlman, 541 F.2d 999, 1004 (2d Cir. 1976); Wudrick v. Clements, 451 F.2d 988, 989–90 (9th Cir. 1971); Forsberg v. Security State Bank, 15 F.2d 499, 501, 502 (8th Cir. 1926); cf. Schwartz v. Seldon, 153 F.2d 334, 335–36 (2d Cir. 1945) (insured’s trustee in bankruptcy unsuccessful in avoiding transfer from nonexempt to exempt property).
35. 541 F.2d 999 (2d Cir. 1976).
36. Id. at 1001. The facts established that the bankrupt sold her home to an aunt and uncle for $125,000, from which she realized about $60,000. Id. At the time of the sale, the bankrupt and her husband leased the house back from the relatives in order to continue occupying it. Id. Concurrent with this “sale and leaseback,” the bankrupt withdrew money from her checking account to repay advancements made on the insurance policies (totalling $52,653.40) and to prepay certain premiums (totalling $7,663.22). Id. The bankrupt testified that the purpose of completing these transactions was to prevent the lapse of the insurance policies since her husband was ill and obtaining new coverage would be difficult. Id.
37. Id. at 1004.
38. Id. at 1005. The dissenting judge in Adlman argued that the undisputed facts demonstrated a “scheme to defraud creditors.” Id. at 1007 (Moore, J., dissenting). Viewing the sale and leaseback of the bankrupt’s home — which he did not consider an arm’s length transaction — in combination with the immediate conversion of one proceeds to exempt property, the dissenting judge concluded that one could infer an actual intent to hinder, delay, or defraud. Id.
fraudulent intent from the conversion of a bankrupt’s nonexempt property into exempt property appears to spring from a desire to avoid penalizing the performance of a legal act. This explanation has apparently been applied even where the bankrupt’s purpose may indeed have been to keep his property out of the hands of creditors.

Of the courts which adhere to the “actual intent” test, some may also deem, as a matter of law, certain transfers by the bankrupt to have been made with actual intent to defraud. This practice appears to be an outgrowth of an opinion in a 1914 case, In re Julius Brothers. In that decision, the court determined that there were two classes of transfers which might satisfy the required intent to hinder, delay, or defraud creditors. One class included those transfers which were entered into with actual fraudulent intent. The other class involved those transfers in which the fraudulent intent is conclusively presumed as a matter of law. The court noted as the prime example of the latter class a voluntary transfer of the bankrupt’s property while he was insolvent and for which he received no valuable consideration. Notwithstanding the court’s ultimate conclusion that the transfer under consideration did not fall within this second class, its recognition that such a class exists has caused considerable confusion.

Courts which have recognized this second class have sometimes held that the transfer at issue was presumptively fraudulent. The language of

39. See Forsberg v. Security State Bank, 15 F.2d 499, 501 (8th Cir. 1926). This case was heavily relied upon in Adiman. See 541 F.2d at 1004, 1005.
40. See Forsberg v. Security State Bank, 15 F.2d 499, 501 (8th Cir. 1926). In Forsberg, the bankrupt also knew he was insolvent at the time he made the transfer of nonexempt property into exempt property. Id. at 502. Nonetheless, the Forsberg court concluded that “there must appear in evidence some facts or circumstances which are extrinsic to the mere facts of conversion of nonexempt assets into exempt and which are indicative of such fraudulent purpose.” Id. See text accompanying note 37 supra.
41. See Rothschild v. Lincoln Rochester Trust Co., 212 F.2d 584, 585 (2d Cir. 1954); In re Julius Bros., 217 F. 3, 7 (2d Cir. 1914); In re Hirsch, 4 F. Supp. 708, 710 (S.D.N.Y. 1933). See generally Rutter v. General Motors Acceptance Corp., 70 F.2d 479 (10th Cir. 1934). See also 1 COLLIER, supra note 9, ¶14.11, at 14-18.
42. 217 F. 3 (2d Cir. 1914).
43. Id. at 7.
44. Id.
45. Id. The conclusive presumption is based upon “the terms of the agreement or the nature of the transaction itself.” Id.
46. Id.
47. Id. The court found that the bankrupts sold all their property for its full value and, thus, that the transfer was made for valuable consideration. Id. at 4, 7. In addition, the court concluded that there was no actual intent to defraud. Id. at 7.
48. See Rothschild v. Lincoln Rochester Trust Co., 212 F.2d 584, 585 (2d Cir. 1954); In re Hirsch, 4 F. Supp. 708, 710 (S.D.N.Y. 1933). In Rothschild, the transfer involved a house in which the bankrupt and his wife held title. The bankrupt joined with his wife in conveying title to her alone while he was indebted. 212 F.2d at 585. Because of this transfer, the court denied the bankrupt his discharge. It stated: “A conveyance while insolvent, without anything approaching a fair consideration to creditors... is presumptively fraudulent within the discharge provisions of the Act.” Id. (citations omitted). It is submitted that the fact that the Rothschild court relied upon the fraudulent conveyance section of the Act to support its conclusion lessens its potential.
Julius Brothers has, however, been referred to by another court as merely dictum which "went too far."\(^4\) Indeed, one can argue that presuming fraudulent intent conflicts with the basic rule that constructive or implied intent does not satisfy the requirements of section 14c(4). \(^5\) It is submitted that when actual intent is required to be shown, little, if any, deference should be paid to the second classification of Julius Brothers. \(^6\)

B. Burden of Proof

When exploring the different types of evidence encountered under the "actual intent" test, it is also important to consider the burden of proof borne by the parties and the role it plays. Section 14c provides that if the objector demonstrates reasonable grounds for believing that the bankrupt committed an act which would prevent his discharge, the bankrupt has to meet the burden of proving that he has not committed the act. \(^7\) In applying this provision, courts have construed it to require that the objector show a prima facie case. \(^8\) Although this burden may not appear to be that heavy, it is submitted that satisfying the "actual intent" test itself imposes a heavy burden on the objecting party endeavoring to demonstrate a prima facie case. \(^9\)

\(^{49}\) In re Nemorov, 134 F. Supp. 678, 680 (S.D.N.Y. 1955). The Nemorov court contended that "under the statute, the making of such a gift [as described in Julius Brothers] merely sets forth a prima facie case of fraudulent intent and shifts the burden of proving the contrary to the [bankrupt]." Id. (citations omitted). In In re Adiman, 541 F.2d 999 (2d Cir. 1976), the Second Circuit disregarded the dictum and interpreted Julius Brothers as holding that actual intent to hinder, delay, or defraud is not established by a bankrupt making a preference under section 60 of the Act, 11 U.S.C. §96 (1970). 541 F.2d at 1006 n.10.

\(^{50}\) See notes 8 & 9 and accompanying text and note 12 supra.

\(^{51}\) Notwithstanding the probability that the intent required in section 14c(4) will not be presumed as a matter of law by a court, it is suggested that the same facts referred to in Julius Brothers as an act warranting the presumption of fraudulent intent — a voluntary transfer by one who is insolvent for no valuable consideration — could support an inference of actual intent. See notes 23–32 and accompanying text supra.


\(^{53}\) See Feldenstein v. Radio Distrib. Co., 323 F.2d 892, 893 (6th Cir. 1963); In re Pioch, 233 F.2d 903, 905, 907 (3d Cir. 1956); In re Woods, 71 F.2d 270, 272 (2d Cir.), cert. denied, 293 U.S. 601 (1934). See also 1 COLLIER, supra note 9, ¶14.05, at 14–16.

\(^{54}\) See in re Pioch, 233 F.2d 905–06 (3d Cir. 1956). But see in re Gurney, 71 F.2d 144 (2d Cir. 1934). The Gurney court, when confronted with the argument that
The burden as stated in section 14c has recently been replaced by Bankruptcy Rule 407,55 which provides that the objector "has the burden of proving the facts essential to his objection."56 It is difficult to predict what effect this rule will have on the objector's burden of proving actual intent under section 14c(4).57 It is submitted, however, that any difference will most likely be negligible considering the burden imposed by the "actual intent" test itself.

C. Scope of Review

A final consideration which further complicates questions of evidence and burden of proof in this area is the scope of the appellate court's review58 regarding the conclusions of the referee.59 It is well established that the issue of actual intent is a question of fact.60 If the referee makes a finding of fact that the bankrupt performed an act with actual intent to hinder, delay, or defraud his creditors, this finding must be accepted by the reviewing court unless clearly erroneous.61 Actual intent, however, is often inferred from other findings of fact and, as such, is considered to be an ultimate finding of fact.62 In this situation, the "clearly erroneous" rule may not apply and actual intent must be shown before a discharge would be denied, concluded that it was not necessary to decide this question since the objecting party had demonstrated reasonable grounds for believing that the bankrupt committed the act and the bankrupt had failed to carry the burden of disproving it. Id. at 145-46. Thus, the Gurney court determined that submission of evidence of actual intent was not a prerequisite to establishing a prima facie case.

56. Id.
57. In a very recent case, In re Adlman, 541 F.2d 999 (2d Cir. 1976), the dissenting judge did not apply the standard of proof set forth in rule 407. Rather, he applied the "reasonable grounds" standard noted in section 14c. Id. at 1006-07 (Moore, J., dissenting). This is interesting in light of the fact that Rule 407 was then in existence, yet the dissenting judge did not apply it in concluding that the objecting creditor showed reasonable grounds for believing that the bankrupt committed the act with intent to defraud and that the bankrupt failed to carry her burden of proving the contrary. Id. (Moore, J., dissenting). On the other hand, the majority opinion in Adlman did not expressly state which standard of proof it applied. It can be inferred, however, that the "actual intent" test itself was used to impose a heavy burden on the objecting party. See id. at 1004.
60. See, e.g., Losner v. Union Bank, 374 F.2d 111, 112 (9th Cir. 1967); Arenz v. Astoria Sav. Bank, 281 F. 530, 532 (9th Cir.), cert. denied, 260 U.S. 740 (1922); In re Parnell Lumber Co., 107 F. Supp. 794, 800 (N.D. Ohio 1951); In re Beggs, 93 F. Supp. 863, 865 (N.D. Ohio 1950); cf. Misty Management Corp. v. Lockwood, 539 F.2d 1205, 1211 (9th Cir. 1976).
61. 11 U.S.C. Rule 810 (Supp. V 1975). Bankruptcy Rule 810 provides in pertinent part: "The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge of [sic] the credibility of the witnesses." Id. See Losner v. Union Bank, 374 F.2d 111, 112 (9th Cir. 1967); In re Simon, 197 F. Supp. 301, 303 (E.D.N.Y. 1961), aff'd sub nom. Simon v. Agar, 299 F.2d 853 (2d Cir. 1962); cf. Misty Management Corp. v. Lockwood, 539 F.2d 1205, 1211 (9th Cir. 1976).
62. See Minnick v. Lafayette Loan & Trust Co., 392 F.2d 973, 977 (7th Cir. 1968) (ultimate finding); Costello v. Fazio, 256 F.2d 903, 908 (9th Cir. 1958) (actual
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greater review may be exercised by the higher courts. More specifically, when a finding of actual intent is drawn from undisputed facts, the courts feel that they, as well as the referee, can reach accurate conclusions.

Although the reviewing court is dealing with a question of intent which may often be best determined by the referee — particularly when the bankrupt has testified before him — this factor has not prevented appellate courts from setting aside the referee’s findings either under the “clearly erroneous” approach or under the “greater freedom of review” approach.

In Adlman, for example, the Second Circuit concluded that the bankruptcy judge’s finding of actual intent was “induced by an erroneous view of the law” and was, therefore, incorrect as a matter of law and as a matter of fact.

It is submitted that this liberal standard of review, which ignores the referee’s need to draw inferences in reaching conclusions, may undermine his role as a fact finder.

IV. CONCLUSION

An understanding of the policy behind the “actual intent” test of section 14c(4) and the discharge provisions in general may aid in further comprehending a court’s — especially an appellate court’s — application of the test. Courts do prefer to relieve the bankrupt from bankruptcy by giving him a fresh start through discharge.

As a result, an objecting party should either be able to establish a very compelling case when seeking to obtain a denial of discharge under section 14c(4), or abandon the attempt. If there is no direct evidence of actual intent, it will need to be inferred, and the facts supporting that inference will have to be very persuasive.

It is extremely doubtful that a court will presume or imply the intent, which, in the usual case, will need to be fraudulent.

To achieve the objectives of section 14c(4), actual intent must continue to be required. It is hoped, however, that the appellate courts will refrain

from given facts); In re Pioch, 235 F.2d 903, 905 (3d Cir. 1956) (ultimate finding of fact); In re Masor, 117 F.2d 368, 370 (7th Cir. 1941) (conclusion by referee); In re Rowe, 234 F. Supp. 114, 116 (E.D.N.Y. 1964) (inference from undisputed facts).

See also In re Adlman, 541 F.2d 999, 1003 n.5 (2d Cir. 1976).

63. See cases cited in note 62 supra.

64. See, e.g., Costello v. Fazio, 256 F.2d 903, 908 (9th Cir. 1958).

65. See In re Adlman, 541 F.2d 999, 1007 (2d Cir. 1976) (Moore, J., dissenting).

66. See cases cited in note 62 supra. Indeed, one court has concluded that the referee’s findings were unwarranted under either approach. Minnick v. Lafayette Loan & Trust Co., 392 F.2d 973, 977 (7th Cir. 1968).

67. 541 F.2d at 1005 (emphasis added). The dissent, on the other hand, felt that the “clearly erroneous rule” applied since a factual question was involved: whether the bankrupt acted with actual intent to hinder, delay, or defraud. Id. at 1006 (Moore, J., dissenting). The dissent believed the bankruptcy judge’s finding of actual intent was supported by the testimony, and, hence, not clearly erroneous. Id. at 1007 (Moore, J., dissenting).

68. See notes 10–15 and accompanying text supra.

69. See note 12 and accompanying text supra. See also Phillips, Order of Discharge and Post-Bankruptcy Litigation, 16 MERCER L. REV. 409, 409 (1965).

70. See notes 22–40 and accompanying text supra.

71. See notes 41–51 and accompanying text supra.

72. See note 12 supra.
from exercising their review powers so liberally;\textsuperscript{73} if it is shown that the referee's application of the "actual intent" test was not clearly erroneous, deference should be given to his conclusion on this question of fact.

\textit{Stuart J. Agins}

\textbf{CONSTITUTIONAL LAW — PHILADELPHIA HOME RULE CHARTER RECALL PROVISION HELD UNCONSTITUTIONAL.}


In 1951, the people of the city of Philadelphia adopted a home rule charter\textsuperscript{1} pursuant to enabling legislation\textsuperscript{2} effectuating a provision in the Pennsylvania Constitution.\textsuperscript{3} That Charter provided for the recall, without cause, of elected public officials by the electorate.\textsuperscript{4}

Twenty-five years later, on June 15, 1976, the Citizens Committee to Recall Rizzo (Recall Committee) submitted to the Board of Elections of Philadelphia (Board) a petition to recall the Honorable Frank L. Rizzo, mayor of Philadelphia.\textsuperscript{5} Validation of the petition and placement of the recall question on the November 2nd ballot for the general election required a Board finding that at least 145,488 signatures\textsuperscript{6} of the 210,806 submitted\textsuperscript{7} were in compliance with the charter provisions.\textsuperscript{8} Before the expiration of the fifteen-day statutory period allotted the Board to determine the validity or

\textsuperscript{73. See notes 60–67 and accompanying text \textit{supra}.}
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invalidity of the petition, it asked the Court of Common Pleas of Philadelphia for an extension in order to complete the process, and an extension was granted. A further extension was sought as the new deadline neared, but prior to a determination on the petition for extension, the Board rejected the recall petition, declaring it invalid due to an insufficient number of valid signatures.

Following this rejection, the Recall Committee filed an action in mandamus against the Board to compel it to validate the petition and place the question of recall on the November ballot. Mayor Rizzo petitioned to intervene and became codefendant with the Board. Mandamus was granted by the trial court, and both defendants appealed.

On review, the Supreme Court of Pennsylvania held that mandamus had been granted improperly by the lower court and that the recall petition was invalid in that the recall provision in the Home Rule Charter violated the state constitution. Citizens Committee to Recall Rizzo v. Board of Elections of Philadelphia, Pa. at 367 A.2d 232 (1976).

Although there had been litigation in Pennsylvania involving the removal of public officers prior to the Rizzo case, the Pennsylvania percent of the vote cast for the office of Mayor at the last preceding mayoralty election.

(3) The board may question the genuineness of any signature or signatures appearing on the recall petition and if it shall find that any such signature or signatures are not genuine, it shall disregard them in determining whether the petition contains a sufficient number of signatures.

Id. § 9.9-101(3). The Board is required to “complete its examination of the petition within fifteen days and . . . thereupon file the petition if valid or reject it if invalid.” Id. Pa. at 367 A.2d at 233 (Jones, C.J.) (plurality).

Id. at 367 A.2d at 233 n.5.

Id. at 367 A.2d at 233.

Id. at 367 A.2d at 233.

Id. at 367 A.2d at 233. Recognizing that many people were interested in the outcome of the case and that the litigation had to be resolved before the date for placing the recall question on the November ballot, the lower court accelerated the proceeding pursuant to Rule 1003 of the Pennsylvania Rules of Civil Procedure. Id. at 367 A.2d at 233.

Id. at 367 A.2d at 244 (Jones, C.J.) (plurality). See notes 48-69 and accompanying text infra.

Pa. at 367 A.2d at 244 (Jones, C.J.) (plurality). Chief Justice Jones, Justice Manderino, Justice Nix, and Justice O’Brien voted to strike down the recall petition on constitutional grounds. Id. at 367 A.2d at 244 (Jones, C.J.) (plurality); Id. at 367 A.2d at 245 (Nix, J., concurring); Id. at 367 A.2d at 247 (O’Brien, J., concurring). Justices Eagen, Pomeroy, and Roberts dissented. Id. at 367 A.2d at 257 (Eagen, J., dissenting); Id. at 367 A.2d at 270 (Pomeroy, J., dissenting); Id. at 367 A.2d at 287 (Roberts, J., dissenting). There were six opinions, and there was no majority opinion of the court. For a discussion of the justices’ interpretations of the relevant constitutional provisions, see notes 72-98 and accompanying text infra.

Watson v. Pennsylvania Turnpike Comm’rs, 386 Pa. 117, 125 A.2d 354 (1956) (turnpike commissioners not subject to removal at will of appointing power when that
Supreme Court had never considered the question of removal without cause of a nonconstitutional elected public official — i.e., one holding an office created by the legislature, not the constitution — by the process of recall.20

The removal cases that had reached constitutional dimensions had been resolved through the court’s interpretations of sections 1 and 7 of article VI of the Pennsylvania Constitution.

Article VI, section 1 (section 1) states that “[a]ll officers, whose selection is not provided for in this Constitution, shall be elected or appointed as may be directed by law.”21 Article VI, section 7 (section 7) provides:

All civil officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed civil officers, other than judges of the courts of record, may be removed at the pleasure of the power by which they shall have been appointed. All civil officers, elected by the people, except the Governor, the Lieutenant Governor, members of the General Assembly and judges of the courts of record, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate.22

Section 1 gave the legislature the power to create offices to which officeholders could be appointed or elected. The Court had consistently read into this section the implied power of the legislative body to condition tenure of such legislatively created offices, including the power to establish methods for removal from office.23 This provision, however, gave the power has been legislatively restricted; Appeal of Foltz, 370 Pa. 567, 88 A.2d 871 (1952) (township supervisors not subject to removal when legislatively imposed conditions for removal were not fulfilled); Lumley v. Town Council, 362 Pa. 532, 66 A.2d 833 (1949) (burgess reinstated because notice required by case law was not given prior to his removal); In re Marshall, 360 Pa. 304, 62 A.2d 30 (1948) (receiver of taxes of Philadelphia may be removed by legislatively prescribed method from legislatively created office); Weiss v. Ziegler, 327 Pa. 100, 193 A. 642 (1937) (legislature has power to condition tenure of legislatively created offices); Commonwealth ex rel. Smillie v. McElwee, 327 Pa. 148, 193 A. 628 (1937) (Board of Assessment and Revision of Taxes not subject to ouster by legislative body which neither created nor appointed it); In re Supervisors, 291 Pa. 46, 139 A. 623 (1927) (township supervisors subject to removal by legislatively created method); In re Georges Township School Directors, 286 Pa. 128, 133 A. 223 (1926) (school director subject to removal pursuant to legislation which preceded adoption of Pennsylvania Constitution of 1873 and which was neither nullified nor limited by the constitutional provision for removal); Commonwealth ex rel. Vesneski v. Reid, 265 Pa. 328, 108 A. 829 (1919) (borough burgess held to be nonconstitutional elected officer subject to constitutional removal provision in the absence of any legislatively prescribed method of removal); In re Bowman, 225 Pa. 364, 74 A. 203 (1909) (justice of peace held to be constitutional officer subject only to constitutional removal provisions).

20. ___ Pa. at ___, 367 A.2d at 290 (Roberts, J., dissenting).
21. PA. CONST. art. VI, § 1.
22. Id. § 7.
23. In Milford Township Supervisors’ Removal, 291 Pa. 46, 139 A. 623 (1927), the court held that the legislatively devised methods of removal of officers were acceptable even though contrary to the constitutional removal provisions “where the Legislature, having the right to fix the length of a term of office, has made it determinable, by judicial proceedings, on other contingencies than the mere passage
legislature no authority over offices which were specifically created by the constitution.²⁴

Section 7 had been declared mandatory and exclusive for all constitutional offices, i.e., those established by the constitution itself,²⁵ but not for legislatively created offices under section 1.²⁶ In In re Bowman,²⁷ for example, a justice of the peace was held to be a constitutional officer, for whom the constitution provided the sole means of removal.²⁸ In contrast, in Weiss v. Zeigler,²⁹ a school district superintendent was held to be subject to the terms for removal fixed by the statute which had created his office.³⁰

Prior to Rizzo, the Pennsylvania Supreme Court had agreed that the first clause of section 7 referring to "[a]ll civil officers" was mandatory for both constitutional and legislatively created officers;³¹ no officer convicted of "misbehavior in office or of any infamous crime"³² could remain in office. Although the court had recognized good behavior as one constitutional

of time." Id. at 52, 139 A. at 625. The court again recognized the legislature's power to condition tenure of legislatively created offices in Weiss v. Ziegler, 327 Pa. 100, 193 A. 642 (1937), where the court considered the removal of a district superintendent of schools. Id. at 104, 193 A. at 644. Likewise, in In re Marshall, 360 Pa. 304, 62 A.2d 30 (1948), the court held that the receiver of taxes of Philadelphia was a legislatively created office and that the officeholder could be removed by a legislatively prescribed method. Id. at 310, 62 A.2d at 33.

24. See ___ Pa. at ___, 367 A.2d at 295 (Roberts, J., dissenting).

25. Id. at ___, 367 A.2d at 288. See, e.g., In re Georges Township School Directors, 286 Pa. 128, 133 A. 223 (1926); In re Bowman, 225 Pa. 364, 74 A. 203 (1909). See also Reid v. Smouler, 128 Pa. 324, 18 A. 445 (1889). The text of the present article VI, section 7 is similar to that of article VI, section 4, the relevant section at the time Georges Township and Bowman were decided. Article VI, section 4 was renumbered article VI, section 7 by amendment in 1966.


28. Id. at 368, 74 A. at 204. The court in Bowman said, however, that "others filling purely legislative offices may be without the constitutional provision as to removal ..." Id.


30. Id. at 105, 193 A. at 645.


The court in Commonwealth ex rel. Woods v. Davis, 299 Pa. 276, 149 A. 176 (1930), upheld the removal from office of the mayor of the city of Johnstown who had been convicted of misbehavior in office. Id. at 283, 149 A. at 179. It declared that the first clause of article VI, section 7 was mandatory and self-executing. Id. at 279, 149 A. at 178. Accord, Commonwealth v. Rosser, 102 Pa. Super. Ct. 78, 156 A. 751 (1930). See note 25 supra with respect to the numbering of article VI, section 7 prior to 1966.

condition for retaining office, it had also interpreted the clause as not being exclusive with respect to legislatively created offices, so that legislative bodies were permitted to attach other conditions of tenure to those offices which they had created pursuant to section 1.

Similarly, the supreme court had subscribed to a uniform interpretation of the second clause; that the appointing power could remove at will was simply a reflection of the common law doctrine. Case law established, however, the right of legislatures to limit the power of removal from offices which they had created. For instance, in *Watson v. Pennsylvania Turnpike Commissioners*, the supreme court held that the power to remove an appointed turnpike commissioner was limited by a legislatively imposed condition that prescribed a rotation for the four commissioners. The court reasoned that the legislature intended that such a rotation system ensure that only one commissioner would be new and inexperienced each year and that the three incumbents would sustain a quorum and guarantee the desired continuity of programs and policies. The unrestricted authority of the appointing power to remove more than one commissioner at a time would frustrate that intent.

The third clause of section 7 had never been questioned in the factual setting presented by the instant case — removal without cause of a nonconstitutional elected public official. Previous cases concerning the removal of such an official had involved removal for cause. For example, in *Milford Township Supervisors’ Removal*, the supreme court approved the method created by the legislature for the removal of an elected township supervisor whose six-year term was subject to judicial divestment if he refused or neglected to perform his duties. The *Milford* court reasoned that section 7 was not the exclusive means of removal that applied to nonconstitutional elected public officers. Despite the court’s finding that

38. Id. at 124, 125 A.2d at 356–57.
39. Id. at 124–25, 125 A.2d at 357.
40. Id. at 125, 125 A.2d at 357.
41. ___ Pa. at ___, 367 A.2d at 238 (Jones, C.J.) (plurality).
42. Id. at ___, 367 A.2d at 290 (Roberts, J., dissenting). See, e.g., *In re Marshall*, 360 Pa. 304, 62 A.2d 30 (1948) (any corrupt act or practice held to be “cause”).
43. 291 Pa. 46, 139 A. 623 (1927).
44. Id. at 50, 139 A. at 624.
45. Id. at 52, 139 A. at 624.
the condition in the statute prescribing removal was simply another way of stating the constitutional condition that "they [the supervisors] behave themselves well while in office," it also concluded that legislatures could always make offices, which they had created, determinable on "contingencies [other] than the mere passage of time." It was against this background of constitutional interpretation that the Pennsylvania Supreme Court struck down the recall provision embodied in the Philadelphia Home Rule Charter. Prior to reaching the constitutional issue, Chief Justice Jones explored the propriety of the grant of mandamus. Noting that the lower court had jurisdiction to hear the case through a petition for a writ of mandamus, he stressed that such a writ will not issue if there is another "adequate, appropriate, and specific remedy available." In response to arguments by the Board and Mayor Rizzo that a specific remedy was available under the Local Agency Law, the Chief Justice stated that within the meaning of that statute, no "parties" had participated in the Board proceeding, and no "adjudication" had been absent some kind of procedural due process.

46. Id. at 51, 139 A. at 625.
47. Id. at 52, 139 A. at 625. The Milford court recognized a limitation on legislative authority to prescribe conditions. It noted that the statute at issue required a judicial proceeding to determine whether legislatively created conditions for removal had been met before the court could declare the office vacant. Id. at 50, 139 A. at 624. Therefore, Milford sanctioned legislatively created methods of removal for legislatively created offices, but only after "proper" judicial proceedings. Id. at 50, 139 A. at 624-25. Nothing was said about the right of the people to recall a public official absent some kind of procedural due process.
50. ___ Pa. at ___, 367 A.2d at 234 (Jones, C.J.) (plurality). See, e.g., Valley Forge Racing Ass'n, Inc. v. State Horse Racing Comm'n, 449 Pa. 292, 297 A.2d 823 (1972) (plaintiffs seeking to compel commission to revoke competitor's license had another remedy in that they could contest renewal of license when matter came up on a yearly basis); Hutnik v. School District, 8 Pa. Commw. Ct. 387, 302 A.2d 873 (1973) (mandamus cannot be invoked by discharged temporary school teacher seeking reinstatement where alternative remedy available — the right to appeal under the Local Agency Law).
51. ___ Pa. at ___, 367 A.2d at 235 (Jones, C.J.) (plurality) citing Pa. Stat. Ann. tit. 53, § 11307 (Purdon 1972). The Local Agency Law provides that [a]ny person aggrieved by a final adjudication who has a direct interest in such adjudication shall have the right to appeal therefrom. Such appeal, unless otherwise provided by a statute authorizing a particular appeal, shall be taken within thirty days to the court of common pleas of any judicial district in which the local agency has jurisdiction.
52. Under the statute, a "party" means "any person who appears in a proceeding before a local agency who has a direct interest in the subject matter of such proceeding." Pa. Stat. Ann. tit. 53, § 11302(3) (Purdon 1972). The Home Rule Charter established the procedure for the Home Rule Board validating a recall petition. 351 Pa. Code § 9.9-101(3) (1974). Nowhere did it provide that anyone, other than Board members, could participate in the proceeding. Chief Justice Jones reasoned therefore, that the Recall Committee could not have been a "party" if it had not participated in the proceeding by which it now claims to have been aggrieved. ___ Pa. at ___, 367 A.2d at 235 (Jones, C.J.) (plurality).
53. An "adjudication" under the Local Agency Law is "any final order, decree, decision, determination or ruling by a local agency affecting personal or property
rendered. Thus, the appeal remedy set forth therein was not available to provide review of the Board’s rejection of the recall petition.\(^{54}\)

Recognizing that mandamus may issue only to compel a public officer or agency to perform a ministerial duty or to prevent an abuse of discretion,\(^{55}\) Chief Justice Jones stated that the Philadelphia Home Rule Charter imposed both a ministerial\(^{56}\) and a discretionary duty\(^{57}\) on the Board. Since the Board had complied with its ministerial duty by issuing a determination regarding the petition’s validity within fifteen days and had discharged its discretionary obligation by determining the petition’s invalidity,\(^{58}\) the Chief Justice reasoned that the Board could be compelled to act in a contrary fashion only if it had exceeded the bounds of discretion established by reasonableness and good faith.\(^{59}\)

In order to determine whether or not the Board had exceeded the lawful parameters of its discretion in invalidating the recall petition, the Chief rights, privileges, immunities or obligations of any or all of the parties to the proceeding in which the adjudication is made . . . .” PA. STAT. ANN. tit. 53, §11302(1) (Purdon 1972). The Chief Justice stated that since the Recall Committee was not a “party” in the proceeding before the Board, there was no adjudication in that no evidence was presented by the Committee in support of its position. \mbox{\ldots}\) Pa. at \ldots, 367 A.2d at 236 (Jones, C.J.) (plurality).

\(^{54}\) Pa. at \ldots, 367 A.2d at 236 (Jones, C.J.) (plurality). \textit{But see} Kretzler v. Ohio Township, 14 Pa. Commw. Ct. 236, 322 A.2d 157 (1974) (action by board of supervisors reducing rank of two police officers held to be “adjudication” even though officers did not participate in the proceeding).

Justice Eagen stated in his dissenting opinion that the Local Agency Act which “mandates an adversary hearing whenever a determination is made that otherwise constitutes an ‘adjudication’” should be read in conjunction with the home rule charter, and that the Board should have afforded all parties an opportunity to be heard, thereby creating a record which would have been adjudicative of the parties’ rights. \mbox{\ldots}\) Pa. at \ldots, 367 A.2d at 258-59 (Eagen, J., dissenting). Moreover, Justice Eagen stressed that being denied the right to argue and present evidence in the same forum prior to an adjudication of parties’ rights violated a doctrine “fundamental to our system of law.” \textit{Id.} at \ldots, 367 A.2d at 260. Though Justice Eagen believed that the recall provision was constitutional, his advocating an adversary hearing before a determination can be made on the validity or invalidity of the recall petition appears to impart at least a constructive procedural due process condition to the method of removal.

\(^{55}\) \textit{Id.} at \ldots, 367 A.2d at 236 (Jones, C.J.) (plurality) \textit{citing} Valley Forge Racing Ass’n v. State Horse Racing Comm’n, 449 Pa. 292, 297 A.2d 823 (1972) (mandamus denied because, \textit{inter alia}, commissioners’ duty to issue licenses was considered discretionary under the Horse Racing Act); Rose Tree Media School District v. Dep’t of Pub. Instruction, 431 Pa. 233, 244 A.2d 754 (1968) (mandamus allowed to compel payment to plaintiff of reimbursable transportation funds approved by defendant since duty to pay was mandatory); and Raffel v. City of Pittsburgh, 340 Pa. 243, 16 A.2d 392 (1940) (mandamus denied to reinstate civil service employee as court found no abuse of discretion in dismissal procedure at administrative level).

\(^{56}\) \textit{Id.} at \ldots, 367 A.2d at 237 (Jones, C.J.) (plurality). The Chief Justice stated that under the Charter “the Board is obliged to ‘complete its examination of the petition within fifteen days and . . . thereupon file the petition if valid or reject it if invalid.’ This duty is purely ministerial . . . .” \textit{Id.}, quoting 351 PA. CODE § 9.9-101(3) (1974).

\(^{57}\) \textit{Id.} at \ldots, 367 A.2d at 237 (Jones, C.J.) (plurality). The Chief Justice noted that “[i]n reaching the decision of whether to accept the petition, the Board is accorded the ultimate discretion as to the validity of the petition.” \textit{Id.}

\(^{58}\) \textit{See} notes 9-13 and accompanying text \textit{supra}.

\(^{59}\) \textit{Id.} at \ldots, 367 A.2d at 237 (Jones, C.J.) (plurality).
Justice examined the sufficiency of the evidence before the Board. He reviewed the signed affidavits accompanying the petition and agreed with the Board that the following sheets of signatures were invalid regardless of the genuineness of the individual signatures: 1) sheets on which twenty-five per cent or more of the signatures were deemed "irregular," since the affiants must have known of the irregularities and therefore could not truthfully have sworn to the affidavits; 2) sheets accompanied by affidavits notarized by "interested" persons, since this constituted a violation of the Notary Public Law; and 3) sheets accompanied by affidavits on which the affiant listed an incorrect address or falsely stated that he was a registered voter. Invalidation of these sheets had the effect of invalidating the entire petition for lack of the requisite number of signatures. Justices Nix and Manderino agreed that the sheets accompanying the affidavits unlawfully notarized by interested persons...
should be invalidated and that this in itself would be a sufficient number of
signatures to invalidate the petition. Consequently, Chief Justice Jones, Justice Nix, and Justice Manderino found that the evidence before the Board was sufficient to invalidate the recall petition and that, therefore, the Board had not abused its discretion or acted contrary to law. Thus, the court held that mandamus to compel validation of the recall petition could not issue.

Had the court stopped here, the recall provision in the Philadelphia Home Rule Charter would have remained viable legislation. Chief Justice Jones, however, proceeded to decide the constitutionality of the recall

[67] Id.

67. Id. at __, 367 A.2d at 249 (Nix, J., concurring).

68. Id. at __, 367 A.2d at 239 (Jones, C.J.) (plurality); Id. at __, 367 A.2d at 249 (Nix, J., concurring). Chief Justice Jones stated: "[W]e believe that the Board made a good faith determination within the lawful bounds of its discretion that the petition was defective as a result of the signatures which fell into the 'illegal notarizations' and 'irregular affidavits' categories." Id. at __, 367 A.2d at 239 (plurality).

69. Id. at __, 367 A.2d 239 (Jones, C.J.) (plurality); Id. at __, 367 A.2d at 249 (Nix, J., concurring). Justice O'Brien discussed the issue of constitutionality but did not discuss the sufficiency of the evidence before the Board as it related to whether or not the Board abused its discretion or acted contrary to law in ruling on that evidence and invalidating the recall petition. Id. at __, 367 A.2d at 247-49 (O'Brien, J. concurring). Justice Eagen declined to rule on the sufficiency of the evidence in the absence of an adversary hearing either before the Board or in the court de novo. Id. at __, 367 A.2d at 257-60 (Eagen, J., dissenting). See note 54 supra. Therefore, only five of the justices actually resolved this issue, three holding the evidence sufficient to support the Board's finding and two, Justice Pomeroy and Justice Roberts, finding it insufficient and concluding that the Board had therefore abused its discretion. See note 66 supra.
provision, and the other justices followed his lead, resulting in several interpretations of the pertinent constitutional provisions.

The Chief Justice interpreted section 7 as mandatory and exclusive for all constitutional officers. Reading the section as a whole, he interpreted the first clause that all officers could retain their offices as long as they behaved well as meaning that they could not be removed unless they misbehaved. He thus read the third clause to mean that nonconstitutional elected officers, as well as constitutional officers, may be removed only for misbehavior, or reasonable cause. Chief Justice Jones acknowledged that section 1 gave the legislature the power to establish methods of removal for legislatively created officers, but he declared that this power was subject to section 7's requirement that reasonable cause accompany removal from office.

Justice Nix, joined by Justice Manderino, interpreted the specific language of the third clause of section 7 as prevailing over the more general language of section 1, with the result that even nonconstitutional elected officials could be removed only by the “Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate.” Justice O'Brien interpreted the legislative authority granted by section 1 to include the authority to establish conditions for tenure, but insisted that

70. ___ Pa. at ___, 367 A.2d at 244 (Jones, C.J.) (plurality). Chief Justice Jones remarked:

We understand that many Pennsylvania municipalities, boroughs and townships have or are presently considering the inclusion of recall provisions in their governing charters, and we would be neglectful of our duty if we did not promptly rule on this matter. . . . Rather than dashing the hopes and expectations of citizens around the state who may approve recall proposals only to find, by a later ruling of this Court, that their actions were to no avail, we prefer to set guidelines for the future.

Id. Justice Roberts pointed out in his opinion that to decide a constitutional question when a case could be decided on nonconstitutional grounds was contrary to the principle followed by the Pennsylvania Supreme Court: “[T]he basic law of this jurisdiction [is] that statutes are presumed constitutional, and we will not reach constitutional issues where the matter can be decided on nonconstitutional grounds.”

71. See notes 72–98 and accompanying text infra.


73. ___ Pa. at ___, 367 A.2d at 244–45 (Jones, C.J.) (plurality).

74. ___ Pa. at ___, 367 A.2d at 245.

75. Id. As all of the decided cases on this issue involved legislation that did require cause for removal, the Chief Justice noted that his decision was consistent with prior case law. Id. For Justice Robert's criticism of the Chief Justice's conclusion, Id. see notes 108–109 and accompanying text infra.

76. ___ Pa. at ___, 367 A.2d at 253 (Nix, J., concurring).

77. Id. at ___, 367 A.2d at 250–51 quoting Pa. Const. art. VI, § 7.

removal was not such a condition. Therefore, he, too, advocated strict adherence to the removal provision in the third clause of section 7.

Justice Eagen, in his dissenting opinion, took exception to Chief Justice Jones' reading the first clause of section 7 as implying that all officers could hold office as long as they behaved well. He asserted that to read this as a sole condition for retaining office would contradict the directive of the second clause that an appointing power may remove at will. Justice Eagen, espousing the view that those who elect an official should be permitted to recall him "at their pleasure," suggested that the electing power, the people, should be authorized as fully as appointing powers.

Referring to the inception of the Philadelphia Home Rule Charter in his dissent, Justice Pomeroy explored the reasons behind the inclusion of the recall procedure. He then explained why the court should defer to those reasons, relying upon the framers' statement of purposes:

Purposes: 1. The power is vested in the electorate to recall officials elected by them so that such officials may be directly responsible for their behavior in office to the electorate. The Charter vests responsibilities of great magnitude in the Mayor, the City Controller and Councilmen. The electorate is entitled to expect the proper discharge of those responsibilities and in accordance with promises made when office was sought, barring changes in circumstances which justify other courses of action. The power of the electorate to recall should serve as a spur to elected officials to be faithful to this trust. It is also intended to serve as an expeditious and effective means for removing from office an elected official who has failed to sustain such trust.

Cf. the impeachment procedure under the Act of June 25, 1919, P.L. 581, Article IV, Section 9 and the experience thereunder.

79. ___ Pa. at ___, 367 A.2d at 248 (O'Brien, J., concurring). Justice O'Brien stated:

While Article VI, Section 1, implies the power to provide for conditions of tenure for nonconstitutional officers, said conditions cannot include methods of removal, because Article VI, Sections 6 and 7, specifically enumerate the methods and the reasons for removal of all civil officers. It is well settled that a conflict between specific and general provisions in the Constitution will be resolved in favor of the specific provisions.

Id. (citation omitted) (emphasis supplied by the court).

80. Id. at ___, 367 A.2d at 248-49.
81. Id. at ___, 367 A.2d at 255-56 (Eagen, J., dissenting). See note 73 and accompanying text supra.
82. Id. at ___, 367 A.2d at 256.
83. Id.
84. Id.
85. Id. at ___, 367 A.2d at 264-66 (Pomeroy, J., dissenting).
86. Id.
87. Id. at ___ n.16, 367 A.2d at 266 n.16, quoting 351 PA. CODE § 9.9-100 n.1 (1974). Notes 2-4 of that same section provide:

2. While no charges are required to be lodged formally against an elected official to subject him to a recall election, it is anticipated on the basis of experience in other jurisdictions having the recall, that the electorate will exercise
Justice Pomeroy asserted that the framers' statement of purposes expressed the wish of the people to "'keep their officers constantly amenable to popular control.'" Recognizing that the constitution declared that "[a]ll power is inherent in the people," Justice Pomeroy stressed that "the decision to seek and obtain recall of an officer is essentially a political one, and not a matter of judicial intervention." Justice Roberts argued most strenuously for recall as a "traditional institution in American local government." Never would the framers of the Philadelphia Home Rule Charter have placed so much power in the hands of certain officials, he contended, had they not reserved the power of recall to the people to act as a check and balance on the exercise of those powers. In an analysis of the constitutional language, Justice Roberts found nothing in section 7 to support the Chief Justice's interpretation that good behavior was the exclusive condition for nonconstitutional officers' holding elected office. He stated that legislatures could create offices under section 1, condition tenure for those offices in addition to the condition of "behaving well," and establish methods for removal. The third clause of section 7, according to Justice Roberts, referred to the removal of nonconstitutional officers only if the Governor attempted to remove them. He criticized Chief Justice Jones' interpretation of the third clause, contending that if the third clause is exclusive as to a requirement of reasonable cause, it must also be exclusive as to the Governor's and the Senate's participation, so that only the Governor and the Senate, not the people, could remove an officeholder.

its power to recall wisely, for good reasons and in accordance with the purposes and spirit of the recall.

3. Elected officials subject to recall are the Mayor, the City Controller, the City Treasurer and Councilmen.

4. Officials holding an elective office are subject to recall regardless of the manner in which they were designated to hold office.


89. ___ Pa. at ___, 367 A.2d at 265 (Pomeroy, J., dissenting), quoting PA. CONST. art. I, § 2.

90. ___ Pa. at ___, 367 A.2d at 268 (Pomeroy, J., dissenting).

91. Id. at ___, 367 A.2d at 274-75 (Roberts, J., dissenting). Justice Roberts emphasized that "[t]he recall power is founded upon the most fundamental principle of our constitutional system: all power stems from the people." Id. (footnote omitted). For a brief synopsis of the historical roots of the recall process, see 48 WASH. L. Rev. 503, 505 n.6 (1973).

92. ___ Pa. at ___, 367 A.2d at 276-77 (Roberts, J., dissenting). Justice Roberts reasoned that "[t]he opinions striking down recall distort the Charter into a one-sided grant of power to the government without accompanying voter control over the exercise of those powers. . . . Invalidating recall undermines the principal objectives of the Charter and abrogates the right of the people to control their city government." Id.

93. Id. at ___, 367 A.2d at 287. See note 74 and accompanying text supra.

94. ___ Pa. at ___, 367 A.2d at 288-89 (Roberts, J., dissenting).

95. Id. at ___, 367 A.2d at 287. By reading the third clause this way, Justice Roberts recognized that it is mandatory, but suggested that "mandatory" does not mean "exclusive." Id. at ___, n.41, 367 A.2d at 293 n.41.

96. See text accompanying note 74 supra.

97. ___ Pa. at ___, 367 A.2d at 287 (Roberts, J., dissenting).
Justice Roberts viewed this as an unjustifiable reading of the third clause, arguing that the "reasonable cause" requirement conditions only the governor's removal powers — "it bears no relation to the voters' right to recall."98

As a result of the justices' examination of the relevant constitutional provisions, three methods of interpretation emerged which provide the Commonwealth of Pennsylvania with little direction. Justices Manderino, Nix and O'Brien adopted a method of strict textual analysis, reading the constitution for the literal meaning of the words.99 Relying on Pennsylvania Supreme Court cases which had applied another method in construing the language now before the court,100 Justices Eagen, Pomeroy and Roberts looked at the constitution and the statutes — the Philadelphia Home Rule Charter, the Local Agency Law, and the Notary Public Law — as reflecting the intent of the framers and the legislators and read the words as an embodiment of that intent.101 Justice Roberts further argued that the framers of the constitution wanted to protect constitutional officers and therefore the constitution provided the exclusive method for removing such officers.102 He felt, however, that no such protection was intended for the occupants of legislatively created offices.103 Chief Justice Jones adopted neither a strict method of interpretation nor one embodying the intent of the framers. Rather, he looked at the historical perspective and noting that all

98. Id.
99. Id. at __, 367 A.2d at 250-51 (Nix, J., concurring); Id. at __, 367 A.2d at 248-49 (O'Brien, J., concurring). Because such an interpretation would be contrary to prior Pennsylvania cases, the three justices (Manderino joining with Nix) believed the holding in Milford Township Supervisors' Removal, 291 Pa. 46, 139 A. 623 (1927), should be overruled. Id. at __, 367 A.2d at 253-54 (Nix, J., concurring); Id. at __, 367 A.2d at 248 (O'Brien, J., concurring). For a discussion of Milford, see notes 23 & 47 and accompanying text and text accompanying notes 43-47 supra.
101. Id. at __, 367 A.2d at 254-60 (Eagen, J., dissenting); Id. at __, 367 A.2d at 260-73 (Pomeroy, J., dissenting); Id. at __, 367 A.2d at 273-99 (Roberts, J., dissenting). Similarly, in evaluating the sufficiency of the evidence before the Board, Justice Pomeroy and Justice Roberts relied on the legislative intent behind certain statutes rather than on the technical language of the statutes themselves. Id. at __, 367 A.2d at 270-73 (Pomeroy, J., dissenting); Id. at __, 367 A.2d at 277-84 (Roberts, J., dissenting).
102. __ Pa. at __, 367 A.2d at 295 (Roberts, J., dissenting).
103. Id.
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legislatively created methods of removal had been for cause, reasoned that "cause" was constitutionally required for removal.104

A flaw in the strict interpretation method, according to Justice Eagen, was the inconsistency between the first and second clauses of section 7 if both are read literally.105 For instance, could an appointing power remove, at his pleasure, an officer who was behaving well in office?

Another problem with the strict constructionist theory is that the case law had been absolutely contrary to such an interpretation.106 When the Pennsylvania constitution was readopted in 1966, the members of that constitutional convention did not change the wording of the removal section even though they were aware that it had been interpreted by the courts as distinguishing between constitutional and unconstitutional officers.107 Had they desired to change the judicial interpretation of that section, they could have done so by stating specifically that the section was applicable to and exclusive for all officers, including those legislatively created.

Justice Roberts disagreed with Chief Justice Jones' approach and observed that the existence of removal for cause in all cases upholding legislative removal procedures is not prima facie evidence that "cause" is required by the constitution.108 Moreover, the Chief Justice's reasoning directly conflicts with the doctrine espoused by Justice O'Brien that "[s]tatutes which attempt to legislate in areas covered by the Constitution must meet the test of the Constitution rather than the Constitution meeting the text of the statutes."109

Although there can be little doubt that the recall provision in the Philadelphia Home Rule Charter is unconstitutional according to the present Pennsylvania Supreme Court, the court's reaction to other recall provisions in local government charters across the state is uncertain.110 Three justices would declare them unconstitutional per se;111 one would

104. Id. at ___, 367 A.2d at 245-46 (Jones, C.J.) (plurality). Unlike his approach to the constitution, the Chief Justice's statutory analysis was one of strict and narrow interpretation, a method he applied consistently when he construed the Philadelphia Home Rule Charter, the Local Agency Law, and the Notary Public Law. Id. at ___, 367 A.2d at 235-43.

105. Id. at ___, 367 A.2d at 256 (Eagen, J., dissenting). See notes 81-82 and accompanying text supra.

106. ___ Pa. at ___, 367 A.2d at 296-98 (Roberts, J., dissenting).

107. Id. at ___, n.50, 367 A.2d at 298 n.50.

108. Justice Roberts said of these cases:

Nothing in these cases suggests that this Court upheld these legislative removal procedures because they required cause. The Opinion of the Chief Justice infers the constitutional necessity for cause from the mere fact that the Legislature has heretofore chosen alternatives which required cause. The error in the Chief Justice's reasoning lies in his assumption that because legislative schemes have provided for removal for cause, cause is constitutionally mandated. Id. at ___, 367 A.2d at 290 (Roberts, J., dissenting).

109. Id. at ___, 367 A.2d at 249 (O'Brien, J., concurring).

110. Justice Roberts reported that twenty-three cities and townships in Pennsylvania have charters with recall provisions and that six counties have such provisions in their recommended charters. Id. at ___, 367 A.2d at 274 (Roberts, J., dissenting).

111. See notes 76-80 and accompanying text supra.
require reasonable cause for removal;112 and three would probably uphold their constitutionality.113 Thus, a well-written recall provision requiring reasonable cause for removal would probably withstand a constitutional attack by a four to three vote in the Pennsylvania Supreme Court if the reasonable cause alleged related to the officeholder's misbehavior in office. Whether local governments feel this is a sufficient guideline to enable them to pass, repeal, or modify recall legislation will be reflected in their action or inaction in response to this opinion. At least one state newsletter has cautioned local officials to postpone any action pending clarification of the guidelines the Chief Justice purported to establish.114

It is difficult to determine whether the invalidation of the Philadelphia recall provision will encourage local officials to engage in self-serving conduct, or whether it will free those officials from the "sword of Damocles"115 hanging over their heads, enabling them to perform more responsibly and energetically for the people.116 Local municipalities, hesitant to write recall provisions into their charters, may refrain from granting necessary powers to their officers, fearful that the officers might abuse their power while enjoying virtual immunity from removal except by the cumbersome process of impeachment.117

Due to the court's decided split on the removal issue, the outcome of future litigation, assuming no change in the justices' positions, is uncertain. Since the Chief Justice recently retired from the court, the newly elected justice will undoubtedly be the swing vote on future resolutions of recall

112. See notes 72-75 and accompanying text supra.
113. See notes 81-98 and accompanying text supra.
114. 1 HOME RULE NEWSLETTER 2-3 (December, 1976) (published by the Dep't of Community Affairs of the Commw. of Pa.). The article states that "[t]he sensible course of action for home rule charter municipalities, however, is to take no action until the 'dust clears' on this matter, and this will take some time." Id. at 3.
116. The author of a recent law review article commented on the process of recall as it related to a proposed constitutional amendment in the state of Utah:
    A compelling policy objection to the proposal as a whole is that it has a distrustful thrust not conducive to entry into public service by able individuals of independent spirit and lively sensibilities. Were the measure adopted it would provide a ready weapon for attack upon a public officer at public expense for whatever reason. What is of primary importance is a constitutional scheme and a political climate that are congenial to public service by individuals of highest quality.


Fearing the detrimental effect of recall without cause, another author commented on the state of Washington's constitutional provision:
    Recall should not serve as a device to remove politically unpopular elective officers, or to voice disapproval of unpopular but otherwise legal decisions or acts in which elective officers have participated. Use of the recall process should be limited solely to removal of a wrongdoer from elective office.


117. See note 90 and accompanying text supra.
CONSTITUTIONAL LAW — SEARCH AND SEIZURE — DOES INSTALLATION OF AN ELECTRONIC TRACKING DEVICE CONSTITUTE A SEARCH SUBJECT TO THE FOURTH AMENDMENT?

I. INTRODUCTION

The Fourth Amendment of the United States Constitution protects the privacy of the individual by prohibiting unreasonable searches and seizures while requiring that a warrant for a search or seizure shall issue only upon probable cause. Modern technology has now enabled law enforcement agencies to utilize electronic surveillance devices which were unknown to the framers of our Constitution and which raise difficult questions as to the applicability of the fourth amendment to control their use. This note shall focus upon whether the placement and use of an electronic tracking device, or "beeper," constitutes a "search" within the meaning of the fourth amendment.


2. The fourth amendment provides:

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.

U.S. CONST. amend. IV.

The determination of whether probable cause exists for a search must "be judged against an objective standard: Would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate?" Terry v. Ohio, 392 U.S. 1, 21–22 (1967).

For a discussion of the relationship between the warrant and reasonableness clause of the fourth amendment, see Player, Warrantless Searches and Seizures, 5 GA. L. REV. 269, 270–71 (1971).

In answering this question, this note will begin with a brief discussion of the seminal case of Katz v. United States, which established a "reasonable expectation of privacy" standard to govern the scope of fourth amendment protection. Since the circuits are divided on the "beeper" question, the various judicial results will then be analyzed. The differing judicial approaches to the "beeper" issue will also be discussed and compared to the somewhat analogous contexts of the vehicle identification number, paint scraping and tire tread cases.

II. BACKGROUND

The Supreme Court of the United States originally limited fourth amendment protection to those searches which involved an actual trespass and to those seizures which comprised the taking of material objects. This "trespass doctrine" required the physical intrusion to be in a "constitutionally protected area" - as in a house or office. This doctrine was expressly

4. The beeper is not a recording device nor does it transmit conversation; rather, it allows discovery of the location of the object to which the beeper is attached by emitting a signal which can be monitored by a radio receiver. United States v. Emery, 541 F.2d 887, 888 n.1 (1st Cir. 1976).
6. Id. at 361 (Harlan, J., concurring).
7. Compare United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), aff'd in part, rev'd in part, 537 F.2d 227 (5th Cir. 1976) (installation of a beeper is a search within the fourth amendment) with United States v. Hufford, 539 F.2d 36 (9th Cir. 1976) (opposite conclusion). The First and Eighth Circuits have expressly declined to decide the question. United States v. Emery, 541 F.2d 887, 888-90 (1st Cir. 1976); United States v. Frazier, 538 F.2d 1322, 1323-25 (8th Cir. 1976).
8. See notes 24-26 and accompanying text infra. Two circuits have held a warrantless search to obtain a vehicle identification number [VIN] to be violative of the fourth amendment. United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966); Simpson v. United States, 346 F.2d 291 (10th Cir. 1965). In contrast, other circuits have concluded that such an inspection does not constitute a search. United States v. Graham, 391 F.2d 439 (6th Cir.), cert. denied, 390 U.S. 1035 (1968); Weaver v. United States, 374 F.2d 876 (5th Cir. 1967); Cotton v. United States, 371 F.2d 385 (9th Cir. 1967). The Court of Appeals for the Fourth Circuit, in United States v. Powers, 439 F.2d 373 (4th Cir.), cert. denied, 402 U.S. 1011 (1971), held such a warrantless inspection to be a search subject to the requirements of the fourth amendment. Id. at 374-76. However, the Powers court concluded that so long as there was a legitimate reason to justify the inspection, it was a reasonable search, and evidence derived therefrom was admissible. Id.
9. See notes 89-96 and accompanying text infra.
10. Olmstead v. United States, 277 U.S. 438 (1928). In Olmstead, the fourth amendment was held not to extend to intangibles such as conversation. Id. at 464-66. Consequently, the Court held that the use of a wiretap to overhear conversation was not a search since there was no physical trespass into the houses or offices of the defendants. Id. The "trespass doctrine" was subsequently followed in Goldman v. United States, 316 U.S. 129, 134-35 (1942) (use of a "detectaphone" to monitor conversations did not violate the fourth amendment in the absence of a physical trespass).
13. United States v. On Lee, 193 F.2d 306, 314-16 (2d Cir. 1951) (Frank, J. dissenting), aff'd, 343 U.S. 747 (1952). When a physical intrusion into a "constitutionally protected area" occurred, a fourth amendment violation was found although only
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repudiated in *Katz v. United States*¹⁴ where the Supreme Court shifted from an emphasis upon protected places to an emphasis upon an individual’s reasonable expectation of privacy. In *Katz*, F.B.I. agents, acting without a warrant, attached a listening device to the outside of a public telephone booth in order to overhear the suspect’s conversations.¹⁵ The Supreme Court held that such nontrespassory eavesdropping constituted a “search and seizure” under the fourth amendment¹⁶ because it “violated the privacy upon which [Katz] justifiably relied while using the telephone booth . . . .”¹⁷ In rejecting the notion of “constitutionally protected areas,”¹⁸ the Court stressed that “the Fourth Amendment protects people, not places”¹⁹ and that what a person “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”²⁰

In Justice Harlan’s concurring opinion in *Katz*, he articulated a dual standard for ascertaining what governmental conduct constitutes a search in terms of an individual’s “reasonable expectation of privacy.” This formulation has subsequently been adopted as the test to determine the fourth amendment’s applicability. It was Justice Harlan’s understanding “that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”²¹ It is well-established that a balance must be struck between the government’s interest

words had been seized. *Silverman v. United States*, 365 U.S. 505, 512 (1961). In *Silverman*, a “spike mike” was pushed through the wall of an adjoining house until it contacted a heating duct on the defendant’s premises, allowing the officers to overhear conversations in the house occupied by the defendant. *Id.* at 506–07. The Court held such an intrusion to be violative of the fourth amendment. *Id.* at 509–12. After *Silverman*, the exclusionary rule was extended to bar the use of verbal evidence obtained as the result of an unlawful invasion in violation of the fourth amendment. See *Wong Sun v. United States*, 371 U.S. 471, 485 (1963).

¹⁴. 389 U.S. 347 (1967). Both *Olmstead* and *Goldman* (see note 10 supra) were overruled and the requirement of an actual trespass “there enunciated can no longer be regarded as controlling.” 389 U.S. at 353.

¹⁵. *Id.* at 348.

¹⁶. *Id.* at 353.

¹⁷. *Id.*

¹⁸. *Id.* at 351.

¹⁹. *Id.*

²⁰. *Id.* at 351 (citations omitted).

²¹. *Id.* at 361 (Harlan, J. concurring). For a discussion of *Katz* and Mr. Justice Harlan’s formulation of the rule, see, e.g., Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 384–88, 403 (1974); *Note*, supra note 1, at 982–84.

in obtaining necessary information and the individual's "right of personal security, personal liberty and private property."\(^{22}\)

Certain activities by law enforcement agents have been determined not to attain the level of a search so as to require compliance with the fourth amendment. For example, the taking of paint scrapings from a car or examining tire treads for identification comparisons without a warrant has been held not to violate any reasonable expectation of privacy.\(^{23}\) Similarly, the warrantless examination of an automobile for its vehicle identification number (VIN) has been ruled not to be a search by the United States Court of Appeals for the Fifth, Sixth, and Ninth Circuits,\(^{24}\) while an opposite conclusion has been reached by the Seventh and Tenth Circuits.\(^{25}\) The Fourth Circuit has taken the position that such an inspection is a search but may be justified without a warrant when there is a legitimate reason to identify a motor vehicle.\(^{26}\)

The Fifth and the Ninth Circuits, in cases discussed below, are in disagreement over whether the attachment of "beepers" to a vehicle for the purpose of tracking its location constitutes a search subject to fourth amendment limitations.

III. FIFTH CIRCUIT'S DECISION IN United States v. Holmes

In United States v. Holmes,\(^{27}\) defendants were charged with conspiracy and possession with intent to distribute marijuana.\(^{28}\) While a government

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24. United States v. Johnson, 413 F.2d 1396, 1399-1400 (5th Cir. 1969), aff'd en banc, 431 F.2d 441 (1970) (per curiam) (inspection of identification numbers was not a search); United States v. Graham, 391 F.2d 439, 442-43 (6th Cir.), cert. denied, 390 U.S. 1035 (1968) (examination of automobile properly in police custody was not a search thereof); Weaver v. United States, 374 F.2d 878, 882 (5th Cir. 1967) (opening door to examine VIN was not a search); Cotton v. United States, 371 F.2d 385 (9th Cir. 1967) (opening car door to check serial number while car was in police custody was not a search). In Cotton and Johnson, the courts alternatively held that if such inspections did constitute a search, they were reasonable searches which did not violate the fourth amendment. Cotton v. United States, 371 F.2d at 392; United States v. Johnson, 413 F.2d at 1400. See also United States v. Wood, 500 F.2d 681 (5th Cir. 1974), cert. denied, 401 U.S. 101i (1971); United States v. Williams, 434 F.2d 681 (5th Cir. 1970); United States v. Polk, 433 F.2d 644, 647 (5th Cir. 1970) (examination of VIN on rear axle is outside any reasonable expectation of privacy).
25. United States v. Nikrasch, 367 F.2d 740, 744 (7th Cir. 1966) (warrantless search disclosing serial numbers violated the fourth amendment); Simpson v. United States, 346 F.2d 291 (10th Cir. 1965) (warrantless search for vehicle identification numbers held unconstitutional).
27. 521 F.2d 859 (5th Cir. 1975), aff'd en banc by an equally divided court, 537 F.2d 227 (5th Cir. 1976).
28. A grand jury returned an indictment against all nine appellees and two other persons. 521 F.2d at 863. They were all charged with conspiracy in violation of 21 U.S.C. § 846 (1970), and six appellees were indicted on the possession count. Id. § 841(a)(1) and 18 U.S.C. § 2 (1970).
agent was discussing the purchase with Holmes, another agent, acting without a warrant, attached an electronic beeper to the exterior of Holmes' van while the vehicle was located in a public parking lot.\(^ {29} \) The defendants filed motions to suppress\(^ {30} \) evidence obtained from a subsequent search of the van and other property, contending that because the agents conducted an illegal search in the attachment of the beeper in violation of the fourth amendment,\(^ {31} \) the evidence so procured constituted "fruit of the poisonous tree."\(^ {32} \) The government argued that a citizen does not have a reasonable expectation of privacy in a vehicle left on a public parking lot or driven on public roads, and therefore the installation of the tracking device was not a search because the defendant's privacy was not invaded.\(^ {33} \) The United States District Court for the Northern District of Florida suppressed the evidence, holding that the installation of the beeper was an illegal search.\(^ {34} \) On appeal, the United States Court of Appeals for the Fifth Circuit affirmed,\(^ {35} \) and on rehearing en banc, this decision was upheld by an equally divided court.\(^ {36} \)

The Fifth Circuit\(^ {37} \) began its inquiry into whether the attachment of the beeper to Holmes' van was an illegal search by stating that the fourth amendment, in light of *Katz*, extends protection to a citizen from unreasonable governmental intrusion into the privacy of his life.\(^ {38} \) The court formulated this threshold question as being whether the government had invaded the individual's "right of personal security, personal liberty and private property"\(^ {39} \) and had thus violated "the privacy upon which he justifiably relied."\(^ {40} \) In applying the *Katz* standard to the instant case, the court noted that, contrary to the Government's contentions, an individual does not relinquish all expectations of privacy in his vehicle when it is

\(^ {29} \) 521 F.2d at 861. An undercover agent met Holmes in a lounge in Gainesville, Florida for the purpose of displaying to Holmes the cash required to consummate the purchase of 300 pounds of marijuana. *Id.* While this meeting was taking place, another agent attached the beeper under the right rear wheel of Holmes' vehicle. *Id.*

\(^ {30} \) Pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, all nine appellees moved to suppress the evidence which consisted of 1200 pounds of marijuana found in defendant's van and another 1200 pounds of marijuana and related paraphernalia found in a house and a shed on the defendants' property. 521 F.2d at 862-63.

\(^ {31} \) Id. at 862-63.

\(^ {32} \) *Id.*

\(^ {33} \) 521 F.2d at 864.

\(^ {34} \) *Id.* at 861.

\(^ {35} \) *Id.* Although the Fifth Circuit affirmed as to the illegality of the search, *id.*, it reversed the holding of the district court that all the defendants had standing to challenge the installation and use of the beeper. *Id.* at 870-72.

\(^ {36} \) 537 F.2d 227 (1976).

\(^ {37} \) Circuit Judge Simpson wrote the majority opinion.

\(^ {38} \) 521 F.2d at 864.

\(^ {39} \) *Id.* at 865, citing Boyd v. United States, 116 U.S. 616, 630 (1886); for a discussion of *Boyd*, see note 22 and accompanying text supra.

\(^ {40} \) 521 F.2d at 865, citing *Katz* v. United States, 389 U.S. 347, 353 (1967); for a discussion of *Katz*, see notes 14-21 and accompanying text supra.
parked on a public lot or driven on public roads. The Fifth Circuit stated that this expectation includes the right to presume that the police will not attach a tracking device to his car in order to trace his movements when he drives his vehicle in areas accessible to the public. The Government's contention that probable cause existed to justify the installation was similarly rejected.

The court distinguished the present case from those involving the checking of vehicle identification numbers, the comparison of tire treads, or the taking of paint scrapings. The majority viewed the latter situations as involving intrusions of only limited scope, purpose and duration. Furthermore, the Supreme Court's decision in Katz was found to be controlling and the Fifth Circuit noted no distinction between the violation of privacy which was held to occur in Katz when a tap was placed on a phone booth to overhear conversations, and the installation of a tracking device on a van to trace its movement. Therefore, the court held that the attachment of the beeper was a search, and that the agents' failure to obtain a warrant made that search unreasonable and a violation of the fourth amendment.

In contrast, Judge Ainsworth, writing for the dissent from the Fifth Circuit's en banc affirmance, viewed the installation of the tracking device as not constituting a search within the meaning of the fourth amendment.

41. 521 F.2d at 864.
42. Id. at 866. The Court expressed concern that if the warrantless installation of the beeper in the instant case was held not to be within the protection of the fourth amendment, then "there is nothing to forestall the implanting of a similar device on one's person, and this on no greater grounds than existed in the present case: the merest of suspicions." Id.
43. Id. The court impliedly accepted the determination of the district judge that at the time of the installation of the beeper, the agents did not possess any information that the van had been or was to be used in the transportation of marijuana. Id. Furthermore, the trial judge concluded that an application for a warrant at the time the beeper was attached would have been denied for lack of probable cause. Id. at 863.
44. See notes 24–26 and accompanying text supra.
45. 521 F.2d at 865. The Government relied on United States v. Polk, 433 F.2d 644 (5th Cir. 1970) and United States v. Johnson, 413 F.2d 1396 (5th Cir. 1969), aff'd en banc, 431 F.2d 441 (1970). For a discussion of these cases, see note 24 and accompanying text supra. The Fifth Circuit found these cases inapposite because the beeper used in Holmes was in operation for over 42 hours and involved more than a limited intrusion on the privacy of the individual.
47. 389 U.S. at 353.
48. 521 F.2d at 865. The government sought to distinguish Katz from the instant case on the ground that the phone tap at issue in Katz overheard and recorded conversation, an area in which, the Government claimed, the individual has an "extraordinary expectation of privacy." Id.
49. Id. at 864.
50. Id. at 864, 867. The government did not contend that any exceptions to the warrant requirement were applicable in order to justify the warrantless search. Id. at 867 n.15.
51. 537 F.2d at 228 (Ainsworth, J., dissenting).
Citing the vehicle identification,\textsuperscript{52} paint scraping\textsuperscript{53} and other beeper cases,\textsuperscript{54} the dissent considered the installation of the beeper to be only a minimal intrusion upon the defendant's expectation of privacy.\textsuperscript{55} Moreover, in the view of the dissenting judges, \textit{Katz} was inapposite to the instant case because the beeper did not intercept conversation but merely transmitted the vehicle's location.\textsuperscript{56} Therefore, the dissent concluded, the Government's action in attaching the tracking device was not an illegal search for failure to comply with the warrant requirement of the fourth amendment.\textsuperscript{57} Alternatively, even if attachment of the beeper were a search, the dissent concluded that placement was justified without a warrant under a determination of either reasonable suspicion or probable cause.\textsuperscript{58}

IV. THE REACTION TO HOLMES IN THE NINTH AND OTHER CIRCUITS

In \textit{United States v. Hufford},\textsuperscript{59} defendants were convicted of possession with intent to distribute amphetamines.\textsuperscript{60} Hufford ordered two large drums of caffeine used in the manufacture of amphetamines from a chemical

\textsuperscript{52} The dissent relied upon cases holding an inspection of a car to determine its vehicle identification number to be reasonable and not violative of the fourth amendment. 537 F.2d at 230 (Ainsworth, J., dissenting), \textit{citing United States v. Johnson}, 431 F.2d 441 (5th Cir. 1970) (en banc).

\textsuperscript{53} \textit{Id.} at 229–30. In \textit{Cardwell v. Lewis}, 417 U.S. 583 (1974), the Supreme Court held that the warrantless examination of the exterior of defendant's automobile upon probable cause to obtain paint samples was reasonable and did not infringe any expectation of privacy that the requirement of a search warrant was meant to protect. 417 U.S. at 591–92. For a further discussion of \textit{Cardwell}, see notes 89–96 and accompanying text \textit{infra} and \textit{United States v. Polk}, 433 F.2d 644 (5th Cir. 1976).

\textsuperscript{54} Use of an electronic tracking device was upheld by the Fifth Circuit in \textit{United States v. Bishop}, 530 F.2d 1156 (5th Cir. 1976) (use of beeper by bank officials in a packet of "bait" money) and \textit{United States v. Perez}, 526 F.2d 859 (5th Cir. 1976) (beeper placed in television set which police bartered for heroin with). \textit{See also United States v. Carpenter}, 403 F. Supp. 361, 364–65 (D. Mass. 1975) (beeper placed in package of cocaine by custom agents acting without a warrant did not violate the fourth amendment).

\textsuperscript{55} 537 F.2d at 229 (Ainsworth, J., dissenting).

\textsuperscript{56} \textit{Id.} at 231.

\textsuperscript{57} \textit{Id.} at 228.

\textsuperscript{58} \textit{Id.} at 228–29. The dissent viewed the meeting between Holmes and the agent, at which time the money for the marijuana purchase was displayed, as forming a "reasonable basis for placing the beeper on the van then situated in the public parking lot of the lounge." \textit{Id.} at 229.

The dissent also found the exigent circumstances sufficient to qualify for an exception to the warrant requirement because Holmes was about to depart to consummate the narcotics transaction, and "[t]he agents did not know when they might have another chance, if at all, to install the beeper on the vehicle." \textit{Id.} For cases which develop the well-defined exceptions to the warrant requirement of the fourth amendment, \textit{see}, e.g., \textit{Coolidge v. New Hampshire}, 403 U.S. 443, 464–73 (1971) (plain view doctrine); \textit{Chimel v. California}, 395 U.S. 752 (1969) (search incident to an arrest); \textit{Terry v. Ohio}, 392 U.S. 1 (1968) (stop and frisk); \textit{Warden v. Hayden}, 387 U.S. 294, 298–300 (1967) (hot pursuit); \textit{Carroll v. United States}, 267 U.S. 132, 152, 156 (1925) (automobile exception). \textit{See also Note, Warrantless Searches and Seizures of Automobiles, 87 Harv. L. Rev. 835, 835–37 (1974).}

\textsuperscript{59} 539 F.2d 32 (9th Cir. 1976).

company. After Hufford picked up the caffeine drums, agents followed him to a rented garage by relying on the signal emitted by the beeper. Subsequently, the agents obtained a search warrant, entered the premises and seized a variety of drug paraphernalia. The defendants filed motions to suppress the evidence, contending that the agents invaded their constitutional right to privacy by placing the beeper in the drum without obtaining a search warrant. The United States District Court for the District of Oregon agreed with this contention with regard to Hufford and granted the motion. The United States Court of Appeals for the Ninth Circuit reversed, holding that the fourth amendment was not violated since there had been no infringement upon the defendants' reasonable expectation of privacy.

The Ninth Circuit, in finding that the agents' activity of installing the beeper did not constitute an illegal search, acknowledged that it reached an opposite conclusion from the Fifth Circuit's decision in Holmes. The court reasoned that as long as the drum was in the control of the chemical company, Hufford had no reasonable expectation of privacy concerning it. The Ninth Circuit then concluded that once Hufford had possession, "his movements were knowingly exposed to the public, and therefore [were] not a subject of Fourth Amendment protection." The decision in Hufford has

61. 539 F.2d at 33.
62. Id.
63. Id. The district court concluded that but for the beeper, the agents could not have ascertained the location of the garage. Id. at 34.
64. Id. at 33.
66. Id.
67. Id. at 44–45. The district court, concluding that Martyniuk lacked standing to contest the installation of the beeper because he had no possessory interest in the drum, denied his motion. Id. at 46.
68. United States v. Hufford, 539 F.2d 32, 33 (9th Cir. 1976). The Ninth Circuit affirmed the conviction of defendant Martyniuk. Id. at 35.
69. Id. at 33 n.1. The Ninth Circuit also noted that the Fifth Circuit was then in the process of rehearing Holmes en banc. Id.
70. Id. at 34.
71. Id. at 33–34, citing Katz v. United States, 389 U.S. 347, 351 (1967). The Ninth Circuit also relied upon Cardwell v. Lewis, 417 U.S. 583 (1974) (see note 53 supra) in support of this proposition. There, the Supreme Court had stated:

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view. 539 F.2d at 34, quoting 417 U.S. at 590. See notes 89–96 and accompanying text supra. The court also noted that since there was no fourth amendment violation when the beeper was installed, there was no distinction between the use of the tracking device as opposed to visual surveillance in following Hufford once he had acquired the drum. 539 F.2d at 34. The Hufford court stated that "[t]he electronic beeper was merely a more reliable means of ascertaining where Hufford was going as he drove along the public road." Id. at 34–35.
been followed by the Ninth Circuit with respect to the attachment of an electronic tracking device to an airplane.\(^{72}\) The First and Eighth Circuits have likewise been confronted with the question of whether the warrantless use of a beeper constitutes an illegal search but they have not, as yet, squarely resolved the issue. The Eighth Circuit upheld the attachment of a tracking device without a warrant in United States v. Frazier.\(^{73}\) In concluding that the intrusion was justified by exigent circumstances and probable cause, that court did not decide whether the installation itself was a search within the fourth amendment.\(^{74}\) Similarly, in United States v. Emery,\(^ {75}\) the First Circuit upheld as constitutional a warrantless insertion of a beeper into packages containing cocaine.\(^ {76}\) This court distinguished Holmes on the ground that a defendant cannot have a reasonable expectation of privacy in contraband and therefore did not indicate whether the First Circuit would follow Holmes in an appropriate case.\(^ {77}\)

V. AN ANALYSIS OF THE Holmes AND Hufford OPINIONS

The split between the Fifth and Ninth Circuits results from a disagreement over whether the warrantless installation of a beeper is a search within the scope of the fourth amendment. As set forth by Mr. Justice Harlan's concurrence in Katz,\(^ {78}\) the test to be applied in determining the extent of fourth amendment protection is whether an individual has exhibited an actual, subjective expectation of privacy, and whether this expectation would be recognized as reasonable by society.\(^ {79}\) The majority in Holmes concluded that a person may reasonably expect that the police will not attach a beeper to his car to trace his movements when he drives his vehicle in public.\(^ {80}\) While the Fifth Circuit did acknowledge that what a

\(^{72}\) United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976). In Pretzinger, the Ninth Circuit held that "[u]nder the law of this circuit . . . attachment of an electronic location device to a vehicle moving about on public thoroughfares (or through the public airspace) does not infringe upon any reasonable expectation of privacy and therefore does not constitute a search." Id. at 520 (citation omitted). In this specific case, however, a magistrate had issued an order permitting the installation of the beeper to the defendant's plane. Id. at 519.

\(^{73}\) 538 F.2d 1322, 1323-25 (8th Cir. 1976).

\(^{74}\) Id. at 1324. In Frazier, FBI agents were investigating an extortion plan which endangered the life of an unknown individual. Id. at 1325. The agents had sufficient facts concerning the defendant's involvement to establish probable cause for the attachment of the beeper to his vehicle. Id. Moreover, since the scheme was to be executed the morning after the agents uncovered it, the court viewed this situation as supplying exigent circumstances for the immediate installation of the tracking device. Id.

\(^{75}\) 541 F.2d 887 (1st Cir. 1976).

\(^{76}\) Id. at 890.

\(^{77}\) Id. at 889-90.

\(^{78}\) Katz v. United States, 389 U.S. 347 (1967); see notes 14-21 and accompanying text supra.

\(^{79}\) 389 U.S. at 361 (Harlan, J. concurring); see notes 14-21 and accompanying text supra. See also United States v. Cruz Pagan, 537 F.2d 554, 557-58 (1st Cir. 1976); Ouimette v. Howard, 468 F.2d 1363 (1st Cir. 1972).

\(^{80}\) 521 F.2d at 866.
person knowingly exposes to the public is not normally protected by the fourth amendment,81 the court noted that there is no way in which a citizen can place his vehicle "under a protective cloak as a signal to police that one considers the car private."82 In contrast, the Ninth Circuit in Hufford reasoned that an individual has no right to expect his movements to remain private when he drives along a public road.83

It is submitted that a citizen has a reasonable expectation of privacy in his movements — that he should be free from warrantless electronic surveillance. If Katz were to be limited to the area of conversation, as the dissenting justices in Holmes maintained, the average citizen could take little solace in the fact that while his conversations were not recorded, his every movement was being monitored. A balance must be drawn between the needs of government and the rights of the individual.84 The approach of the Fifth Circuit furthers this goal. Under it, law enforcement agents would not be denied the use of beepers; rather, fourth amendment restrictions would be imposed upon their installation.85 The individual's right of privacy would also be protected since a neutral magistrate, rather than a police officer or government agent, would determine whether probable cause existed to justify attachment of the tracking device.86

The decision in Holmes appears to be consistent with the cases which have held that there is not a search when a policeman inspects a car for its vehicle identification number (VIN).87 In such a situation, the invasion of the individual's privacy is minimal, since the intrusion is limited in scope and duration. Moreover, a citizen may not be entitled to harbor a reasonable expectation of privacy in the secrecy of these numbers, due to the quasi-public nature of the VIN and the need of the government to check the VIN expeditiously before the automobile is moved.88

82. Id. at 865.
83. 539 F.2d at 33-34.
84. See, e.g., Amsterdam, supra note 21, at 388-403; Knox, Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures, 40 Mo. L. Rev. 1 (1975).
86. By classifying installation of a tracking device as a search, fourth amendment protection would be afforded the individual. As stated by Mr. Justice Jackson:
[The fourth amendment's] protection consists in requiring that those inferences [which can be drawn] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman . . . .
87. See note 45 and accompanying text supra. Presumably, the Seventh and Tenth Circuits, which have held that a warrantless inspection of a vehicle for its identification numbers was a search (see note 25 and accompanying text supra) would conclude that attachment of a beeper is likewise a search since it involves an even greater intrusion into an individual's expectation of privacy.
Whether Holmes can be reconciled with the 1974 Supreme Court case of Cardwell v. Lewis,99 which held that the obtaining of paint scrapings from the exterior of defendant's vehicle without a warrant is not an illegal search,90 is more troublesome. The activity in Cardwell was confined to scraping paint and examining tire treads; a limited intrusion which was based upon probable cause.91 In contrast, the beeper used in Holmes was in operation for 42 hours and probable cause did not exist for its installation.92 These factual distinctions could justify the divergent results. However, the Cardwell Court relied upon a line of cases represented by Carroll v. United States93 which permit warrantless automobile searches if exigent circumstances and probable cause exist,94 to further conclude that a citizen was entitled to a lesser expectation of privacy in a vehicle than in a home or office.95 It is submitted that the Cardwell Court merged two separate issues by relying upon the automobile exception to the warrant requirement to support its finding that a person enjoys a lesser expectation of privacy in a motor vehicle.96 The threshold question should be whether a search has occurred under Katz: it is only after a person's reasonable expectation of privacy is determined to have been violated that consideration need be given to whether an exception to the warrant requirement is applicable.97 The Holmes majority correctly separated these issues so that the determination of whether a search had occurred was resolved before the court examined the possible applicability of any exceptions to the warrant requirement of the fourth amendment.98

As acknowledged by the Fifth Circuit in Holmes, certain governmental intrusions do not constitute searches due to their minimal invasion upon a citizen's right to privacy.99 It is also settled by the great weight of authority that a citizen does not have a reasonable expectation of privacy to be free

90. Id. at 591–92. The Ninth Circuit in Hufford cited to Cardwell as support for its position. See note 71 and accompanying text supra.
91. 417 U.S. at 586, 592.
92. 521 F.2d at 863 n.7, 866.
93. 267 U.S. 132 (1925).
94. 417 U.S. at 589. This exception is based on the need of police to act without a warrant due to the mobility of automobiles. 267 U.S. at 153; see Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42, 49 (1970); Preston v. United States, 376 U.S. 364 (1964); Miles & Wefing, The Automobile Search and the Fourth Amendment, A Troubled Relationship, 4 SETON HALL L. REV. 105 (1972); Note, supra note 58.
95. 417 U.S. at 589–91. The Court stated, "[t]he search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building." Id. at 590, quoting Almeida–Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring). See note 71 supra. But see 53 N.C.L. REV. 722, 744–45 (1975) and cases cited therein.
98. See id. The Government in Holmes did not contend that any exceptions to the warrant requirement were applicable. Id. at 867 n.5.
99. Id. at 864–65.
from visual surveillance. The distinction between search and surveillance is one of degree, requiring a balance between the individual's right of privacy and legitimate governmental interests. The Ninth Circuit in Hufford has taken the position that the use of an electronic tracking device merely augments what can be observed by visual surveillance and is therefore no greater an infringement upon the privacy of the individual. In contrast, the Fifth Circuit has held that while a citizen may anticipate visual surveillance, "he can reasonably expect to be 'alone' in his car when he enters it and drives away." 

In practical effect, use of a beeper greatly surpasses visual surveillance by continually broadcasting the location of the individual. If a tracking device is not required for this purpose, then law enforcement agents would not need to rely upon a beeper to monitor a person's movements. Therefore, it is submitted that if government officials require the use of electronic surveillance devices, then a warrant should be required for their installation subject only to those specifically defined exceptions to the warrant requirement of the fourth amendment. It is well-settled that "[t]he warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest" and to maintain the procedure of antecedent justification which is central to the fourth amendment. Agents would still be able to place a beeper in contraband.

100. See, e.g., Katz v. United States, 389 U.S. at 351; United States v. Hufford, 539 F.2d at 34; United States v. Holmes, 521 F.2d at 866.
101. As stated by one commentator, "[a] line must be drawn between those intrusions unreasonable in the absence of judicial or circumstantial justification, and other fact-finding techniques which probe without entering the domain of fourth amendment rights." Note, supra note 1, at 969 n.5. See Amsterdam, supra note 21, at 403.
102. 539 F.2d at 34.
103. 521 F.2d at 866 (footnote omitted).
104. As noted by the Fifth Circuit in Holmes, "[t]he beacon does convey information as useful as any obtained from a wiretap. . . . the beeper continually broadcasts the statement, 'Here I am.'" 521 F.2d at 865 n.12.
105. For a discussion of the exceptions to the warrant requirement, see note 58 supra. In United States v. Mapp, 476 F.2d 67 (2nd Cir. 1973), the Second Circuit listed the recognized exceptions to the warrant requirement as: (1) hot pursuit; (2) plain view doctrine; (3) emergency situation; (4) automobile search; (5) consent and (6) incident to arrest. Id. at 76 (citations omitted).
without a warrant since no one's reasonable expectation of privacy would be thereby infringed;\textsuperscript{108} but when the government is undertaking an exploratory search for evidence, as in \textit{Holmes}, a warrant should be required.

Policy considerations should also be weighed in resolving the conflict between the Fifth and Ninth Circuits. The fantastic advances in the field of electronic surveillance raise great dangers to the privacy of the individual.\textsuperscript{109} If attachment of electronic beepers is held not to be a search, and hence not within the protection of the fourth amendment, no significant restrictions on the government in this area will exist.\textsuperscript{110} One commentator has warned, "It is only 'searches' and 'seizures' that the fourth amendment requires to be reasonable; police activity of any other sort may be as unreasonable as the police please to make them."\textsuperscript{111} Moreover, if the warrantless installation of tracking devices to one's vehicle or property is permitted, there are no technological barriers to prevent government agents from attaching a beeper to a person's clothing. One court noted that "[i]t offends common sense to suggest that such a continuous electronic surveillance would not violate any reasonable expectation of privacy."\textsuperscript{112} The early admonition of the Supreme Court in \textit{Boyd v. United States}\textsuperscript{113} is relevant to a determination of the present inquiry: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."\textsuperscript{114}

If the position of the \textit{Holmes} majority does not ultimately prevail, the development of a mass monitoring system in which law enforcement agents, not subject to fourth amendment restrictions, could indiscriminately place beepers in a person's pocket to track his movements might not be thwarted. It can be contended that a line of demarcation could be drawn between attaching beepers on a person and installing them in a vehicle, but it is submitted that under \textit{Katz}, the individual has a reasonable expectation of privacy in both situations.\textsuperscript{115} This right of the citizen should not be outweighed except by an independent magistrate's determination that

\begin{itemize}
  \item \textsuperscript{109} See, e.g., Amsterdam, supra note 21, at 384; Fried, supra note 1, at 475; Note, Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home is His Fort, 23 CLEV. ST. L. REV. 63 (1974).
  \item \textsuperscript{110} The Supreme Court in \textit{Katz} confirmed the relevance of the fourth amendment to the area electronic surveillance. 389 U.S. at 350-59. However, some commentators have suggested that the first amendment may limit governmental intrusions in this area. See, e.g., King, Wiretapping and Electronic Surveillance: A Neglected Constitutional Consideration, 66 DICK L. REV. 17, 24-38 (1961); Note, The Right of the People to be Secure: The Developing Role of the Search Warrant, 42 N.Y.U.L. REV. 1119, 1137 (1967).
  \item \textsuperscript{111} Amsterdam, supra note 21, at 388 (footnote omitted). As noted by the Fifth Circuit in \textit{Holmes}, "[n]o safeguards would be imposed except by the self-restraint of law enforcement officials." 521 F.2d at 866.
  \item \textsuperscript{113} 116 U.S. 616 (1886).
  \item \textsuperscript{114} \textit{Id.} at 635.
  \item \textsuperscript{115} See, e.g., United States v. Holmes, 521 F.2d at 866; United States v. Bobisink, 415 F. Supp. at 1339 (D. Mass. 1976); Amsterdam, supra note 21; Knox, supra note 84.
\end{itemize}
probable cause exists to justify the intrusion in the absence of exigent circumstances.\textsuperscript{116}

Should this issue reach the Supreme Court, it is conceivable, however, that the Ninth Circuit's position in \textit{Hufford}\textsuperscript{117} may be upheld. If the Court views the VIN and paint scraping cases as establishing a trend toward permitting greater warrantless governmental intrusions, by labeling such activity as not being a "search,"\textsuperscript{118} the position of the \textit{Hufford} court may be interpreted as the next logical extension in this area. The Supreme Court may also adopt a \textit{Cardwell} mode of analysis\textsuperscript{119} and conclude that an individual is entitled to a lesser expectation of privacy in a motor vehicle.\textsuperscript{120}

\textbf{VI. Conclusion}

It appears likely that the current United States Supreme Court will continue to curtail certain rights of criminal defendants which had been expanded by the Warren Court.\textsuperscript{121} However, it is hoped that the long-standing rationale of \textit{Katz} will continue as the determinative standard for judging the scope of fourth amendment protection. Upon application of these principles, the opinion of the \textit{Holmes} majority should ultimately prevail and require that the attachment of electronic tracking devices be based upon antecedent justification by an independent magistrate in all federal jurisdictions. If the installation of a beeper is not defined as constituting a search, the Court's admonition in \textit{Katz}, that "the Fourth Amendment protects people, not places,"\textsuperscript{122} will no longer have its present significance.

\textit{Ira J. Rappeport}


\textsuperscript{117} United States v. Hufford, 539 F.2d 32 (9th Cir. 1976); see notes 67–71 and accompanying text supra.

\textsuperscript{118} See note 24 and accompanying text supra.

\textsuperscript{119} See notes 94 & 95 and accompanying text supra. See also note 53 supra.

\textsuperscript{120} See United States v. Holmes, 521 F.2d 859, 866–67 (5th Cir. 1975).


\textsuperscript{122} Katz v. United States, 389 U.S. 347, 351 (1967).