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GPS Tracking and the Fourth Amendment

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GPS tracking and the Fourth Amendment

May the police surreptitiously attach a GPS device to your car and track your movements without first getting a warrant? The answer may depend upon how the Supreme Court decides a case being argued before it on Tuesday.

The police in that case attached a GPS device to a suspect's car and monitored his driving for four weeks. Although this was done without a proper warrant, prosecutors used this evidence to help convict the defendant for drug trafficking.



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The defendant claims the police violated his Fourth Amendment right to be free from "unreasonable searches." He rightfully notes that police ordinarily may not conduct a search unless they reasonably suspect a person is involved in criminal activity and usually must demonstrate this "probable cause" to a judge and obtain a warrant.

The government responds that tracking someone's driving is not a "search," so the

Fourth Amendment is not even implicated. It correctly notes that searches only occur when the police invade an area where people have a reasonable expectation of privacy, and it contends that people have no expectation of privacy with regard to their driving because others can freely see where they're going.

So who's right? On the one hand, it's easy to understand the government's position: If people do things out in the open, how can they have a reasonable expectation of privacy? For example, if police officers see a murder being committed through an apartment window with its curtains open, they are free to use this evidence. Since there was no reasonable expectation of privacy, the police don't need a justification to look in the window.

Similar logic can apply when people drive their cars on public roads. By driving out in the open, drivers implicitly waive any expectation that their movements are private. Indeed, the Supreme Court ruled in an earlier case that the police did not need a justification to use a tracking device to follow a car on a 100-mile trip because there was no reasonable expectation of privacy with regard to movements on public streets.

The current case raises the question of whether people's legitimate privacy expectations are different when the police use technology to track them for an entire month and not just for a single trip.

Some lower court judges have said that there is no difference and, consequently, that the police need no justification to use a GPS device for a month. As one judge put it, the "reasonable expectation of privacy" when a person travels on the highways is "zero."

But other lower court judges have used a different math and reached the opposite conclusion. They concede that people have no reasonable expectation of not being followed on a one-time basis, but think that the ongoing monitoring of an individual's driving amounts to more than just the sum of permissibly monitored individual trips.

These judges believe that the "whole" of one's movements reveals "a great deal more" than "the sum of its parts." While monitoring a single trip does not reveal an individual's "habits and patterns," month-long monitoring can reveal whether the individual "is a weekly churchgoer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, [or] an associate of particular in-

dividuals or political groups."

These judges think police should not be able to engage in such extensive monitoring unless they first convince a judge there is reason for believing a person is involved in criminal activity.

I agree. As Princeton Professor Kim Lane Scheppele once observed, in a police state the government is opaque and the people transparent, but in a free society the people should be opaque and the government transparent.

Giving the police carte blanche power to surreptitiously attach GPS devices and monitor citizens' driving habits sounds too much like life in a police state. In a free society, such monitoring should occur only under close judicial supervision to ensure that this privacy invasion is justified.

Federal Court of Appeals Judge Alex Kozinski, who was a child in Communist Romania, put it more bluntly: "There is something creepy and un-American about such clandestine ... behavior. To those of us who have lived under a totalitarian regime, there is an eerie feeling of déjà vu."

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