Global Positioning System Technology and the Fourth Amendment

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Surveillance techniques abound that were unimaginable at the time of the nation’s founding. Our daily activities are more knowable by more people more quickly than was conceivable even a short time ago. How should we treat law enforcement’s warrantless use of privacy-reducing technological innovations? One answer is that we simply learn to live with it. Privacy advocates respond that a hallmark of our democracy is the ability of its citizenry to lead lives free of unwarranted government monitoring. Perhaps legislation is necessary.1 But legislation is by its nature fragile, subject as it is to cynical political manipulation or irrational risk calculation in the face of crisis. And so we turn to the constitution’s prohibition of unreasonable searches and seizures: How does the current conceptual framework of the Fourth Amendment accommodate new surveillance techniques?

GPS Technology
The use of global positioning system (GPS) devices to track vehicle movements is an instructive example of the new surveillance. The global positioning system is maintained by the United States military and made available to civilian use. GPS receivers use satellite signals to determine position, velocity, and time.2 Law enforcement uses GPS technology in different ways, often surreptitiously attaching GPS units to vehicles. The GPS data are either remotely accessed through a modem or by retrieving the device. The data show where the vehicle has been since the installation and activation of the device.

Law enforcement agents are using GPS technology to investigate suspected criminals of all varieties, from cases of drugs, embezzlement, and burglary, to assault and murder.3 In response to a Freedom of Information Act request, police in one Virginia locality reported that they used GPS devices in nearly 160 cases from 2005 to 2007.4 Unsurprisingly, legal issues surrounding the use of GPS monitoring have begun to surface in the state and federal courts.

A Fourth Amendment Primer
First things first: The question in surveillance cases is rarely, if ever, whether the government may use a particular surveillance method. Instead, the question is simply whether the government needs to make a showing in order to justify doing what it wants. The default rule—although there are many exceptions—is that if the government is doing investigative work that the Fourth Amendment regulates, the government needs to have obtained a warrant by establishing probable cause to believe it will find what it seeks.

As for what the Fourth Amendment regulates, those seeking its protection must show they were the object of a search or seizure. A seizure is a meaningful interference with a possessory interest.5 Contrarily, a search is an invasion of an expectation of privacy that is reasonable or legitimate.6 Reasonableness can be determined through reference to property concepts and social understandings.7

Only if a search or seizure is shown to have occurred may one argue that it violated the Fourth Amendment. A search or seizure can violate the Fourth Amendment because of the way that it was executed, or for lack of an underlying justification, or for lack of judicial authorization. Such violations, absent exceptions, result in suppression of the evidence obtained through the violation.

The Supreme Court and Technology
The Supreme Court has yet to rule on GPS technology’s relation to search and seizure jurisprudence—whether installing a GPS device and/or accessing it implicates search or seizure protections.
such as the probable cause and warrant requirements. But the Court’s Fourth Amendment jurisprudence has set the stage for analysis.

In the late 1960s, the court, in Katz v. United States, moved from a property-related treatment of searches to a privacy-oriented conception that defines a search as an invasion of a reasonable expectation of privacy. The court decided that the government should have obtained a warrant before transmitting and recording the defendant’s end of a telephone call made from a telephone booth. At the time, this seemed like quite a victory for privacy proponents.

But four years later, in a case called White, this new conception of “search” failed to cause the court to prohibit the warrantless transmitting of a conversation between a defendant and a government agent in the former’s home. The court’s theory, which antedated its earlier move from trespass to privacy analysis, was essentially that citizens assume the risk that those they voluntarily speak with might be government agents. Because no reasonable expectation of privacy was invaded, no search had occurred. Justice Harlan, who had crafted the privacy test in his concurrence in the Katz case, dissented, concerned as he was about the chilling effects of secret surveillance.

Twelve years after Katz, the court determined that we do not have a legitimate expectation of privacy in the telephone numbers dialed from our home telephones, since we “voluntarily” turn over this information (the numbers dialed) to a third party (the phone company). Hence, the government needs no warrant to obtain these numbers from the telephone company through company installation (on company property, at government request) of a special device (a “pen register”) that records the numbers. Justice Marshall dissented, arguing that the legitimacy of privacy expectations should depend on the “risks [we should be forced to assume in a free and open society].”

In these early privacy cases, the court was taken with the notion that if a person knowingly exposed information to the public—even if the public was the telephone company with whom one had to do business if one wanted a telephone—then one could not reasonably expect that information to remain private, even from the government. Further, talking to an acquaintance in our home entailed assuming the risk that we were, effectively, talking to the government. But “secret” surveillance, as in Katz, was thought to be another matter. In White, the thinking went, one of the conversational participants was engaged in the monitoring activity; in Katz, neither was.

In the 1980s, the court decided two cases involving the use of “beepers” to track the movements of canisters in vehicles. Beepers are the oldest electronic tracking devices. They emit radio signals that can be picked up by receivers. Unlike GPS devices, beepers do not record where they have been. In United States v. Knotts, the court determined that the use of a beeper was not a search (did not invade a legitimate expectation of privacy), on the theory that the radio signals simply aided the agents’ visual surveillance, and the surveillance was limited to tracking the canister along its journey on public highways to outside a private cabin.

In United States v. Karo, the court decided that transferring a “beeped” canister to the subject of an investigation was neither a search (because it created only a “potential” for an invasion of a legitimate expectation of privacy) nor a seizure (because it worked no meaningful interference with a possessor interest). But the court held that monitoring a beeper in a private residence in a setting not open to visual surveillance invades a legitimate expectation of privacy and so is a search.

In Dow Chemical Co. v. United States, a case involving aerial photography that failed to give the court constitutional pause, the court returned to the enhanced sensory faculties theme, warning that “[a]n electronic device to penetrate walls or windows . . . would raise very different and far more serious questions.” Kyllo v. United States subsequently treated thermal imaging of a home from a location in the street as a search. Kyllo was concerned about the employment of a device not in general public use that sought to reveal what would otherwise be unknowable without an entry.

**Doctrinal Challenges**

There are thus a number of Fourth Amendment doctrinal obstacles to privacy preservation in the GPS context. As to the seizure question, it has proved difficult to show that the mere installation of a GPS device (without, say, removing the car to another location or delaying the owner’s use of it) or extracting data from the device is a seizure—a meaningful interference with possessory rights—particularly if the device is installed and removed while the vehicle is on public property.

As for the search question, a number of doctrinal challenges arise. These include the idea that what I knowingly expose to “the public,” perhaps including my vehicle’s movements, cannot simultaneously be the object of a search; enhancement of ordinary senses analysis (if GPS observations could have been made by visual surveillance, there may be no search); and commonness of surveillance device (if the surveillance device was of a kind in general public use, there may be no search).

There is an additional problem. Courts sometimes accept warrantless surveillance methods that they might reject if more widely used. Judge Richard Posner, in an opinion allowing warrantless GPS installation and monitoring, besides noting that the police had “abundant grounds for suspecting the defendant,” considered the possibility of “whole surveillance” of thousands of vehicles and deferred the question of whether such mass GPS surveillance would qualify as a search. The Supreme Court has reacted similarly to the mass surveillance question. What might not pass muster en masse seems to go unchecked in relative isolation.

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The Future
A number of approaches are worth considering in overcoming such doctrinal obstacles in the GPS context. First, we might ask whether, if GPS monitoring were unregulated by the Fourth Amendment, privacy would decrease to levels “inconsistent with the aims of a free and open society.” This approach to assessing surveillance methods was suggested 35 years ago by Professor Anthony Amsterdam.22 Such a standard is consistent with an effort to recognize the normative component of “legitimate” expectations of privacy, although it obviously produces no bright line. The approach is consistent with concerns expressed by Justices Harlan and Marshall, among others.23

Under such an approach, we might ask in new surveillance (and perhaps other) cases, not whether a person reasonably expected privacy, but whether a person reasonably expected privacy vis-à-vis the government.24 Although it may be true that leaving garbage by the curbside,25 traveling on public roads, or calling someone exposes information to others, maybe we ought to be able to reasonably expect that the person rooting through our garbage, monitoring every movement our vehicle makes, or recording a telephone number we dialed is not a government agent acting without a warrant. Although a partially open hotel room bathroom window might invite a peeping Tom, perhaps it ought not invite a warrantless peeping Uncle Sam (or his state cousin).26 Of all of these privacy-imperiling scenarios, GPS monitoring would appear to be near the top of the list.

Second, we could seek to make more robust the older trespass view of search doctrine, and characterize as searches surveillance methods that either invaded privacy or involved trespass, however “technical.”27 The idea would be to regain some of the “bright-line” advantages of a property-oriented view of searches without losing protection in cases of sophisticated surveillance that involve no trespass.

Third, we might focus on the quantity of information gleaned through GPS monitoring, and determine that it is so invasive of privacy interests that Fourth Amendment protection is warranted. This is the approach of Professor Renée McDonald Hutchins.28 Her analysis seeks to directly confront the privacy challenges of GPS monitoring without revolutionizing Fourth Amendment jurisprudence.

Fourth, some federal courts, addressing an issue left unresolved in Knots and Karo,29 have treated installation plus monitoring of beepers as a search. Some have required a warrant,30 while others have held that warrantless beeper use is acceptable, as long as probable cause exists.31 GPS devices, of course, are much more intrusive than beepers.

Finally, some state courts are treating monitoring of electronic tracking devices as searches requiring warrants under their state constitutions.32 These courts, as the final arbiters of the meaning of their state laws, provide privacy protection where an uncertain federal constitutional jurisprudence has not clearly done so. Meanwhile, the uneasy relationship between privacy and increasingly intrusive innovation continues.

Endnotes


4. Id.


10. Id. at 787–90 (Harlan, J., dissenting).


17. Id. at 714.


20. United States v. Garcia, 474 U.S. 399, 998 (7th Cir. 2007).

21. 460 U.S. at 283–84.


23. See White, 401 U.S. at 786–90 (Harlan, J., dissenting); Smith, 442 U.S. at 750 (Marshall, J., dissenting).


26. Ponce v. Craven, 409 F.2d 621, 625 (9th Cir. 1969) (if habeas petitioner had not wanted to be seen or heard by police, he could have closed bathroom blinds and spoken more softly).

27. See David P. Miraldi, Comment, The Relationship Between Trespass and Fourth Amendment Protection After Katz v. United States, 38 OTTO ST. L.J. 709, 732 (1977). Although Rakas says that property concepts are relevant to privacy analysis (439 U.S. at 143 n.12), Karo says that physical trespass is only “marginally relevant” to Fourth Amendment analysis (468 U.S. at 712–13).


29. 460 U.S. at 279 n. 1; Karo, 468 U.S. at 713–14.

