
CONSTITUTIONAL LAW — FOURTH AMENDMENT — SEVENTH CIRCUIT HOLDS THAT GPS TRACKING IS NOT A SEARCH. — *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007), *reh'g and suggestion for reh'g en banc denied*, No. 06-2741, 2007 U.S. App. LEXIS 8397 (7th Cir. Mar. 29, 2007).

Since *Katz v. United States*,¹ the definition of a search under the Fourth Amendment has centered on whether the state has violated an individual's reasonable expectation of privacy. Although courts have closely guarded the sanctity of the home, they have afforded significantly less protection to individuals traveling in public.² Technological advancement has made this position increasingly troublesome: movement outside the home has always been subject to observation, but new technology has made continuous, detailed monitoring more prevalent and affordable. Although some courts have made an effort to restrict the use of tracking technology, others, including the Supreme Court, have hesitated to limit enhanced observation of individuals in public.³ In *United States v. Garcia*,⁴ the Seventh Circuit followed suit, holding that the state's use of a Global Positioning System (GPS) device to monitor a suspect's vehicle was not a search and therefore did not require probable cause. Although the court expressed concern about the potential for mass surveillance, it relied on reasoning that does nothing to prevent intrusive, suspicionless monitoring on a large or small scale. By recognizing that individuals have a limited expectation of privacy against prolonged, extensive monitoring of their public activity, the court could have begun to limit suspicionless state surveillance that is no longer adequately checked by logistical constraints.

In the spring of 2005, Wisconsin officials discovered an abandoned laboratory that had once been used to manufacture methampheta-

¹ 389 U.S. 347 (1967).

² Compare *United States v. Karo*, 468 U.S. 705, 714–15 (1984) (“Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances.”), with *United States v. Knotts*, 460 U.S. 276, 281 (1983) (holding that an individual traveling on a public thoroughfare “has no reasonable expectation of privacy in his movements”).

³ Compare *United States v. Bailey*, 628 F.2d 938, 944 (6th Cir. 1980) (holding that tracking devices may not be inserted into non-contraband personal property without a warrant), *United States v. Moore*, 562 F.2d 106, 112 (1st Cir. 1977) (maintaining that one “can properly expect not to be carrying around an uninvited device that continuously signals [one’s] presence”), and *State v. Jackson*, 76 P.3d 217, 224 (Wash. 2003) (en banc) (holding that under the Washington Constitution, a warrant is required to install GPS tracking devices), with *Knotts*, 460 U.S. at 281, and *United States v. McIver*, 186 F.3d 1119, 1126–27 (9th Cir. 1999) (holding that placement of electronic tracking device on a car’s undercarriage was not a search).

⁴ 474 F.3d 994 (7th Cir. 2007), *reh'g and reh'g en banc denied*, No. 06-2741, 2007 U.S. App. LEXIS 8397 (7th Cir. Mar. 29, 2007).

mine.⁵ The police began investigating Bernardo Garcia, a nearby resident with a history of meth-related offenses.⁶ Officers learned that Garcia had told acquaintances that he intended to begin making the drug, and they obtained a video of Garcia purchasing items commonly used in its manufacture.⁷ The police later learned that Garcia was driving a gray Ford Tempo and, without obtaining a warrant, planted a GPS tracking device on the vehicle.⁸ When they downloaded the GPS locator records, they discovered that the car had traveled to a large tract of wooded land outside of town. They obtained permission from the land's owners to conduct a search and discovered a makeshift lab, which contained equipment and materials used to manufacture methamphetamine.⁹ The officers referred their findings to the U.S. Attorney's office, which charged Garcia with crimes relating to the production of methamphetamine.¹⁰

Before trial, Garcia moved to suppress all evidence obtained from the use of the GPS tracking device.¹¹ The court held that GPS tracking was permissible under the Fourth Amendment only if the government could "establish both the existence of reasonable suspicion . . . and the likelihood that surveillance . . . [would] lead to the discovery of relevant evidence."¹² Because the state did not receive "fair warning" of this new rule, the court ordered an evidentiary hearing before a magistrate to allow the state to demonstrate that the officers had possessed reasonable suspicion and had been likely to obtain relevant evidence by tracking Garcia's vehicle.¹³ After the hearing, the court found that the state had met its burden, and held that the evidence was admissible.¹⁴

The Seventh Circuit affirmed the district court's ruling, but on different grounds. Writing for the panel, Judge Posner argued that because the police could have observed Garcia's public movements by following his car or monitoring lamppost security cameras, recording his movements through GPS tracking did not constitute a search under the Fourth Amendment.¹⁵ Judge Posner relied heavily on the Supreme Court's consistent indication that there could be no reasonable expect-

⁵ United States v. Garcia, No. 05-CR-155-C, 2006 WL 1294578, at *1 (W.D. Wis. May 10, 2006).

⁶ *Id.* at *1-2.

⁷ *Id.* at *2.

⁸ *Id.*

⁹ United States v. Garcia, No. 05-CR-155-C, 2006 WL 298704, at *1 (W.D. Wis. Feb. 3, 2006).

¹⁰ *Id.* at *2.

¹¹ United States v. Garcia, No. 05-CR-0155-C-01, 2006 WL 1601716, at *1 (W.D. Wis. May 31, 2006).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at *1-2.

¹⁵ *Garcia*, 474 F.3d at 997.

tation of privacy in activities that were publicly observable. He noted that although *United States v. Knotts*¹⁶ had held that the “mere tracking of a vehicle on public streets” through the use of a radio beacon (or “beeper”) did not constitute a search, the Supreme Court had “left open the question whether installing the device . . . converted the subsequent tracking into a search.”¹⁷ Judge Posner observed that the state could have lawfully tracked the defendant’s movements using cameras or satellite imagery and that GPS tracking fell into the same category, because the GPS satellite merely “transmitted geophysical coordinates” instead of images.¹⁸ The court found that the physical attachment of the device made no “practical difference” because the relevant information was available by other means.¹⁹ The court also distinguished Garcia’s case from *Kyllo v. United States*,²⁰ in which police used a thermal imager to observe the interior of a home. Because GPS technology was not a “substitute for a form of search unequivocally governed by the Fourth Amendment,” such as physical entry into the home, the monitoring did not constitute a search.²¹

The court acknowledged, however, that GPS tracking was qualitatively different from monitoring with more traditional technology, like radio beacons or in-person surveillance. Modern satellites and cameras, the court noted, could facilitate “wholesale surveillance” in a way that more resource-intensive observation methods could not.²² Although Judge Posner was not prepared to limit police to eighteenth-century technology, he suggested that it was too soon to conclude that “a program of mass surveillance” would be permissible under the Fourth Amendment simply because it was an efficient alternative to a massive physical police force.²³ In the end, however, the court was satisfied that the state had not engaged in mass surveillance and that its officers had only used GPS tracking “when they [had] a suspect in their sights.”²⁴

Although the court recognized the potential for government abuse of technologically enhanced surveillance methods, its reasoning does nothing to prevent such abuse. The *Garcia* court declined a valuable opportunity to provide a limiting principle to cabin the government’s use of new technology to track anyone (or everyone), indefinitely, without suspicion. Instead, the court should have recognized a limited ex-

¹⁶ 460 U.S. 276 (1983).

¹⁷ *Garcia*, 474 F.3d at 996–97.

¹⁸ *Id.* at 997.

¹⁹ *Id.*

²⁰ 533 U.S. 27 (2001).

²¹ *Garcia*, 474 F.3d at 997.

²² *Id.* at 998.

²³ *Id.*

²⁴ *Id.*

pectation of privacy in public movements and declared GPS tracking a search. New technology gives the state an unprecedented ability to monitor individuals' daily activities in ways that were inconceivable or prohibitively expensive when the courts were developing modern Fourth Amendment doctrine. As courts grapple with this new reality, they can protect legitimate privacy interests without prohibiting longstanding, conventional surveillance practices by recognizing as a search the use of technology to produce an extensive, particularized account of an individual's daily activity.

The Seventh Circuit's doctrinal analysis focused heavily on the public nature of the activity for which Garcia sought protection. The court's preoccupation with what is and is not public is understandable. Since *Katz*, courts attempting to determine whether a search has occurred ask, first, whether the defendant exhibited a subjective expectation of privacy, and second, whether that expectation is "one that society is prepared to recognize as 'reasonable.'"²⁵ The Supreme Court has consistently held that individuals' reasonable expectations of privacy are severely limited while in public, especially when traveling along public roads.²⁶ Once a defendant has "voluntarily conveyed [his movements] to anyone who wanted to look," he is subject to government monitoring, including "enhance[d]" observation through binoculars or beepers.²⁷

This line of precedent was formulated at a time when the government could not monitor hundreds of people continuously — a limitation that new technology has rendered obsolete. When the Supreme Court was developing the bulk of its Fourth Amendment jurisprudence, the Justices could not reasonably have anticipated the sort of all-encompassing surveillance that is possible today. The considerable resources needed to track individuals twenty-four hours a day for weeks on end functioned as a very real check on government authorities. Now GPS monitoring can do the same job for a few hundred dollars,²⁸ and ever more sophisticated camera networks and satellites will soon be able to track individuals to and from their doors.²⁹ Although

²⁵ *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)) (internal quotation marks omitted).

²⁶ In *United States v. Knotts*, 460 U.S. 276 (1983), for example, the Court concluded that an individual "travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements." *Id.* at 281.

²⁷ *Id.* at 281–82, 285.

²⁸ See John S. Ganz, Comment, *It's Already Public: Why Federal Officers Should Not Need Warrants To Use GPS Vehicle Tracking Devices*, 95 J. CRIM. L. & CRIMINOLOGY 1325, 1357 (2005).

²⁹ See *id.* at 1359; Darren Handler, Note, *The Eye in the Sky & Our Digital Dog Tags: An Exploratory Review of Global Positioning Systems ("GPS") & Potential Privacy Implications*, 18 ST. THOMAS L. REV. 853, 854 (2006); Patrick Korody, Note, *Satellite Surveillance Within U.S. Borders*, 65 OHIO ST. L.J. 1627, 1631–36 (2004).

tailing a vehicle around the clock was a police tactic reserved for those suspects whose movements were highly likely to reveal criminal activity, fixing a GPS device to a suspect's bumper allows for cost-efficient fishing expeditions.³⁰ Cars parked outside bars could be tracked for speeding or reckless behavior; vehicles in bad neighborhoods could be monitored to uncover convergences on a drug house; cars parked by minorities in white neighborhoods could be tagged in case they were involved in a crime. Yet courts continue to insist that there is absolutely no reasonable expectation of privacy in public movements. Judge Posner was fully aware of this logic's inauspicious endpoint: he acknowledged that GPS was meaningfully different from other modes of observation and that "a program of mass surveillance" might not be justified on the ground that "10 million police officers [tailing] every vehicle" could have accomplished the same result.³¹ The expectation of privacy that would be violated by such a program is neither new nor unique to the case of mass surveillance; rather, a limited expectation of privacy in public movements has always existed, but until now, courts could afford to ignore it without significant effect.

If courts are to restore restrictions on state observation and avoid the police-state scenario to which Judge Posner alluded, the critical first step is to declare extensive public surveillance a search. This determination requires that courts acknowledge that society is prepared to recognize some reasonable expectation of privacy in public movements. Although the extent of this expectation may be difficult to define, most individuals do, in fact, expect some privacy while in public.³² When someone drives across town, visits a movie theater, or dines at a restaurant, she cannot expect that no one will know she was there. But it does not necessarily follow that she has consented to a single person, much less the state, observing and recording all of her movements — including, perhaps, visits to churches, doctors, or political organizations³³ — and compiling an intimate account of her daily life.³⁴ Few would argue that the details of millions of Americans' lives should be so closely scrutinized by government officials. Judge Posner

³⁰ See *Garcia*, 474 F.3d at 998.

³¹ *Id.* The court noted that "[t]here is a practical difference lurking here," because "new technologies enable, as the old (because of expense) do not, wholesale surveillance. One can imagine the police affixing GPS tracking devices to thousands of cars at random . . ." *Id.*

³² See, e.g., April A. Otterberg, Note, *GPS Tracking Technology: The Case for Revisiting Knotts and Shifting the Supreme Court's Theory of the Public Space Under the Fourth Amendment*, 46 B.C. L. REV. 661, 685 (2005) ("American citizens likely do not expect to lose virtually all privacy when they step outside their front doors . . . [T]here can be such a thing as finding privacy in public — taking refuge in the anonymity a public space provides.").

³³ See *State v. Jackson*, 76 P.3d 217, 223 (Wash. 2003) (en banc) (listing examples of sensitive information that could be obtained from GPS data); Otterberg, *supra* note 32, at 697–98 (same).

³⁴ See Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 LAW & PHIL. 559, 588–90 (1998).

would likely agree: if there were nothing objectionable about the suspicionless monitoring of public movements, there would be no need to resist a “program of mass surveillance.”³⁵ In the words of *Katz*, society is likely prepared to recognize at least some legitimate expectation of privacy in the pattern, or sum total, of an individual’s daily activities. The difficulty, of course, lies in defining the scope of this expectation.

In determining whether a specific instance of enhanced observation constitutes a search, courts should focus on the aspects of modern surveillance that are most troubling. First, courts should consider the intensity of the surveillance, including its duration and level of detail. Prolonged, continuous monitoring is a greater threat to privacy than intermittent observation: a lamppost camera may record an individual for a single moment as she passes through an intersection, whereas GPS surveillance can report every stop she made that day. Simply put, police can learn more about an individual’s behavior and lifestyle over the course of a week than they can in an afternoon, or in the time it takes to cross an intersection. Second, courts should consider the state’s ability to synthesize the information collected to produce a particularized profile of an individual. Brief glimpses on a security monitor reveal only snapshots of a person’s life and, without context, say little about her habits and lifestyle. A comprehensive camera network that maps an individual’s public movements, however, tells the government much more about her personal life. Rather than relying on isolated cameras to deter speeding or enhance real-time security, such a system collects data about the person herself. When the focus of surveillance turns from monitoring a specific place to monitoring a specific person, the potential for uncovering the intimate details of that person’s life is substantially higher.

These criteria serve primarily to reflect Americans’ expectation that government monitoring will not extend much beyond the customary, incidental observation they are prepared to tolerate from any other third party. Both factors — the intensity of the monitoring and the ability to synthesize information about a particular individual — also attempt to mirror the practical barriers that once constrained police conduct. This analysis does not rule out placing cameras on dangerous street corners or staking out a drug house — such monitoring collects

³⁵ *Garcia*, 474 F.3d at 998 (intimating that technology may eventually lead to unacceptably intrusive mass surveillance). Judge Posner stated that “[s]hould government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough to decide whether . . . to treat such surveillance as a search.” *Id.* But in light of the court’s previous reasoning that there is no privacy interest in one’s movements on the public thoroughfare, such surveillance could not possibly be considered a search. This statement, taken together with the court’s extensive and unessential discussion of mass surveillance, seems to suggest that Judge Posner himself harbors some expectation of privacy in his public movements.

only snippets of information about individuals and cannot provide a comprehensive account of their lives. The analysis does, however, prevent the state from accumulating vast amounts of personal information about individuals whom they have no reason to suspect of wrongdoing. To be sure, requiring reasonable suspicion or probable cause may prevent the collection of information that could have been lawfully obtained by someone who happened to be in the right place at the right time.³⁶ But in a world in which technology allows government to be everywhere all the time, courts must protect the public's reasonable expectation that their lives will not be continuously projected onto a bureaucrat's computer screen.

Acknowledging that extensive, technologically enhanced monitoring is a search will allow courts to engage in a more forthright analysis of the reasonableness of state action. Such freedom would be a welcome gift to the courts, which have often appeared uncomfortable with the idea of suspicionless surveillance, even in the context of public movements.³⁷ In fact, many courts may already be looking to the reasonableness of the underlying state action. As Judge Posner suggested, what made monitoring acceptable in *Garcia*, and in other cases, is that the invasion of privacy was reasonable. Though the court had already denied that a search occurred, Judge Posner felt compelled to note that the police had only used GPS once they had a "suspect in their sights."³⁸ That the officers had "abundant grounds" for their surveillance is reassuring,³⁹ but it is not evidence that no search occurred: it is evidence that the search was reasonable. Under the test laid out above, there is little doubt that the GPS tracking in *Garcia* was a search. The monitoring was intensive and particularized; the police monitored Garcia's every move over the course of several days and could have compiled a map of his driving patterns. Although they had gathered ample evidence to justify their suspicion before installing

³⁶ The Supreme Court has hesitated to restrict the efficient collection of information that could be permissibly collected through traditional means. *See, e.g.*, *United States v. Knotts*, 460 U.S. 276, 282 (1983); *but see* *Silverman v. United States*, 365 U.S. 505, 509-12 (1961) (holding that a warrantless physical intrusion into a defendant's home violates the Fourth Amendment even if the information thus collected could have been obtained by other means).

³⁷ Some courts have bemoaned the unusual intrusiveness of technology that provides comprehensive travel histories spanning weeks or years, *see, e.g.*, *Jackson*, 76 P.3d at 264; others have reacted strongly to the idea of a digital beacon transforming a suspect's own property into a witness against him, *see, e.g.*, *United States v. Bailey*, 628 F.2d 938, 944 (6th Cir. 1980); *United States v. Moore*, 562 F.2d 106, 112 (1st Cir. 1977); and still others, including the Seventh Circuit, have expressed concern that new technologies could allow for objectionable monitoring on a massive scale, *see Garcia*, 474 F.3d at 998; *Bailey*, 628 F.2d at 944 (expressing worry that "[t]he rationale of the Government's argument would authorize warrantless beeper surveillance of laboratory equipment, handguns, or [other] legitimately owned item[s]").

³⁸ *Garcia*, 474 F.3d at 998.

³⁹ *Id.*

the GPS device, current doctrine does not require the state to be so scrupulous.

Eventually, courts will have to grapple with the realities of surveillance in the twenty-first century. The old mantra that what is public cannot be the subject of a search fails to protect citizens from the extensive, suspicionless monitoring made possible by modern technology; economic considerations no longer stand as a barrier to widespread, intrusive observation. If courts are to protect against future “programs of mass surveillance,” they must first acknowledge that the use of sophisticated technology to conduct intensive, particularized monitoring is a search. Only then can they begin to apply the reasonableness requirement of the Fourth Amendment. To be sure, this doctrine may draw seemingly arbitrary lines between conventional and modern surveillance, but the new restrictions on modern techniques would merely supplant the cost barriers that constrain governmental use of conventional tactics. The courts’ current stance on privacy outside the home provides no such protection. By refusing to acknowledge any legitimate privacy interest in public movements, the courts defy common-sense expectations of privacy and open the door to seemingly limitless monitoring that few Americans would be eager to endure.