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Federal Judge OKs Installation of Surveillance Cameras Without a Warrant

On October 29, a federal district court judge ruled that police can enter onto privately owned property and install secret surveillance cameras without a warrant.

The judge did set forth a few guidelines that must be followed before such activity would be permissible, but the fact that such a scenario is accepted as constitutional by a federal judge is a serious setback for privacy and for the Fourth Amendment.

The Fourth Amendment guarantees:

> 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.

A report published by CNet provides background to this crucial constitutional ruling:

> Two defendants in the case, Manuel Mendoza and Marco Magana of Green Bay, Wis., have been charged with federal drug crimes after DEA agent Steven Curran claimed to have discovered more than 1,000 marijuana plants grown on the property, and face possible life imprisonment and fines of up to $10 million. Mendoza and Magana asked [U.S. Magistrate Judge William] Callahan to throw out the video evidence on Fourth Amendment grounds, noting that "No Trespassing" signs were posted throughout the heavily wooded, 22-acre property owned by Magana and that it also had a locked gate.

Earlier, Drug Enforcement Agency officers walked around the rural property and installed several strategically placed "covert digital surveillance cameras." Agents entered the land — land they knew to be privately owned — without permission and without a search warrant, in apparent violation of the Fourth Amendment.

U.S. District Court Judge William Griesbach held that the officers' behavior was reasonable. In coming to this constitutionally suspect conclusion, Griesbach followed the recommendation put forth in an earlier ruling on the case made by Judge Callahan.

Commenting on the genesis of the decision, Ars Technica reported:

> The property in question was heavily wooded, with a locked gate and "no trespassing" signs to notify strangers that they were unwelcome. But the judges found that this did not establish the "reasonable expectation of privacy" required for Fourth Amendment protection. In their view, such a rule would mean that (in the words of a key 1984 Supreme Court precedent) "police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy."

The 1984 Supreme Court decision referred to is the case of *Oliver v. United States*. In a 5-4 decision, the justices cited the Court's earlier decision in *Hester v. United States* in which the Court found that the Fourth Amendment did not prohibit police from entering and searching an "open field" without a warrant.

Specifically, the Supreme Court ruled:

> That doctrine was founded upon the explicit language of the Fourth Amendment, whose special protection accorded to "persons houses, papers, and effects" does "not exten[d] to the open fields." *Hester v. United States*, supra, at 265 U. S. 59. Open fields are not "effects" within the meaning of the Amendment, the term "effects" being less inclusive than "property," and not encompassing open fields. The government's intrusion upon open fields is not one of those "unreasonable searches" proscribed by the Amendment.

Relying on that pair of high court rulings, attorneys representing the federal government argued that "placing a video camera in a location that allows law enforcement to record activities outside of a home and beyond protected curtilage does not violate the Fourth Amendment."

This ruling in Wisconsin is but the latest battle in the federal government's war on the Fourth Amendment.

In June, the federal government informed an appeals court that it has the right and the power to place GPS tracking devices on the privately owned vehicles of citizens without obtaining a warrant. This is in open rebellion to a Supreme Court decision from January that held that such warrantless installation of tracking devices on cars was unconstitutional.

In a case being heard by the Ninth Circuit Court of Appeals, the Obama administration argued that since the Supreme Court's ruling didn't specifically mandate the obtaining of a search warrant in all situations, then the justices intended to leave a loophole open — a loophole large enough to mount a tracking device.

According to the Justice Department's spokesperson, "A warrant is not needed for a GPS search, as the [Supreme] Court … did not resolve that question." As quoted in an article in the *Wall Street Journal*, the Justice Department has "advised agents and prosecutors going forward to take the most prudent steps and obtain a warrant for new or ongoing investigations," just in case.

This sort of circular reasoning is commonplace in Washington. The federal government claims that warrants are unnecessary, yet insists that its minions attempt to obtain them. This is precisely the vagueness and double talk that creates chaos and throws up a smokescreen behind which the palladium of American civil liberties is destroyed.

In fairness, the Supreme Court bears a portion of the blame for this confusion. The decision handed down in January in the case of the *United States v. Jones* left several critical constitutional questions unanswered — perhaps purposely so.

Of course, as constitutionalists are aware, there is no need for the Supreme Court to sit as the ultimate arbiter of what does and does not conform to constitutional standards.

As Alexander Hamilton wrote in *Federalist*, no. 33:

> If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted [sic] to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed…. But it will not follow from

> this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. [Emphasis in original.]

That is to say, when the federal government enacts a measure purporting to be the law of the land, but that act is unconstitutional, it is merely a usurpation and of no force whatsoever.

Unfortunately, for generations Americans have been trained to look to the Supreme Court for guidance on issues of constitutional validity, and so it has gladly assumed that role.

The case of when agents of the federal government "legally" may attach a satellite-based tracking device to the car of a suspect is one of the areas now under the purview of the high court.

The Obama administration opened another theatre of operations when it filed a document on September 4 in the D.C. District Court. In the pleading, the president argues that there is no "reasonable expectation of privacy" in a person's cellphone GPS data. The president's lawyers argue that they do not need a warrant to request cellphone company records regarding a customer's movements and location as tracked by their signal towers.

In its argument against a motion filed to suppress the government's use of a defendant's cellphone location data, the Obama administration claims that the customer tracking records kept by cellphone service providers are no different from other business-related "third-party records" such as store receipts and bank account statements, and customers have no legal basis for any additional expectation of privacy.

The feds are making their case for warrantless tracking of citizens in a re-trial of the Jones case.

After the original decision by the Supreme Court to throw out the case against Jones, lawyers for the federal government are shifting their focus to Jones's cellphone tracking data.

Wired describes the decision and the White House's reaction:

> The Supreme Court tossed that GPS data, along with Jones' conviction and life term on Jan. 23 in one of the biggest cases in recent years combining technology and the Fourth Amendment.
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> "We hold that the government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search,'" Justice Antonin Scalia wrote for the five-justice majority.

That decision, the Obama administration claimed, is "wholly inapplicable" when it comes to cell-site data.

The Obama administration continues making that point in its latest legal defense of warrantless surveillance:

> A customer's Fourth Amendment rights are not violated when the phone company reveals to the government its own records that were never in the possession of the customer. When a cell phone user transmits a signal to a cell tower for his call to be connected, he thereby assumes the risk that the cell phone provider will create its own internal record of which of the company's towers handles the call. Thus, it makes no difference if some users have never thought about how their cell phones work; a cell phone user can have no expectation of privacy in cell-site information.

Sadly, such baffling arguments are the norm in this post-Patriot Act era. Under the applicable

provisions of that despotic decree, the location of cellphones and the content of e-mails may be tracked, tagged, and saved by police and federal law enforcement without a search warrant.

“That one’s actions could be recorded on their own property, even if the property is not within the curtilage, is contrary to society’s concept of privacy,” wrote Brett Reetz, Magana’s attorney, as reported by CNet. “The owner and his guest … had reason to believe that their activities on the property were not subject to video surveillance as it would constitute a violation of privacy.”

A jury is scheduled to hear the case on January 22, 2013.