

BALANCING LAW ENFORCEMENT AND PRIVACY IN THE TECHNOLOGICAL AGE: USING THE SEVENTH CIRCUIT RATIONALE IN *UNITED STATES V. GARCIA* AS A FOUNDATION FOR ANALYZING FOURTH AMENDMENT IMPLICATIONS OF GPS TRACKING TECHNOLOGY

INTRODUCTION

The Fourth Amendment to the U.S. Constitution ensures that citizens are "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."¹ This proclamation was devised decades before the widespread commercial use of electricity, let alone the advent of automobiles, computers, and satellite systems. In the 220 years since the signing of the U.S. Constitution, science and technology have clouded what constitutes a search.²

One area where this cloudiness becomes especially apparent is Global Positioning System ("GPS")-based surveillance. The United States Supreme Court has not yet considered the use of GPS trackers,³ and few federal courts have addressed the issue.⁴ Of the courts that have addressed the issue of GPS surveillance, the circuits are split on whether to consider GPS surveillance a search.⁵ Further, many state constitutions contain privacy provisions that are broader than those found in the United States Constitution, making it more likely that GPS surveillance would be considered a search in those states.⁶

The majority of courts that have considered the issue of GPS surveillance have analogized to two United States Supreme Court cases that considered beepers, technological ancestors of GPS systems. In *United States v. Knotts*, the Court held that the use of a beeper to track the movements of a suspected drug manufacturer did not constitute a Fourth Amendment search because the suspect had no reasonable expectation of privacy on public roads.⁷ In *United States v. Karo*, the Court held that the use of a beeper to conduct surveillance on a suspected drug dealer inside his private residence was a Fourth Amendment search because the suspect had a reasonable interest in maintaining the privacy of his home.⁸

The issue of privacy is a crucial theme in *Knotts* and *Karo*, and the need for privacy provides fodder for those who consider GPS surveillance a search.⁹ However, in *United States v. Garcia*, the Court of Appeals for the Seventh Circuit noted that "there is a tradeoff between security and privacy, and often it favors security."¹⁰ In *Garcia*, the circuit court held that police did not violate the Fourth Amendment when they placed a GPS tracker underneath the rear bumper of a suspected drug manufacturer's car.¹¹

As GPS technology continues to become cheaper and more easily obtainable, police surveillance is likely to

incorporate the GPS more frequently. It is therefore vital to make the determination whether such surveillance constitutes a search. By making this determination, it becomes more likely that police officers will be aware of their legal duties when using the GPS, and future investigations will be more likely to comply with the law.¹²

Part I of this comment briefly explains GPS technology and discusses judicial history relevant to GPS surveillance. Part II considers the rationale of the Seventh Circuit in *Garcia*. Part III argues that the Seventh Circuit's rationale in *Garcia* provides a good foundation for future analyses of the Fourth Amendment implications of GPS surveillance and proposes a model by which this foundation can be improved.

I. GPS TECHNOLOGY AND ASSOCIATED JUDICIAL HISTORY

A. The Technology Behind GPS Surveillance

The GPS is a network of twenty-four satellites that send constant transmissions to receivers on earth.¹³ Based on processed signals from the satellites, the system can mathematically determine the receiver's location with great accuracy.¹⁴ GPS receivers are often designed to record and store location information internally, but systems are available where real-time location information can be obtained via personal computer.¹⁵ The GPS was originally

designed for military use but has been since made available to civilians.¹⁶

The GPS is significantly different from the beepers considered in *Knotts* and *Karo*. A beeper emanates signals that can be picked up by a radio receiver.¹⁷ Police officers use these radio signals to determine how close they are to the suspect.¹⁸ In other words, while GPS may be used to track a suspect's movements without actual pursuit, a beeper merely helps the police continue the pursuit.

B. *Knotts, Karo*, and the Idea of Public vs. Private

Much confusion arises from the Fourth Amendment because, while it protects against unreasonable search and seizure, it does not explicitly grant a right to privacy.¹⁹ Rather, the Supreme Court has held that the right to privacy is generally left to the individual states.²⁰ As a result, some states have established comprehensive privacy rights, while other states have not.²¹

Though it has left many decisions regarding the right to privacy to the individual states, the United States Supreme Court has considered the issue of privacy on occasion. Prior to the 1960's, interpretation of the Fourth Amendment turned on whether officers physically trespassed upon an individual's property.²² However, in the 1967 case *Katz v. United States*, the Court's interpretation

of the amendment began to move away from a physical trespass standard and toward the standard of reasonable expectations of privacy.²³ In subsequent Fourth Amendment analyses, the Court generally asked two questions. First, did the individual have an expectation of privacy?²⁴ Second, would society consider this expectation of privacy reasonable?²⁵

The Court had an opportunity to apply its new Fourth Amendment analysis to the issue of technology-enhanced surveillance in *United States v. Knotts*.²⁶ In *Knotts*, law enforcement learned that the defendant had been stealing chloroform, a chemical used in manufacturing drugs, from his former employer.²⁷ The police conducted surveillance and determined that the defendant had also been purchasing chloroform elsewhere.²⁸ With permission from the company from whom the defendant had been purchasing the chloroform, the police installed a beeper inside one of the chloroform containers.²⁹ Using the beeper and visual surveillance, the police were able to follow the defendant to a cabin where they conducted visual surveillance sufficient to obtain a search warrant.³⁰ Inside the cabin, the police uncovered a drug laboratory.³¹ The defendant made a motion to suppress evidence because of warrantless monitoring of the beeper.³² The Supreme Court reversed the circuit court judgment and

held that monitoring the beeper did not constitute a search because there is no reasonable expectation of privacy on a public roadway.³³ Further, the Court held that the Fourth Amendment does not prohibit police from "augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them."³⁴

In *United States v. Karo*, the Court again considered beeper-based surveillance. In this case, a government informant reported that the defendants had recently purchased a large quantity of ether to be used to extract cocaine from clothing that had been imported to the United States.³⁵ With permission from the informant, the Drug Enforcement Agency ("DEA") placed a beeper in one of the cans of ether.³⁶ The DEA agents used visual surveillance and the beeper to follow the defendants to a private home.³⁷ Over the next weeks, the cans of ether were repeatedly moved undetected between homes and storage facilities, and the DEA agents used the beeper to locate them.³⁸ When the cans arrived at a home rented by one of the defendants, agents used the beeper to monitor the cans inside the house.³⁹ When the agents had reason to believe that the ether was being used inside the home, they obtained a warrant and uncovered cocaine and laboratory equipment.⁴⁰ Though the Court held that the installation of the beeper

in the can of ether did not constitute a search, it held that the monitoring of the beeper within the defendant's home did constitute a search.⁴¹ In the majority opinion, Justice Rehnquist wrote that had the agents entered the house without a warrant, it would have violated the Fourth Amendment because individuals have reasonable expectations of privacy within a home.⁴² Therefore, the agents were not entitled to use a beeper to monitor a space that they would not have been permitted to monitor without the beeper.⁴³

Taken in tandem, *Knotts* and *Karo* illustrate a line that courts frequently draw between public⁴⁴ and private spaces.⁴⁵ This distinction is important to keep in mind in subsequent discussion of technology-based surveillance.

C. Federal and State Cases Addressing GPS Surveillance

Examining the handful GPS-based surveillance cases over which courts have adjudicated gives a glimpse at the disparity in privacy laws between various jurisdictions.

Years after the Supreme Court heard the *Knotts* and *Karo* cases, *United States v. McIver* brought the issue of GPS-based surveillance before the Ninth Circuit Court of Appeals.⁴⁶ In *McIver*, police officers planted a beeper and a GPS tracker on the undercarriage of a car owned by a suspected marijuana grower while the car was parked in the suspect's driveway.⁴⁷ The circuit court held that this did

not violate the Fourth Amendment because the suspect offered no evidence to suggest that he had intended to keep the undercarriage of his car private.⁴⁸ Additionally, the court justified the use of GPS surveillance because the United States Forest Service, the department responsible for the investigation, determined that, given the size of its force, it was infeasible to conduct constant human surveillance of the marijuana growing site.⁴⁹ Had the department had enough resources, it would have been able to maintain constant human surveillance.⁵⁰

Shortly after the *McIver* holding, the United States District Court for the Northern District of New York joined the Ninth District in holding that the placement of a GPS tracker on a suspect's vehicle does not constitute a Fourth Amendment search.⁵¹ In *Moran*, the district court extended the Supreme Court's *Knotts* rationale to include the GPS by holding that a person traveling on a public roadway has no reasonable expectation of privacy.⁵² The *Moran* court further justified the use of warrantless GPS surveillance by acknowledging that traditional investigative techniques would have proven to be unduly dangerous in light of the facts of the case.⁵³

While many jurisdictions have chosen not to extend privacy rights beyond those extrapolated from the Fourth

Amendment by the United States Supreme Court,⁵⁴ other states have incorporated more comprehensive privacy rights into their constitutions. For example, in *State v. Jackson*,⁵⁵ the Washington Supreme Court states that the privacy rights guaranteed by the Washington constitution are broader than those guaranteed by the Fourth Amendment to the United States Constitution.⁵⁶ Therefore, under Washington state law, a warrant is required before GPS-based surveillance is conducted.⁵⁷

Unless and until the United States Supreme Court makes a determination regarding whether GPS-based surveillance constitutes a Fourth Amendment search, jurisdictional variations will remain.

II. THE SEVENTH CIRCUIT AND *UNITED STATES V. GARCIA*

A. Facts

Soon after Bernardo Garcia was released from prison for offenses related to methamphetamines, the police began receiving reports that he had been consuming and selling the drug and that he intended to resume manufacturing it.⁵⁸ The police located Garcia's car on a public street and planted a GPS memory tracking unit beneath the car's rear bumper.⁵⁹ The police did not obtain a warrant for the planting of the GPS device.⁶⁰ The police retrieved the device and used it to determine that Garcia had been

frequenting a particular piece of land.⁶¹ Upon inspecting this piece of land, the police discovered a methamphetamine manufacturing site.⁶² Garcia sought to have evidence obtained from the site suppressed as the fruit of a warrantless search.⁶³

B. The Holding: No Warrant Was Necessary for the GPS Tracking

The district court judge held that no warrant was necessary for the planting of the GPS tracker because the police had reasonable suspicion that Garcia was engaged in the manufacturing of illegal drugs.⁶⁴ Garcia appealed on the grounds that the Fourth Amendment demanded a warrant for a GPS-based search.⁶⁵

The Seventh Circuit Court of Appeals looked at the case from a different angle, holding that no warrant was necessary under the Fourth Amendment because no search or seizure had taken place.⁶⁶ In his opinion, Judge Posner pointed to the *Knotts* precedent to show that "the mere tracking of a vehicle on public streets by means of a similar though less sophisticated device...is not a search."⁶⁷ However, Judge Posner acknowledged that a fresh analysis was needed to address modern GPS technology.⁶⁸ The circuit court concluded that GPS technology was analogous to simpler technology such as surveillance cameras and

beepers.⁶⁹ As such, evidence obtained from the GPS surveillance could have been obtained by human surveillance had the police devoted human resources to the search.⁷⁰ Judge Posner concluded his opinion by remarking that if GPS technology is ever used for the purposes of mass surveillance by the government, the issue of GPS surveillance should be revisited.⁷¹

III. A PROPOSED MODEL TO DETERMINE WHETHER GPS SURVEILLANCE CONSTITUTES A FOURTH AMENDMENT SEARCH ON A CASE-BY-CASE BASIS

A. *Garcia* Provides a Solid Foundation For the Analysis

The Seventh Circuit's rationale in *Garcia* provides a sound argument as to why any analysis of GPS-based surveillance should begin with the rebuttable presumption that such surveillance is not a Fourth Amendment search. In many instances, evidence obtained from GPS surveillance could be obtained by human surveillance if the necessary human resources were devoted to it. Although this fact seems simple enough, it leads to a number of implications.

The fact that GPS technology allows law enforcement to conduct effective surveillance without placing an overwhelming burden on police resources encourages police efficiency.⁷² Using GPS technology, officers can be taken off twenty-four hour surveillance duty and are able to

perform other jobs that promote public safety. Further, evidence obtained from the GPS tends to be "cleaner" than evidence obtained from human surveillance.⁷³ Where human surveillance relies on subjective impressions from fallible officers, GPS surveillance provides hard evidence about a suspect's whereabouts at a particular time.

GPS surveillance also promotes officer safety.⁷⁴ While human surveillance frequently puts police officers in perilous situations, using the GPS allows law enforcement to maintain contact with suspects without having to place officers in danger. Consider, for example, surveillance being conducted on a suspect who is known to carry a deadly weapon. Rather than placing an officer in a situation where he/she risks detection and the possibility of violence, the GPS allows that officer to track the suspect from a safe distance.

Smart public policy strongly advocates the promotion of GPS-based surveillance as a means of promoting police efficiency and officer safety. Therefore, I propose that all analyses of whether GPS surveillance constitutes a Fourth Amendment search begins with a rebuttable presumption that it does not.

B. Shortcomings of a Blanket Assumption That GPS Surveillance Does Not Constitute a Fourth Amendment Search

Though policy clearly favors a rebuttable presumption that GPS surveillance does not constitute a Fourth Amendment search, there are shortcomings to presuming that GPS surveillance never constitutes a search. Foremost among these shortcomings is the risk of compromising privacy.

GPS surveillance provides law enforcement with the ability to conduct round-the-clock surveillance. The result is likely to be an extraordinarily detailed glimpse at the life of the individual being pursued.⁷⁵ With this detailed glimpse comes the risk of undue embarrassment or the unwilling revelation of various aspects of one's daily life. It is unsettling to consider the possibility that innocent citizens could be unwittingly exposed to government-sanctioned voyeurism for no legitimate reason.⁷⁶

In addition, the efficiency of GPS surveillance raises the risk of "wholesale surveillance," whereby large numbers of citizens could be tracked for no legitimate reason.⁷⁷ With technology comes the potential for abuse,⁷⁸ and individuals must be assured that they will not be subject to surveillance without a reasonable basis for that surveillance.⁷⁹

C. A Five-Factor Test to Determine Whether GPS Surveillance Constitutes a Search on a Case-by-Case Basis

While *Garcia* serves as a solid foundation in analyses of whether GPS surveillance constitutes a search, it could be further refined to address issues noted by critics. In addition to a rebuttable presumption that GPS surveillance does not constitute a Fourth Amendment search, I propose a five-factor test for courts to use when making the determination as to whether a search has occurred.

The first factor that courts should consider is the specificity of a particular threat. Law enforcement should be encouraged to use GPS surveillance in the face of a specific threat more so than it would be encouraged to use it in the face of a vague threat.⁸⁰

Second, courts should consider whether the GPS tracker being used is a memory-based system or a system capable of real-time surveillance. A common criticism of GPS technology is that it replaces human surveillance rather than augments it. GPS trackers capable of providing real-time surveillance help quell this criticism as they are equivalent to an actual pursuit rather than an after-the-fact review of a suspect's movement.

Third, courts should consider what safeguards are in place to protect privacy. The use of GPS surveillance should be encouraged if steps are taken to mitigate the obtainment or divulging of non-pertinent information.⁸¹

Fourth, courts should consider the feasibility of other types of surveillance. If GPS surveillance can prevent an officer from being placed in a dangerous position or can help obtain evidence not otherwise obtainable, GPS surveillance should be encouraged.

Fifth, courts should consider time constraints faced by police officers. If an officer is in a position where he/she must obtain evidence quickly to prevent a dangerous situation, the use of GPS should be less likely to require a warrant.

While none of these factors should be the sole determinate of whether or not GPS surveillance constitutes a Fourth Amendment Search, each factor could prove useful in promoting a just analysis of the issue.

CONCLUSION

The Seventh Circuit's holding in *Garcia* provides a good foundation for analyzing whether or not GPS-based surveillance constitutes a Fourth Amendment search. Courts should make a rebuttable presumption that GPS surveillance does not constitute a search and should implement a five-factor test to help the analysis. Taken in tandem, these proposals would result in a healthy balance between law enforcement and privacy.

¹ April A. Otterberg, *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, 670 (2005) (quoting U.S. Const. Amend. IV).

² In *U.S. v. Garcia*, the United States Court of Appeals for the Seventh Circuit held that "the Supreme Court has insisted...that the meaning of a Fourth Amendment search must change to keep pace with the march of science." 474 F.3d 994, 997 (7th Cir. 2007).

³ John S. Ganz, *It's Already Public: Why Federal Officers Should Not Need Warrants to Use GPS Vehicle Tracking Devices*, 95 J. Crim. L. & Criminology 1325, 1339 (2005).

⁴ *Id.*

⁵ *Id.* at 1326.

⁶ *Id.*

⁷ 460 U.S. 276 (1983).

⁸ 468 U.S. 705 (1984).

⁹ See, e.g., Otterberg, *supra* n. 1, at 661-662 (discussing critics who argue that technological advances allow a society analogous to the society in George Orwell's dystopian novel *1984*).

¹⁰ *Garcia*, 474 F.3d at 998.

¹¹ *Id.* at 997.

¹² If it is determined that GPS surveillance constitutes a search under the Fourth Amendment, officers planning to use GPS surveillance would need to obtain a warrant to do so.

¹³ Ganz, *supra* n. 3, at 1328.

¹⁴ Otterberg, *supra* n. 1, at 665.

¹⁵ *Id.* at 1329.

¹⁶ GPS users now include everyone from police officers conducting criminal investigations to citizens using in-car navigators to find their favorite restaurants. *Id.* at 1328-1329.

¹⁷ *Id.* at 1328.

¹⁸ *Id.*

¹⁹ *Id.* at 1333.

²⁰ *Id.*

²¹ *Id.* at 1326.

²² Otterberg, *supra* n. 1, at 670-671.

²³ *Id.* at 672

²⁴ *Id.*

²⁵ *Id.*

²⁶ 460 U.S. 276 (1983).

²⁷ *Id.* at 278.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 279.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 281.

³⁴ *Id.* at 282.

³⁵ 468 U.S. at 708.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 708-710.

³⁹ *Id.* at 710.

⁴⁰ *Id.*

⁴¹ *Id.* at 714-715.

⁴² *Id.* at 715.

⁴³ *Id.*

⁴⁴ As used in this comment, "public space" will refer to locations where an individual has no reasonable expectation of privacy.

⁴⁵ As used in this comment, "private space" will refer to locations where an individual has a reasonable expectation of privacy.

⁴⁶ 186 F.3d 1119 (9th Cir. 1999)

⁴⁷ *Id.* at 1123.

⁴⁸ *Id.* at 1126.

⁴⁹ *Id.* at 1122; see also *United States v. Berry*, 300 F.Supp.2d 366, 368 (D. Md. 2004) (“A GPS merely records electronically what the police could learn if they were willing to devote the personnel necessary to tail a car around the clock.”).

⁵⁰ *McIver*, 300 F.Supp.2d at 1122.

⁵¹ *United States v. Moran*, 349 F.Supp.2d 425 (N.D.N.Y. 2005).

⁵² *Id.* at 467.

⁵³ The *Moran* case involved alleged drug trafficking by the Hell’s Angels motorcycle gang. The Hell’s Angels were known for being violent, and they routinely engaged in counter surveillance activities. Additionally, police infiltration of the gang would have been impossible due to initiation rituals that include committing crimes or using narcotics, actions that police officers would not have been permitted to perform. *Id.* at 436.

⁵⁴ See, e.g., *Osborn v. Nevada*, 118 Nev. 323, 327 (Nev. 2002) (holding that Nevada shall use the analysis of the Ninth Circuit Court of Appeals in *McIver*, whereby there is no reasonable expectation of privacy on a public roadway); *United States v. Gbemisola*, 225 F.3d 753, 759 (D.C. Cir. 2000) (“As one cannot have reasonable expectation of

privacy concerning an act performed within the visual range of a complete stranger, the Fourth Amendment's warrant requirement was not implicated."); and *People v. Gant*, 9 Misc.3d 611, 618 (N.Y.Co.Ct. 2005) ("It is well established that where there is no expectation of privacy, there is no search and seizure within the purview of the Fourth Amendment.").

⁵⁵ 150 Wash.2d 251, 259-260 (Wash. 2003).

⁵⁶ See also *State of New Jersey v. Scott*, 2006 WL 2640221 (N.J.Super.A.D. 2006) (holding that, although the wording of the relevant section of the New Jersey constitution reads similarly to the Fourth Amendment, "it affords citizens greater protection...than does the Fourth Amendment."); *People v. Lacey*, 3 Misc.3d 1103(A) (N.Y.Co.Ct. 2004) ("citizens of this State have a right to be free from the type of governmental intrusion that occurs when a GPS is attached to a citizen's vehicle, regardless of reduced privacy expectations."); and *Biddle v. State of Delaware*, 2006 WL 1148663 (Del.Super. 2006) (holding that one private citizen violated another private citizen's right to privacy by placing a GPS tracker on her car).

⁵⁷ *Jackson*, 150 Wash.2d at 256.

⁵⁸ *Garcia*, 474 F.3d at 995.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 996.

⁶⁵ *Id.*

⁶⁶ *Id.* at 997.

⁶⁷ *Id.* at 996.

⁶⁸ *Id.* at 997.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 998.

⁷² *See Ganz, supra n.3, at 1327.*

⁷³ *Id.* at 1356.

⁷⁴ *Id.* at 1357.

⁷⁵ *See Otterberg, supra n. 1, at 697-698.*

⁷⁶ *See Karo, 468 U.S. at 712* (“It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence.”)

⁷⁷ *See Garcia, 474 F.3d at 998.*

⁷⁸ However, it is important to remember that abuse is a result of conducting surveillance improperly, not merely a

result of utilizing an efficient means of surveillance.
See *McIver*, 186 F.3d at 1125 (“We reject the notion that the visual observation of the site became unconstitutional merely because law enforcement chose to use a more cost-effective ‘mechanical eye’ to continue the surveillance”).

⁷⁹ While noting this concern, it should also be mentioned that no available case law documented actual instances of police abuse of tracking technology. See *Karo*, 468 U.S. at 733 (Stevens, J., dissenting) (“I do not believe that electronic surveillance has become...so pervasive that homeowners must expect that containers brought into their homes are infested with electronic bugs.”)

⁸⁰ By way of illustration, law enforcement should use GPS technology if there is reliable information that a suspect is in possession of a large quantity of illegal drugs more so than if there is a report that an individual has been “acting suspiciously.”

⁸¹ Safeguards to protect privacy are currently a consideration in instances of wiretapping. Wiretapping laws mandate that authorities intercepting phone conversations make an effort to avoid intercepting conversations not pertinent to the investigation. *Moran*, 349 F.Supp.2d at 464. Other possible ways to mitigate the

obtainment or divulging of non-pertinent information from GPS surveillance may include placing maximum time limits for GPS surveillance on a particular individual and asking officers to sign agreements agreeing not to disclose any non-pertinent information inadvertently obtained over the course of the GPS surveillance.