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**IT'S ALREADY PUBLIC: WHY FEDERAL OFFICERS SHOULD NOT  
NEED WARRANTS TO USE GPS VEHICLE TRACKING DEVICES**

*John S. Ganz*

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## COMMENTS

### IT'S ALREADY PUBLIC: WHY FEDERAL OFFICERS SHOULD NOT NEED WARRANTS TO USE GPS VEHICLE TRACKING DEVICES

JOHN S. GANZ\*

#### I. INTRODUCTION

A technology previously associated with military "smart bombs" now offers police proven, substantial value in investigating the movements of criminal suspects. Global Positioning System (GPS)-based surveillance systems enable police to cheaply and easily gather intelligence and evidence they would otherwise have to obtain through more costly, cumbersome and risky means such as physical "tails" by pursuing officers.<sup>1</sup> The efficiency gains GPS tracking provides are especially significant because they enable police to extend their operational capability with minimal incremental spending.<sup>2</sup>

In a recent case in Washington State, police used GPS trackers attached to a murder suspect's car and truck to quickly locate the remote wilderness grave in which the suspect had buried the body of his nine-year-old victim.<sup>3</sup> The information proved critical to prosecutors in obtaining a conviction.<sup>4</sup>

While the use of GPS tracking devices grows among law enforcement, federal law remains largely undefined regarding the need to obtain warrants

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\* J.D. Candidate 2006, Northwestern University School of Law.

<sup>1</sup> See discussion *infra* Parts II.B, IV.B.2.

<sup>2</sup> See discussion *infra* Part IV.B.2.

<sup>3</sup> State v. Jackson, 46 P.3d 257, 260 (Wash. Ct. App. 2002); see discussion *infra* Part III.F.2.b.

<sup>4</sup> See discussion *infra* Part IV.B.2.

before their deployment. State law presents a similarly mixed picture: while California and Nevada courts ruled that no warrants are required before using GPS devices,<sup>5</sup> the Washington Supreme Court<sup>6</sup> and a county court in New York<sup>7</sup> recently ruled that police must obtain warrants before conducting GPS-based surveillance. These rulings followed a 1988 Oregon State Supreme Court ruling requiring state police officers to obtain warrants before using "beeper" transmitters, the technological precursors to GPS.<sup>8</sup>

The federal-state split is a function of differing constitutional conceptions of personal privacy.<sup>9</sup> Federal courts have not required police to get warrants to use electronic tracking devices because the information gathered through them—such as the movement of a car or airplane through public thoroughfares—is already publicly available. Put another way, federal law recognizes no legitimate expectation of privacy with respect to movement in public.<sup>10</sup> This notion is especially true for cars, which federal courts grant even less protection with respect to search and seizure.<sup>11</sup>

More recently, some state courts and groups such as the American Civil Liberties Union (ACLU) cited the level and precision of information GPS trackers collect relative to beepers in arguing that their use should be subject to a warrant requirement.<sup>12</sup> These groups conceive of GPS as a substitute police officer who gathers and stores precise, detailed data which goes well beyond that available through less sophisticated tracking devices.<sup>13</sup> As such, these parties consider GPS substantially more intrusive than beepers and therefore worthy of heightened procedural restraints.

These arguments have succeeded at the state level because state law privacy protections often exceed those provided under federal law.<sup>14</sup> While federal law merely prohibits unreasonable searches and seizures in limited situations, several state constitutions, like those of Oregon and Washington, adopt a broader conception of privacy which includes protection against government *scrutiny*.<sup>15</sup> Absent warrants, state and local law enforcement agencies operating under these more far-reaching constitutions can neither

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<sup>5</sup> *People v. Zichwic*, 114 Cal. Rptr. 2d 733, 742-43 (Cal. Ct. App. 2002); *Osburn v. State*, 44 P.3d 523, 526 (Nev. 2002); see discussion *infra* Part III.F.1.

<sup>6</sup> See discussion *infra* Part III.F.2.b.

<sup>7</sup> See discussion *infra* Part III.F.2.c.

<sup>8</sup> See discussion *infra* Part III.F.2.a.

<sup>9</sup> See discussion *infra* Parts III.A.1, III.F.

<sup>10</sup> See discussion *infra* Part III.A.1.

<sup>11</sup> See discussion *infra* Part III.A.3.

<sup>12</sup> See discussion *infra* Parts III.F.2.b, III.F.2.c.

<sup>13</sup> See discussion *infra* Part III.F.2.b.

<sup>14</sup> See discussion *infra* Parts III.F.2.a, III.F.2.b.

<sup>15</sup> See discussion *infra* Parts III.F.2.a, III.F.2.b.

invade a protected space nor engage in systematic forms of scrutiny, such as deployment of GPS trackers.<sup>16</sup>

This Comment provides a legal argument<sup>17</sup> that GPS-based tracking of vehicles in public areas does not implicate the Fourth Amendment and therefore should not be subject to warrant requirements—provided such tracking does not pierce the exterior of a vehicle or enable police to track movement inside a legitimately private space. To the extent a state constitution is consistent with federal law, that state should follow this approach. Fundamentally, the information that law enforcement obtains through GPS tracking is already available, either without technological assistance or with less sophisticated tracking technology. As such, it is legally insignificant in terms of current Fourth Amendment jurisprudence.

This clarification is critical because GPS technology offers substantial promise in improving the quality of evidence available to law enforcement.<sup>18</sup> The fact that GPS provides a new form of technical evidence—similar to video surveillance or audiotape of conversations—argues in favor of encouraging its use because judges and juries could, at least theoretically, rely more comfortably upon it than they would less reliable information, such as witness testimony. Moreover, by overlaying GPS tracks with other electronic intelligence such as recorded phone conversations, police develop a richer, more accurate understanding of their targets, one which can aid juries in deciding a case.<sup>19</sup>

From a policy perspective, the practical limits of resources available to law enforcement in the post-9/11 era argue in favor of GPS usage because the technology greatly enhances law enforcement efficiency.<sup>20</sup> And while critics argue GPS represents a danger to individual liberty, the technology can just as easily be used to attack public corruption: officials in New Jersey, for instance, used GPS tracking to prosecute police officers charged with falsifying records and other forms of misconduct.<sup>21</sup>

Part II explains the technological basics of tracking technology and possible law enforcement uses of GPS.

Part III first examines the federal constitutional law of search and seizure relevant to the installation and monitoring of electronic tracking devices. It then examines recent developments in state law.

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<sup>16</sup> See discussion *infra* Parts III.F.2.a, III.F.2.b.

<sup>17</sup> See discussion *infra* Part IV.B.1.

<sup>18</sup> See discussion *infra* Part IV.B.2.

<sup>19</sup> See discussion *infra* Part IV.B.2.

<sup>20</sup> See discussion *infra* Parts II.B, IV.B.2.

<sup>21</sup> See discussion *infra* Part II.B.

