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Judges Divided Over Rising GPS Surveillance

By CHARLIE SAVAGE

WASHINGTON — The growing use by the police of new technologies that make surveillance far easier and cheaper to conduct is raising difficult questions about the scope of constitutional privacy rights, leading to sharp disagreements among judges.

A federal appeals court, for example, issued a ruling last week that contradicts precedents from three other appeals courts over whether the police must obtain a warrant before secretly attaching a Global Positioning System device beneath a car. The issue is whether the Fourth Amendment’s protection against unreasonable searches covers a device that records a suspect’s movements for weeks or months without any need for an officer to trail him.

The GPS tracking dispute coincides with a burst of other technological tools that expand police monitoring abilities — including automated license-plate readers in squad cars, speed cameras mounted on streetlight poles, and even the widely discussed prospect of linking face-recognition computer programs to the proliferating number of surveillance cameras.

Some legal scholars say the escalating use of such high-tech techniques for enhancing traditional police activities is eroding the pragmatic considerations that used to limit how far a law-enforcement official could intrude on people’s privacy without court oversight. They have called for a fundamental rethinking of how to apply Fourth Amendment privacy rights in the 21st century.

“Often what we have to do with the march of technology is realize that the difference in quantity and speed can actually amount to significantly more invasive practices,“ said Paul Ohm, a University of Colorado law professor and former federal computer-crimes prosecutor. “It’s like you keep turning the volume knob and it becomes something different, not the same thing just a little louder.”

Last week, such calls seemed to be answered by an ideologically diverse panel on the United States Court of Appeals for the District of Columbia. It overturned a drug trafficking
conviction because the evidence against the defendant included tracking data from a GPS receiver that the police hid under his sport utility vehicle without a warrant. The device essentially recorded his whereabouts 24 hours a day for four weeks.

Traditionally, courts have held that the Fourth Amendment does not cover the trailing of a suspect because people have no expectation of privacy for actions exposed to public view.

But the appeals court argued that people expect their overall movements to be private because different strangers see only isolated moments and a police department’s surveillance resources are limited. GPS technology, by allowing police departments to inexpensively track someone’s comings and goings, changes that equation, it said.

“Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble,” wrote Judge Douglas Ginsburg.

“A person who knows all of another’s travels can deduce whether he is a weekly churchgoer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individual or political groups — and not just one such fact about a person, but all such facts.”

Supreme Court review of the decision seems likely. It contradicted decisions in three similar GPS-related cases by appellate panels in Chicago, St. Louis and San Francisco.

In 2007, for example, Judge Richard Posner argued that “following a car on a public street” is “unequivocally not a search within the meaning” of the Fourth Amendment. While acknowledging that “technological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive,” he concluded that using a GPS device to investigate a suspect crossed no constitutional line.

The Fourth Amendment “cannot sensibly be read to mean that police shall be no more efficient in the 21st century than they were in the 18th,” he wrote. “There is a tradeoff between security and privacy, and often it favors security.”

Judge Posner also cited a 1983 Supreme Court ruling upholding the use of a hidden radio transmitter that helped police trail a suspect. But other judges have argued that the limited power of that device make it different from the prolonged, automated tracking that GPS devices enable.

On Thursday, five judges on the San Francisco appeals court dissented from a decision not to re-hear a ruling upholding the warrantless use of GPS trackers. Chief Judge Alex Kozinski
characterized the tactic as “creepy and un-American” and contended that its capabilities handed “the government the power to track the movements of every one of us, every day of our lives.”

There is no central repository of how many police forces use the devices, which cost several hundred dollars. But there has been a recent spate of cases about them. Several state supreme courts — including those in Massachusetts, New York, Oregon and Washington — have ruled that their state constitutions require police to obtain a warrant to use them.

Related questions have arisen over businesses’ customer records, which courts generally allow police to obtain without a warrant. The appeals court in Philadelphia is considering whether the Fourth Amendment protects location data for cellphones.

The few Fourth Amendment cases involving contemporary technologies to reach the Supreme Court so far have generally stuck to the principle that privacy rights cover only actions no one else could normally see or hear. In 2001, for example, the court ruled that without a warrant, police cannot point a thermal imaging device at a home in search of heat associated with marijuana growing.

Privacy advocates say the volume of public information about people that is increasingly collectable has called into question that approach. Stephen Leckar, who represented the defendant in the GPS case before the District of Columbia appeals court, argued that judicial oversight is needed over the mass collection of information like a suspect’s movements, in order to maintain checks and balances.

But Orin Kerr, a George Washington University professor and former federal computer-crimes prosecutor, criticized the ruling. He argued that the police need clear rules, and said it would sow confusion to require warrants for collecting large amounts of information about suspects’ action in public because investigators cannot know ahead of time how much they will eventually compile — or how much is too much.

“Police will never know whether they have violated the Fourth Amendment until some judge tells them,” Mr. Kerr said.

In other privacy contexts, courts have recognized that aggregating information can make a legal difference. For example, the Supreme Court has interpreted a privacy exception in the Freedom of Information Act as covering “rap sheets” compiling people’s criminal records — even though each offense was separately listed in public documents scattered through decades of courthouse files.