ARE UTILITY POLE-MOUNTED CAMERAS UNLAWFUL?

By Richard Lorenz, Cable Huston

The recent occupation of the Malheur Wildlife Refuge in Eastern Oregon produced no shortage of unusual scenes. Among them was occupier Levoy Finnicum scaling a utility pole near a power transformer and prying open a white box attached to the top. Inside the box were two video cameras — apparently used to monitor the activities of the occupiers. The cameras were tossed to the ground and denounced by the occupiers as further evidence of the invasion of their freedom and privacy by a government unmoored from its Constitutional limitations.

In this instance, the Malheur occupiers actually may have had a valid point. At least one federal court has held that the government may not — without first obtaining a search warrant — use utility pole-mounted video surveillance cameras in a manner that continuously records the activities of individuals on private property, where they have a reasonable expectation of privacy.[1] Of course, whether or not one's expectation of privacy is "reasonable" is both highly subjective and fact-specific. Another recent federal appellate court decision found — under very similar circumstances — that no warrant was required in order to place a camera on a utility pole.

For utility pole owners, these conflicting federal court decisions do not send a clear signal of whether consenting to the installation of such pole-mounted cameras would violate the Constitutional rights of their customers. For example, could a pole owner face potential legal liability for granting permission to install a surveillance camera, which is later found to be an unlawful search and seizure? On a more practical level, do pole owners really want either police detectives or "patriots" shimmying up and down their poles to install and remove cameras? This article will discuss the state of the law as it applies to utility pole-mounted surveillance, and offers "best-practices" for pole owners to use to mitigate potential legal liability.

IS A SEARCH WARRANT REQUIRED?

The government's power to pry into the private lives of individuals is directly limited by the Fourth Amendment. See *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). The Fourth Amendment protects "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Searches and seizures without a warrant are presumptively unreasonable. See, *e.g., Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014). The application of the Fourth Amendment to individual cases is constantly evolving, along with the development of new surveillance technologies.

Washington Federal Court decision

In April 2013, law enforcement officers obtained permission from a utility to install a disguised video camera on a utility pole near Leonel Vargas' rural Eastern Washington home.[2] The video camera recorded the front and side of Vargas' home 24 hours a day for at least six weeks. The camera could be panned and zoomed remotely, and the video feed could be reviewed remotely. During the six weeks of surveillance, law enforcement observed Vargas firing guns, relaxing and socializing with friends in the front yard, and even urinating near the side of the house.

Based on the evidence captured through the video surveillance, law enforcement obtained and executed a search warrant against Vargas. They found illegal guns and drugs. Criminal charges were filed against Vargas in federal court. Clearly the surveillance had worked. Or had it?

Vargas filed a motion to suppress any evidence obtained either directly or indirectly from the utility pole video surveillance on grounds that it violated the Fourth Amendment. The question before the court was whether Vargas had a reasonable expectation of privacy while in the front yard of his rural home, such that law enforcement was required to obtain a search warrant. The federal court found that Mr. Vargas reasonably expected that his private activities in his front yard would not be subject to such constant, covert surveillance. The judge believed that the fact that Vargas socialized and even urinated in his yard indicated an expectation of privacy. None of the evidence found by law enforcement upon executing the subsequent search warrant would be admissible to prove the criminal charges.

6th Circuit Court of Appeals decision

In a similar case, the U.S. Court of Appeals for the 6th Circuit found that the defendant did *not* have a reasonable

1 Obviously, the Malheur occupiers were not on their own private property at the time, and any concerns about government surveillance of its own property could have been alleviated simply by leaving the property.
2 *See generally United States of America v. Leonel Michel Vargas*, Order granting Defendant's Motion to Suppress.

expectation of privacy while in the front yard of his farm in rural Tennessee. The ATF, acting without a search warrant, installed a video camera on a utility pole about 200 yards from the farm of defendant Houston. The video feed was operated continuously for 10 weeks. The video captured images of Houston outside and near his home while on his property. Based on the video evidence, the ATF obtained a search warrant and ultimately found more than 25 firearms on the property.

Unlike the Vargas case, the 6th Circuit found that the ATF's continuous and covert surveillance of Houston's property and the outside of his home did not violate the Fourth Amendment. The 6th Circuit found that Houston had no reasonable expectation of privacy with respect to any activity that could have been viewed by passersby on public roads. The Court was persuaded that the ATF could have stationed an agent at the top of the utility pole 24 hours a day, 7 days a week, for 10 weeks to observe Houston's property. The ATF should not be punished, therefore, for choosing to conduct such surveillance using a camera rather than in person.

BEST PRACTICES FOR POLE OWNERS

These two cases, although interesting, do not offer pole owners much guidance when law enforcement requests access to poles for surveillance purposes. Although the 6th Circuit is the higher court, its decisions are not necessarily binding in other circuits. Further, each of these cases is highly fact-specific. It would be too much to ask pole owners to try to judge whether a search warrant is required prior to granting access in any particular instance.

Always require a search warrant

Because it is difficult, if not impossible, to tell whether or not a search warrant is required, my first advice to pole owners would be to always require a search warrant as a matter of policy. When there is a valid search warrant, there can be no Fourth Amendment violation. Thus, the utility is on very safe ground allowing access to its poles pursuant to and consistent with a search warrant. Further, by requiring a search warrant as a matter of policy, the pole owner at least has the assurance that the target of such surveillance has been vetted by an impartial magistrate. Likewise, the burden of obtaining a search warrant should be relatively small. It is unlikely that critical evidence would be lost or destroyed during the few days that it would take to obtain a warrant.

Require a license agreement

My second piece of advice to pole owners would be to require law enforcement to execute a license agreement prior to attaching any cameras or other facilities to a pole. The license agreement would be very similar to a pole attachment agreement — perhaps more narrowly tailored for the type of facility to be attached and the duration of the attachment. Such license agreement should, at a minimum, address each of the points highlighted below:

- **Identification of all poles and attachments –** As part of the license agreement, the attaching law enforcement entity should be required to clearly identify each pole to which an attachment will be made. Law enforcement should also specify the nature of the attachment — for example its size and weight, whether it requires a power supply, and any other details relevant to the safe use of the pole.
- **Attachment specifications –** The license agreement should set forth the pole owner's technical specifications for such attachments. This will help ensure that the attachment is made and maintained in a safe manner by qualified persons, and that it otherwise complies with all applicable safety codes and standards.
- **Indemnity –** The license agreement should have a very strong and broadly worded indemnity provision. The indemnity should cover not only accidents that may be caused by the attacher or its attachments, but it should also expressly indemnify the pole owner against any legal action alleging an infringement of privacy rights. Given that the attacher is almost certain to be a governmental entity, the indemnity should not be subject to tort claim limits or any other statutory limitations of liability that may otherwise apply to the attaching entity.
- **Costs –** While the pole owner may choose to allow law enforcement access to utility poles on a temporary basis without charging a rental rate, pole owners are still entitled to recover their out-of-pocket expenses associated with administering the license agreement and facilitating (or-making) the attachment itself.

AVOID CONSENTING TO THE USE OF POLES LOCATED ON PRIVATE PROPERTY

Finally, I would advise pole owners to exercise additional caution with respect to poles that are located on private property (not owned by the pole owner) as compared to poles located in public rights of way. Poles are usually located on private property pursuant to an easement. By their nature, however, easements are limited in scope. A typical utility easement might allow the pole owner permission to install and maintain a pole on private property only for the purpose of providing utility services. Allowing law enforcement to spy on the property owner or its neighbors is clearly outside of the scope of providing utility services.

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