No. SJC-09519

IN THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

GAIL NELSON,

Plaintiff-Appellant,

v.

SALEM STATE COLLEGE, et al.

Defendants-Appellees

On Appeal from the Judgment of the
Essex Superior Court

Case No. 98-1986

BRIEF OF AMICUS CURIAE ELECTRONIC PRIVACY INFORMATION CENTER, IN SUPPORT OF PLAINTIFF-APPELLANT

Marc Rotenberg
Marcia Hofmann
Electronic Privacy Information Center
1718 Connecticut Ave. NW 200
Washington, DC 20009
(202) 483-1140

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF AMICUS CURIAE

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C., that was established in 1994 to focus public attention on emerging civil liberties issues. EPIC has participated as amicus curiae in numerous privacy cases, including Hiibel v. Sixth Judicial Circuit of Nevada, 542 U.S. 177 (2004), Doe v. Chao, 540 U.S. 614 (2003), Smith v. Doe, 538 U.S. 84 (2003), Dep't of Justice v. City of Chicago, 537 U.S. 1229 (2003), Watchtower Bible and Tract Soc'y of N.Y. Inc. v. Vill. Of Stratton, 536 U.S. 150 (2002), and United States v. Councilman, 418 F.3d 67 (1st Cir. 2005) (en banc).[1]

[1] IPIOP Law Clerks Michael Capiro, Charles Duan, Dhruv Kapadia, Ibrahim Moiz, Tori Praul, and Nerisha Singh assisted in the preparation of this brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. whether covert video surveillance by an public employer violates an employee's privacy under G. L. c. 214, s. 1B, or under the Fourth Amendment and art. 14.
2. whether the public employer was entitled to qualified immunity on the constitutional claim and common law immunity on the statutory claim.
3. whether the public employer is immune under the discretionary functions exception to the Massachusetts Tort Claims Act, G. L. c. 258, s. 10(b), for alleged negligent training and supervision of its employees resulting in an invasion of privacy.

ARGUMENT

The use of covert video surveillance by state agents without judicial authority offends the common understanding of society's expectation of privacy and threatens, in the near future, to reveal the most intimate aspects of one's physical form. If this activity is permitted, and amici would not concede this point, then it must be subject to the rule of law. First, freedom from surveillance cameras in closed, intimate spaces is an expectation of privacy that society is prepared to recognize as reasonable. Where one chooses to undress provides a good indication not only of a subjective expectation of privacy but also of an objective expectation that is shared by others. In such locations, the use of video surveillance must be held a search regulated by the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights ("Article 14").

Second, video surveillance is a technology easily abused that, with enhanced capabilities that are already being deployed, may cause substantial harm and embarrassment to the subject. Unlike the opportunity provided to a person who observes another, video

surveillance cameras have the ability to zoom in on a subject, to record images, to match images against a database of images, and even to obtain outlines of the human body that would be otherwise concealed beneath clothing. Digital images are also easily copied and distributed online.

Third, when such surveillance occurs, the law must require that users are well trained and carefully supervised so that the opportunity to conduct a covert, visual search of a person does not become an excuse for state-sanctioned voyeurism.

The history of privacy protection in the United States is the history of the courts and the legislatures acting to safeguard the right of privacy as technology evolves. Where the law fails to distinguish between those uses of technology that safeguard individual liberty and those that intrude upon private life, our freedom is diminished and we are made less safe.

I. Ongoing Surveillance Offends Society's Expectation that Individuals in the Workplace are Entitled to Some Private Space and Therefore Must be Subject to Law.

The College's subjection of Ms. Nelson to constant video surveillance was a search under the Fourth Amendment and Article 14. Government action becomes a constitutionally regulated search when it intrudes upon an "expectation of privacy . . . that society is prepared to recognize as reasonable." Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); accord Commonwealth v. Blood, 400 Mass. 61, 68 (1987).

The issue in this case is not whether the police should be allowed to videotape Ms. Nelson's office. The issue, rather, is whether the police should be allowed to videotape Ms. Nelson's office without any external judicial oversight. This Court's holding that covert video surveillance constitutes a search under the Fourth Amendment and Article 14 would only require that law enforcement officials acquire a warrant in order to perform such surveillance, a burden that cannot be said to be unreasonable. Blood, 400 Mass. at 76-77 ("It is too easy to forget — and, hence, too

often forgotten — that the issue here is whether to interpose a search warrant procedure . . . .” (quoting United States v. White, 401 U.S. 745, 789-90 (1971) (Harlan, J., dissenting))).

A. The Court Must Closely Scrutinize the Rapidly Growing Use of Video Surveillance.

Video surveillance is being used at a staggering — and somewhat frightening — rate. There are 26 million surveillance cameras installed worldwide, 11 million of them in the United States. Dan Farmer & Charles C. Mann, Surveillance Nation, Tech. Rev., April 2003, at 36, 36. In the United Kingdom, there are reportedly 4.2 million surveillance cameras; the average Briton is captured on three hundred cameras every day. Jeffrey Rosen, The Naked Crowd 36-37 (2004).

Government use of surveillance has grown substantially. The United States Park Police have installed a $2 million video surveillance system to monitor the District of Columbia. U.S. Gen. Accounting Office, GAO-03-748, Video Surveillance: Information on Law Enforcement’s Use of Closed Circuit Television to Monitor Selected Federal Property in Washington, D.C.

16 (June 2003). See also EPIC, Observing Surveillance (documenting presence of video cameras in Washington, DC).[2]

The Massachusetts police have installed numerous surveillance cameras on streets to watch the traffic. On one small stretch of road in Massachusetts, a camera records every passing car, collecting license plate numbers, vehicle speeds, and even the number of passengers. Farmer & Mann, supra, at 36.

Individuals are also using surveillance cameras in growing numbers. In 2000, the Christian Science Monitor reported that annual sales of "spy" cameras in New York had tripled to 125,000. Alexandra Marks, Smile! You're on Hidden Camera, Christian Sci. Monitor, Dec. 22, 2000.[3] Parents are also using "nanny cams" (miniature surveillance cameras hidden in household objects such as teddy bears) to watch their children's caretakers; manufacturers have reported up to threefold sales increases in the last decade. A 2003 survey conducted by Parenting Magazine and America Online revealed that 83% of parents would

[2] http://www.observingsurveillance.org (last visited Nov. 2, 2005).
[3] Available at http://csmonitor.com/cgibin/durableRedirect.pl?/durable/2000/12/22/p1s3.htm.

secretly videotape their babysitter if they suspected improper childcare. Pat Burson, You've Decided to Videotape Your Nanny. Now the Next Tough Question: Do You Tell Her?, Newsday, Dec. 13, 2004. X10, one manufacturer of miniature video cameras and nanny cams, was reported to have sales of over $21.3 million in 2000, 52% of which came from wireless camera sales. John Schwartz, Nanny-Cam May Leave a Home Exposed, N.Y. Times, Apr. 14, 2002.

The use of video surveillance in the workplace has grown rapidly in the past few years. In 2005, the American Management Association surveyed 526 companies on their employee surveillance policies. Am. Mgmt. Ass'n Int'l, 2005 Electronic Monitoring & Surveillance Survey 12 (May 18, 2005).[4] The survey revealed that 51% of employers use video cameras to prevent theft, violence and sabotage, and 16% use them to monitor employee performance. Id. at 9-10. Of those using video surveillance, between 15% and 20% do so without informing employees. Id.

Schools are yet another major consumer of video surveillance technologies. The University of

[4] Available at http://www.amanet.org/research/pdfs/EMS_summary05.pdf.

Pennsylvania maintains over 400 cameras across its campus, and the University of Michigan at Ann Arbor has planned (as of 2003) to install a 200-camera monitoring system across its sixteen dormitories. Jeffrey R. Young, Smile! You're on Campus Camera, Chron. Higher Educ., June 13, 2003, at A36.[5] Some schools are also secretive about their surveillance. In October 2002, students at the University of Texas at Austin were denied information about the locations of security cameras; a school representative said that the secrecy creates "a greater degree of confidence in securing the campus." Id.

The exponential growth in the use of video surveillance raises far-reaching privacy concerns. But the fact that a new technology makes possible widespread surveillance does not resolve the question of whether the widespread surveillance should be permitted. As the Massachusetts legislature said many years ago about the analogous world of telephone wiretapping in an age when its use was rapidly expanding:

[5] Available at http://chronicle.com/free/v49/i40/40a03601.htm.

> The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime.

Interception of Wire and Oral Communications, Mass. Gen. Laws ch. 272, § 99(a) (2005). Similarly, the rapid adoption of video surveillance leaves open an important question as to the scope of the right to privacy. In cases where the surveillance technology is used by agents of the state in a covert fashion and is directed toward a zone of privacy where a person is choosing to undress, the law cannot be silent.

B. Public Opinion Clearly Establishes that the People Expect Privacy in Some Circumstances, Even in Spaces Generally Open to the Public.

To answer the question of whether the covert videotaping of Ms. Nelson violated the Fourth Amendment and Article 14, the Court must ask whether the videotaped victim enjoyed a reasonable expectation of privacy. As one of the clearest expressions of what society recognizes as reasonable is the law that it enacts, it is only natural that we should first look

to the laws of the states and the nation to answer this question.

The number of state anti-voyeurism statutes indicates the public's view that, even in public areas, individuals still retain an interest in privacy. The National Center for Victims of Crime reports that thirty-one states have laws against covert video surveillance of public spaces for voyeuristic or stalking purposes. See Stalking Res. Ctr., Nat'l Ctr. for Victims of Crime, Video Voyeurism Laws (2004).[6] Massachusetts enacted one such law recently; its text is representative of others:

> Whoever willfully photographs, videotapes or electronically surveils another person who is nude or partially nude, with the intent to secretly conduct or hide such activity, when the other person in such place and circumstance would have a reasonable expectation of privacy in not being so photographed, videotaped or electronically surveilled, and without that person's knowledge and consent, shall be punished by imprisonment in the house of correction for not more than 2 1/2 years or by a fine of not more than $5,000, or by both such fine and imprisonment.

Electronic Recording or Surveillance of Nude or Partially Nude Person, Mass. Gen. Laws ch. 272, §

[6] http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspxnz?DocumentID=37716.

104(b) (2005).[7]

Congress has also made clear that hi-tech voyeurism, even in public places, is impermissible. Video Voyeurism Protection Act, 18 U.S.C.S. § 1801(a) (2005) (Prohibiting the "capture [of] an improper image of an individual."), available at Marc Rotenberg, The Privacy Law Sourcebook: United States Law, International Law, and Recent Developments 334 (EPIC 2004).

The lesson to be drawn from this discussion is that, even in public places, there are circumstances in which society is prepared to — in fact, does — recognize as reasonable. See generally Lance E. Rothenberg, Comment, Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and Failure of the Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space, 49 Am. U. L. Rev. 1127, 1158-59 (2000) (describing other anti-voyeurism statutes, such as California's, that have used the word "circumstances" to incorporate a view of a reasonable

[7] A subsequent provision exempts from this statute "law enforcement officer[s] acting within the scope of [their] authority under applicable law." Id. To rest the case on this provision, naturally, would beg the question, as the issue at bar is the scope of law enforcement's authority.

expectation of privacy in public).

Ms. Nelson's changing of clothes in an enclosed space clearly evinces both a subjective and objective expectation of privacy. See Katz, 389 U.S. at 361 (Harlan, J., concurring). She surrounded herself with six-foot-high partitions. This almost a literal representation of what has often been described as a "zone of privacy."[8] The Supreme Court found that Mr. Katz had a reasonable expectation of privacy in his telephone call even though he was standing in a glass telephone booth on a street corner in Los Angeles. Katz, 389 U.S. at 348. Ms. Nelson changed her clothes behind a partition. Her expectation of privacy should be no less.

Courts across the country have consistently agreed that video surveillance is in itself highly intrusive and violates individual privacy. The Fifth Circuit, for example, has said that "indiscriminate video surveillance raises the spectre of the Orwellian

[8] Case law has also addressed the reasonable expectation of privacy in enclosed spaces of the workplace; many of those cases are discussed by the parties. See, e.g., State v. Bonnell, 856 P.2d 1265 (Haw. 1993) (reasonable expectation of privacy in an employee break room that was unobservable outside of the room and where employees could have quickly identified the approach of intruders).

state," United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987), and numerous courts are in agreement.[9]

C. If Such Surveillance is Left Unchecked, then the Reasonable Expectation of Privacy Would Be Severely Undermined.

Not only do the people have a reasonable expectation of privacy from surveillance cameras, the people should enjoy such privacy, because a holding otherwise would be essentially tantamount to a holding that society has virtually no reasonable expectation of privacy beyond the front door of the home. This conclusion must logically follow because of the new and developing technologies of surveillance that threaten to undermine our privacy and dignity in new and chilling ways.

One such technology, a new device known as "Backscatter X-Ray," can effectively see through clothing and produce naked images of people walking

[9] See, e.g., United States v. Torres, 751 F.2d 875, 882 (7th Cir. 1984) ("[T]elevision surveillance . . . could be grossly abused — to eliminate personal privacy as understood in modern Western nations."); Commonwealth v. Price, 408 Mass. 668, 677 (1990) (Liacos, J., dissenting) (quoting Torres). But see id. at 674 (majority opinion) (dicta) (calling video surveillance "a relatively minor intrusion beyond . . . audio recording").

down the street. See EPIC, Backscatter X-Ray Screening Technology;[10] Joe Sharkey, Airport Screeners Could Get X-Rated X-Ray Views, N.Y. Times, May 24, 2005, at C5. This technology has already been deployed at several locations, such as public transportation entrances and border patrol sites.[11] Undoubtedly, as time passes, Backscatter technology will become cheaper, more accessible, more concealable, and more readily used, just as video surveillance has already become. The argument for Backscatter X-Ray, like the argument for video surveillance, is that it protects public safety and helps deter criminal conduct.

If the Court should rule today that the people cannot reasonably expect freedom from indiscriminate video surveillance because it is so commonplace and expected, will the Court rule tomorrow that people should not reasonably expect freedom from "virtual" strip searches because they have become equally commonplace?

Video surveillance itself will soon become even

[10] http://www.epic.org/privacy/airtravel/backscatter/default.html (last updated July 11, 2005).
[11] See id. (airports); Ben Webster, Body Scan Machines to Be Used on Tube Passengers, Times (London), Jul. 8, 2005, at Home News, 19 (subways); Judy Foreman, First Bags, Now Passengers?, L.A. Times, Jan. 10, 2005, at F3 (border patrol).

more invasive with emerging face-recognition technology and the corresponding ability to track the movements of every person at any time. See generally W. Zhao et al., Face Recognition: A Literature Survey, 35 ACM Computing Surveys 399 (2003) (survey of current face-recognition technologies). Such technology, which is already currently available in several commercial products, id. at 401, may ultimately be able to identify individuals captured only momentarily by a camera and compare them against enormous databases. Id. at 432-33. With the ubiquity of surveillance cameras described previously, it is no stretch of the imagination to see that, one day, the surveillance network might know every step we take outside of our homes. These are issues of profound importance that will increasingly challenge the nation's highest courts in the years ahead. See, e.g., Jeffrey Rosen, Supreme Futurology, N.Y. Times Mag., Aug. 28, 2005 at 24.

The Court, then, has two options. It could concede that technology dictates our reasonable expectation of privacy, and live with the thought that the people shall be subject to exposure to the eye of the hidden camera that can and does venture places

that no human eye could ever have seen. Or it could decide that the law has the power to protect society's expectation of privacy in the face of such technology, and it could establish safeguards that permit technological innovation and preserve human dignity.

The Supreme Court faced just this issue in Kyllo v. United States, in which the police employed a sophisticated thermal device to detect the high-heat lamps commonly employed in growing marijuana. 533 U.S. 27, 29-30 (2001). Justice Scalia, writing for the majority, held that a thermal scanner used to measure heat waves emanating from a home constituted a search under the Fourth Amendment. Id. at 34-35. While the Court acknowledged that technology had affected our reasonable expectations of privacy, it remained firm in its conviction that there are "limits . . . upon this power of technology to shrink the realm of guaranteed privacy." Id. at 33-34. The case reminds us that advances in technology should not mechanically chip away our reasonable expectations of privacy; rather, the state's use of technology to search must be limited to protect expectations of privacy.

The highest courts of the states play a critical role in helping to ensure the protection of the right,

described by Justice Louis Brandeis, as "the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Consider this Court's decision in Commonwealth v. Blood. In an earlier case before the United States Supreme Court involving the practice of informants wearing audio bugs, Justice Harlan wrote:

> Were third-party bugging a prevalent practice, it might well smother that spontaneity — reflected in frivolous, impetuous, sacrilegious, and defiant discourse — that liberates daily life. . . . The interest [third-party bugging] fails to protect is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months, or years after the conversation.

White, 401 U.S. 745, 787, 790 (Harlan, J, dissenting). The Supreme Court chose not to join in Justice Harlan's views, but the Massachusetts Supreme Judicial Court did adopt them in Blood. As the Court said,

> it is not just the right to a silent, solitary autonomy which is threatened by electronic surveillance: It is the right to bring thoughts and emotions forth from the self in company with others doing likewise, the right to be known to others and to know them, and thus to be whole as a free member of a free society.

400 Mass. at 69.

In affirming Ms. Nelson's reasonable expectation of privacy as she changed her clothes in an enclosed space of her office, the Court should continue to affirm this line of reasoning, validating the right of every man and woman to be free of the chilling self-consciousness attached to a constant fear of being captured by the unseen camera.

II. **The Training of State Employees in the Use of Video Surveillance Should Not Be Held a Discretionary Function Because of the Well-Established Potential for Abuse of Covert Video Cameras.**

Beyond video surveillance's violation of our reasonable expectations of privacy, and partly because of it, such surveillance is easily and frequently abused in ways that cause substantial harm to social values and human dignity, and so the Court should not complacently assent to the College's alleged failure to train and supervise the use of video surveillance in Ms. Nelson's cubicle by calling it a "discretionary

function" immune to the rigors of the law. Massachusetts Tort Claims Act, Mass. Gen. Laws ch. 258 § 10(b) (2005).

The dangers of abuse of surveillance cameras by untrained and unsupervised operators are widely documented. These dangers include racial profiling, sexual indiscretion, and abuse of surveilled subjects. British studies have found a significant danger of racial discrimination and stereotyping by those monitoring the cameras. National Association for the Criminal Rehabilitation of Offenders, To CCTV or not to CCTV? A review of current research into the effectiveness of CCTV systems in reducing crime 4 (June 28, 2002)[12]; Clive Norris and Gary Armstrong, The Unforgiving Eye: CCTV surveillance in public space, Centre for Criminology and Criminal Justice at Hull University (1997).

It should be clear that video surveillance is an invasive technology that requires oversight and regulation, and the Court should not give state agencies the privilege of employing such technology in an indiscriminate and unfettered manner.

[12] Available at http://www.nacro.org.uk/data/briefings/nacro-2002062800-csps.pdf.

A. Surveillance Cameras Are Prone to Misuse by Operators in Ways that Improperly Invade Individual Privacy Without Enhancing Security.

Between 1995 and 1996, a team of researchers led by criminologist Clive Norris undertook a study of surveillance camera operators at three sites in the United Kingdom. Clive Norris and Gary Armstrong, The Maximum Surveillance Society: The Rise of CCTV 95-96 (1999). Each researcher would shadow a camera operator for the operator's shift, observing who the operator focused on and how the operator acted. Id. at 96. In total, the team observed 25 camera operators, 592 working hours, and 1677 individuals captured on camera. See id. at 97.

Norris's research revealed significant patterns of racial and sexual discrimination. In two of the three cities observed, blacks were surveilled between 170% and 250% more often than whites.[13] Id. at 110. Moreover, blacks were twice as likely to be surveilled as whites for "no apparent reason." Id. at 115. Women, while watched far less frequently than men, were followed by camera operators 15% of the time for

[13] In the third location, there were too few blacks in the general population to produce statistically meaningful results. See id. at 110.

"voyeuristic" reasons; in one incident a camera operator watched for eleven minutes a couple engaging in sexual activity. Id. at 129.[14] True, racial profiling and sexual voyeurism are difficult problems to eliminate, but it will be a sad day when the Court does not at least try to alleviate them. Cf. Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 313 (2003) (alleviating another form of discrimination "incompatible with . . . equality under the law").

The harm done by undisciplined surveillance reaches beyond discriminatory profiling, however: camera operators can — and do — physically harass observed "undesirables" from their seats of power. Operators could, for example, maliciously send law enforcement operatives after a surveilled subject. Norris & Armstrong, supra, at 149. And in one truly disturbing incident, several camera operators, annoyed with a number of youths running around in a parking lot, placed a call to a pay phone in the lot. Id. When

[14] Professor Rosen recounts a similar finding: "I experienced firsthand a phenomenon that critics of CCTV surveillance have often described: when you put a group of bored, unsupervised men in front of live video screens and allow them to zoom in on whatever happens to catch their eye, they tend to spend a fair amount of time leering at women." Rosen, Naked Eye supra, at 48.

one of the boys picked up, the operator, using a disguised accent, made several insults over the phone and then hung up. Id.

Video surveillance also has the potential to chill political protests and other legitimate forms of free speech. See EPIC, Video Surveillance — FOIA Documents (discussing documents obtained by EPIC under the Freedom of Information Act showing that the Park Police conducted surveillance of political protesters in Washington, DC).[15] And the GAO reports that the District of Columbia police employed closed-circuit television to record antiwar demonstrations in 2003. U.S. Gen. Accounting Office, supra, at 13.

B. Because an Untrained Surveillance Camera Operator May Cause Substantial Harm to Observed Subjects, the Court Should Require that State Agents Be Properly Educated and Supervised in This Technology.

There is no lack of well-contemplated standards available for institutions to adopt and follow. The GAO has, in fact, identified numerous best practices for effective video surveillance, culled from its research of several governments' use of such systems. See id. at 22. Among their recommendations were 1.)

[15] http://www.epic.org/privacy/surveillance/foia.html (last visited Nov. 2, 2005).

public notification and discussion about surveillance, 2.) posting of signage at surveilled areas, 3.) standards for the handling and use of video data, and 4.) regulations governing law enforcement's use of the data. Id. at 22-25. Additionally, the GAO points to guidelines developed by the American Bar Association, the International Association of Chiefs of Police, and the Security Industry Association as ways to alleviate the invasive nature of video surveillance. Id. at 24-25; see Am. Bar Ass'n, Technologically Assisted Physical Surveillance, Standard 2-9.3 (1999) (video surveillance).[16] Finally, the GAO recommends regular auditing of camera operators to ensure that the cameras are not being used, say, for voyeuristic purposes; one ingenious idea involves committees of citizens who regularly audit surveillance tapes. U.S. General Accounting Office, supra, at 27-28.

The case law also suggests standards for the use of video surveillance. In United States v. Torres, the Seventh Circuit drew from the statutory requirements for a wiretap requirement in developing parallel Fourth Amendment standards for video surveillance

[16] Available at http://www.abanet.org/crimjust/standards/taps_toc.html.

warrants. 751 F.2d 875, 885 (7th Cir. 1984). The defendants in that case moved to suppress the video evidence on the grounds that the courts lacked the authority to grant warrants authorizing video surveillance. Id.

Judge Posner, writing for the court, rejected this claim, but did take care to note that video surveillance was "exceedingly intrusive." Id. at 882. So concerned was the court with the growing use of video surveillance, it chose to explicitly spell out the requirements for a video surveillance warrant:

> [B]ecause television surveillance is potentially so menacing to our personal privacy, we want to make clear our view that a warrant for television surveillance that did not satisfy the four provisions of Title III[, the warrant requirements for a wiretap under federal law] . . . [W]e borrow the warrant procedure of Title III, a careful legislative attempt to solve a very similar problem, and hold that it provides the measure of the government's constitutional obligation of particular description in using television surveillance to investigate crime.

Id. at 885. Judge Posner also recommended that video surveillance be subject to federal regulation. Id.

The Seventh Circuit is not unique in this holding. Half of the federal circuits have adopted its

four-step warrant test,[17] and no circuit has yet declined it.[18]

The Court has an opportunity in this matter to control the power of surveillance, to ensure that the right to privacy and human dignity remains constant even in an ever-changing world of technology. It is our hope that the Court will exercise this opportunity to the fullest.

CONCLUSION

The use of covert video surveillance by state agents without judicial authority offends society's common understanding of the expectation of privacy. For the reasons set forth above, the decision of the superior court should be reversed, and this Court should find in favor of the Plaintiff-Appellant Gail Nelson and remand this case to the superior court.

---

[17] See United States v. Biasucci, 786 F.2d 504 (2d Cir. 1986); United States v. Williams, 124 F.3d 411 (3d Cir. 1997); Cuevas-Sanchez, 821 F.2d 248; United States v. Falls, 34 F.3d 674 (8th Cir. 1994); United States v. Koyomejian, 970 F.2d 536 (9th Cir. 1992) (en banc); United States v. Mesa-Rincon, 911 F.2d 1433 (10th Cir. 1990).

[18] But see United States v. Koyomejian, 970 F.2d 536, 543 (9th Cir. 1992) (en banc) (Kozinski, J., concurring) (suggesting that, because the government had followed all the Torres requirements, though it was not required to do so, the case was not yet ripe for adjudicating those requirements).

Respectfully submitted,

_____

MARC ROTENBERG
MARCIA HOFMANN
ELECTRONIC PRIVACY INFORMATION CENTER
1718 Connecticut Ave., NW
Suite 200
Washington, DC 20009
(202) 483-1140

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

Under penalty of perjury, I hereby certify that on this 3rd day of November 2005, two copies of the forgoing amicus curiae brief and accompanying motion for leave to file were served on the following by First Class U.S. mail:

Jeffrey M. Feuer
Lee D. Goldstein
Goldstein and Feuer
678 Massachusetts Avenue
Cambridge, MA 02139

John Reinstein
American Civil Liberties Union of Massachusetts
99 Chauncy Street
Boston, MA 02111

David R. Kerrigan, Esq.
Assistant Attorney General
Government Bureau/Trial Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108-1598

Wayne Soini
Jamie DiPaola
AFSCME Council #93, AFL-CIO
8 Beacon Street
Boston, MA 02108

Mark P. Fancher
Guild Law Center for Economic and Social Justice
733 St. Antoine, 3rd Floor
Detroit, MI 48226

_____
Marcia Hofmann