



INSTITUTE FOR JUSTICE

November 22, 2022

Via Regulations.Gov

Secretary Pete Buttigieg
U.S. DEPARTMENT OF TRANSPORTATION
Administrator Robin Hutcheson
Mr. Luke W. Loy
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
1200 New Jersey Avenue SE
West Building, Room W12-140
Washington, D.C. 20590

Re: Unique Electronic Identification of Commercial Motor Vehicles, Dkt. No. FMCSA-2022-0062

Dear Mr. Loy:

The Institute for Justice (“IJ”) submits this comment letter in response to the Advanced Notice of Proposed Rulemaking that the Federal Motor Carrier Safety Administration published on September 23, 2022, seeking feedback on whether it should require every commercial motor vehicle to install an electronic device that would wirelessly transmit identifying information to law enforcement on demand.

INTRODUCTION

IJ is a national public-interest law firm dedicated to securing constitutional rights, including the right to own and use property freely. In furtherance of this work, IJ has an institutional interest in ensuring that the Administration does not promulgate a rule that interferes with the rights protected by the Fourth and Fifth Amendments to the United States Constitution.

While still wide-ranging in its ideas at this preliminary stage, the ANPRM floats several features that would violate the Fourth and Fifth Amendments. Demanding that 12 million commercial vehicles install an electronic monitoring device that can track the vehicles’ whereabouts is both an unconstitutional search and an unconstitutional taking of private property. The Fourth Amendment prohibits the government’s use of technology to track people’s physical movements over time without a warrant based on probable cause to believe a crime is being committed. And the forced installation of a transponder on private property constitutes a warrantless search under the Fourth Amendment and a per se taking of private property under the Fifth Amendment.

To avoid litigation, IJ urges the Administration to heed the constitutional constraints outlined in this comment letter before it proposes a final rule that violates the privacy and property rights of the owners and operators of commercial motor vehicles.

I. BACKGROUND

The ANPRM revealed that the Administration is considering a rule that could require all commercial motor vehicles to install a unique electronic identifier that state and federal law-enforcement officers can query on demand. While the details about the device and data it stores and transmits remain undetermined, the ANPRM contemplates devices that transmit more data than just things like a vehicle's axle weight and inspection records. The ANPRM solicits feedback on what other data the device should relay to law enforcement, including whether it should reveal personal identifiable information, information specific to the driver, and GPS coordinates. The Administration also sought input on the privacy concerns it will raise if it compels the transmission of such data.

This comment letter outlines the constitutional problems that arise when the government forces people to install a transponder or other electronic monitoring device that law enforcement can query for personal identifiable information and location data for the vehicle or its driver. The installation of such a device requires a warrant under the Fourth Amendment because it physically invades the private space of commercial motor vehicles. Electronic monitoring also triggers the Fourth Amendment's warrant requirement if the device permits officers to track location data for any prolonged amount of time. Moreover, the device's physical occupation on private property for public use would violate the Fifth Amendment's prohibition on takings without just compensation.

II. THE ANPRM CONTEMPLATES SOME UNCONSTITUTIONAL FEATURES

A. The Fourth Amendment prohibits the government from using transponders to track movements

For two main reasons, a proposed rule will violate the Fourth Amendment if the Administration tries to mandate that all commercial vehicles install a device to relay personal identifiable information and location data to law enforcement.

First, the government has to get a warrant to intrude onto private property except in a few special circumstances not relevant here. *See Jones v. United States*, 565 U.S. 400, 404 (2012). Indeed, when the government encroaches into a private space to gather information, courts will find a Fourth Amendment violation regardless of whether the trespass violates the privacy a reasonable person expects. *Florida v. Jardines*, 569 U.S. 1, 11 (2013). The warrantless forced installation of electronic devices that can track the movements of commercial motor vehicles is an unconstitutional physical intrusion.

Second, any program—regardless of whether it includes a device physically affixed to a vehicle—would violate the Fourth Amendment if it permits the government to map vehicles' movements over time without a warrant based on individualized suspicion. People rightfully expect that their location data will remain private from the government because prolonged tracking can reveal intimate details by exposing patterns and habits. *See Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2016). The Fourth Amendment protects that expectation of privacy by requiring officers to get a

warrant before they can gather location data. The Administration cannot circumvent that fundamental rule and invade the privacy of commercial motor vehicles because a broader surveillance program might make it easier to enforce the agency's other regulations.

The owners and operators of commercial motor vehicles do not lose their right to keep the government from gathering their location data simply because they operate in a regulated industry. *See City of Los Angeles v. Patel*, 576 U.S. 409, 424 (2015). The narrow exception to the warrant requirement that allows for the close inspection of certain businesses applies *only* when the government has a substantial interest in conducting searches that are necessary to carrying out its regulation of inherently dangerous businesses. And even then, an administrative search requires a constitutionally adequate substitute for the rights safeguarded by the warrant requirement.

The Administration's purported interest in requiring electronic monitoring devices, as outlined in the ANPRM, is not substantial enough to justify a program that could allow for the prolonged tracking of all commercial motor vehicles. The ANPRM says that transponders could help reduce crashes because more detailed monitoring of all commercial motor vehicles might assist law enforcement in identifying higher-risk vehicles. While reducing accidents is a laudable goal, the Administration does not need to compile a record of vehicle location data to accomplish that goal. The Administration cannot disregard the privacy rights of the owners and operators of every commercial motor vehicle that operates in interstate commerce just because it thinks that having more data might in some way make its job easier.

Moreover, like a search pursuant to a warrant, an administrative search must be "carefully limited in time, place, and scope." *New York v. Burger*, 482 U.S. 691, 703 (1987). A general requirement that allows state and federal officers to track 12 million commercial motor vehicles across different industries can never satisfy the particularity and limited scope that the Fourth Amendment requires of governmental searches.

The Administration could consider a record-keeping rule that requires commercial motor vehicles to catalog their own data relevant to accidents or other incidents that implicate public safety. But if the Administration wants to request or review personal information and location data beyond that which is visible to enforcement officers on the roads or at inspection stations, it needs to get a warrant.

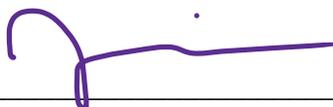
B. The forced installation of responders violates the Fifth Amendment

Requiring owners and operators to install transponders on their own vehicles and at their own expense is also an unconstitutional taking under the Fifth Amendment. A physical occupation of private property is a *per se* taking for which the government must pay just compensation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982). This rule applies no differently when the government claims that the physical occupation achieves an important public purpose or only has a minimal economic impact on the owner. By forcing owners and operators to purchase and affix a transponder to their private vehicles, the Administration will deprive them of their right to possess, use, and dispose of their private property how they want to. Even a temporary physical intrusion is a *per se* taking—the duration of the physical occupation only determines the amount of just compensation, not whether a taking occurred. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

III. CONCLUSION

IJ understands that, at the ANPRM stage, the Administration's policy is still in its infancy and not all the ideas brainstormed in the ANPRM will make it into a final rule. As the Administration considers how it can use technology to reduce accidents or achieve some other statutory purpose, however, it must do so in a way that protects the Fourth and Fifth Amendment rights of those who own and operate commercial motor vehicles.

Thank you for your consideration,



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