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# Supreme Court Decision on GPS Monitoring Provides Little Direction to Future Litigants

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In one of the most closely watched cases of the current term, the U.S. Supreme Court waded cautiously into the murky waters surrounding the application of the Constitution's prohibition on unreasonable searches to 21<sup>st</sup> century technology, for which existing Fourth Amendment case law would seem a poor fit.

In *United States v. Jones*, 132 S.Ct. 945 (2012), the Court held that the installation of a global positioning system (GPS) tracking device on a suspect's vehicle, and the use of that device to monitor the suspect's movements, was a search for Fourth Amendment purposes. However, the significance of the decision is unclear for a number of reasons.

First, the Court was unanimous in its conclusion that a search had occurred, but split sharply on the reasoning behind this conclusion. Second, the majority based its decision on notions of common-law trespass, not on the defendant's expectation of privacy, so it is not clear how it would apply, if at all, to a purported search that did not involve physical trespass onto private property. Third, the majority dealt only with the

threshold issue of whether the installation of the GPS device was a search, and did not address whether a warrant was required to conduct the search or whether the search was reasonable under the circumstances. Ultimately, *Jones* may not end up being a landmark decision in Fourth Amendment jurisprudence, but it is unquestionably the start of an interesting process through which the Supreme Court may struggle to adapt 18<sup>th</sup> century notions of privacy to 21<sup>st</sup> century technology.

The underlying facts in *Jones* are relatively straightforward. In 2004, Jones became the target of a drug trafficking investigation. As part of the investigation, the government installed a GPS tracking device on the "undercarriage" of Jones's car and tracked the car's movements for 28 days. Before trial, the defense moved to suppress evidence gathered using the GPS device, which the government claimed connected Jones to a stash house that contained vast quantities of drugs and cash. The district court granted the motion in part, suppressing any data that was collected while Jones's car was in his garage, but otherwise permitted the introduction of evidence gathered using the GPS device. Jones was subsequently convicted and sentenced to life imprisonment. On appeal, the United States Court of Appeals for the District of Columbia Circuit re-

versed the conviction, ruling that the admission of evidence gathered through the warrantless use of the GPS device violated the Fourth Amendment.

The Supreme Court affirmed the D.C. Circuit Court's decision. Writing for the Court, Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy and Thomas, with Justice Sotomayor concurring, held that the installation of the GPS device on Jones's car, and the use of the device to monitor the car's movements, constituted a search within the Fourth Amendment. Justice Scalia reasoned that, by "physically occup[ying] private property for the purpose of obtaining information," the government's installation and monitoring of the GPS device "would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."

Justice Scalia thus relied on an approach to the Fourth Amendment that many, including Justice Alito and the justices who joined his concurring opinion, thought was long dead. Specifically, Justice Scalia held that the newer "reasonable expectation of privacy" test that originated in *Katz v. United States*, 389 U.S. 347 (1967), did not eliminate the traditional "property-based approach" to Fourth Amendment law that protected individuals against government trespass for the purpose of gathering

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information. Justice Scalia reasoned that “Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20<sup>th</sup> century,” and that *Katz* did not overrule this jurisprudence but instead provided for an alternative approach. Because *Jones* could be decided under the historical, property-based approach alone, Justice Scalia held that it was not necessary to determine whether the use of the GPS device violated any reasonable expectation of privacy. For this same reason, Justice Scalia also refused to consider broader issues potentially presented by the monitoring of suspects through methods other than “traditional surveillance.”

In a concurring opinion joined by Justices Ginsburg, Breyer and Kagan, Justice Alito agreed with Justice Scalia’s conclusion, but for a completely different reason. Justice Alito rejected Justice Scalia’s reliance on what he called “18<sup>th</sup> century tort law,” and reasoned instead that the long-term monitoring of *Jones*’s car was a search because it violated reasonable expectations of privacy. Justice Alito asserted that *Katz* “did away with the old approach” that Justice Scalia relied upon, and replaced it with the reasonable expectation of privacy test, which he believed is violated whenever the government engages in long-term monitoring like what occurred in *Jones*.

Justice Alito’s reasoning did not come without certain caveats — which, according to Justice Scalia, rendered the test unworkable — including that, while “*relatively short-term monitoring* of a person’s movements on public streets” would not violate recognized expectations of privacy, “the use of *longer term* GPS monitoring in investigations of *most offenses* impinges on expectations of privacy” (emphasis added). Nonetheless, Justice Alito reasoned that a test based on a suspect’s reasonable expectations of privacy was better suited for the “vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked.”

Justices Scalia and Alito engaged

in a humorous exchange that brought Justice Scalia’s historical approach to Fourth Amendment law into stark contrast with Justice Alito’s more prospective approach. It began with Justice Alito suggesting that “it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case.” Justice Scalia responded dismissively that the installation of the GPS device on *Jones*’s car was not unlike “a constable’s concealing himself in the target’s coach in order to track its movements.” Justice Alito got the last word, however, noting that Justice Scalia’s example “would have required either a gigantic coach, a very tiny constable or both — not to mention a constable with incredible fortitude and patience.”

Justice Sotomayor provided the fifth vote for Justice Scalia’s judgment in a wide-ranging concurring opinion. In her opinion, Justice Sotomayor agreed that the case could be decided on the narrow grounds set forth in Justice Scalia’s opinion, but nonetheless expressed a willingness to join Justice Alito’s efforts to explore the impact of new technology on conventional expectations of privacy. Justice Sotomayor agreed with Justice Alito that long-term GPS monitoring would impinge on an individual’s reasonable expectation of privacy. Justice Sotomayor went further, however, and suggested that even short-term monitoring could violate reasonable expectations of privacy. Through pervasive monitoring of an individual’s movements, she reasoned that the government could “gather a wealth of detail about [the individual’s] familial, political, professional, religious, and sexual associations,” which, in turn, could “chill ... associational and expressive freedoms.”

Justice Sotomayor further questioned whether, in light of the amount of information that people willingly share with others in the digital age, it was time to “reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.” On this point, Justice Sotomayor pointedly observed

that modern-day expectations of privacy might only “attain constitutionally protected status ... if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy.” Nonetheless, these questions are, at least for now, merely academic because Justice Sotomayor did not believe the Court needed to go further than the reasoning set forth in Justice Scalia’s opinion to decide the case before the Court.

In light of these competing opinions, what should we make of the decision in *Jones* and its impact on future cases related to GPS monitoring, particularly those that do not involve a physical intrusion by the government onto private property to install the GPS device? Although it is always dangerous to try to count votes from one Supreme Court case to predict the outcome in future Supreme Court cases, it appears that there are at least five members of the Supreme Court (the four justices from Justice Alito’s concurrence plus Justice Sotomayor) who are prepared to hold that long-term GPS monitoring of an individual’s movements violates reasonable expectations of privacy. But, it appears equally clear that all of the justices, except Justice Sotomayor, are prepared to hold that short-term GPS monitoring of an individual’s movements does not constitute a search within the meaning of the Fourth Amendment.

In addition, the *Jones* decision did not decide whether the government’s monitoring of *Jones*’s movements was reasonable, or whether a warrant was required before such monitoring could be conducted because, the Court ruled, the government had waived this argument by failing to raise it on appeal below.

As a result of these open questions, the Supreme Court’s decision in *Jones* would appear to raise more issues than it answers, but it nonetheless serves as an interesting opening to what will surely be an ongoing struggle within the Supreme Court and the lower courts to apply the Fourth Amendment to new technology and the changing notions of privacy that come along with that technology. ■