

Supreme Court Limits GPS Surveillance

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On January 23, the U.S. Supreme Court announced its much awaited decision in *United States v. Jones* (No. 10-1259, 2012 U.S. Lexis 1063), which many anticipated would provide critical guidance as to whether expanding police use of GPS surveillance is limited by the Fourth Amendment's prohibition of unreasonable searches. It is, but to what extent or under what standards for constitutional analysis remains anything but certain. Rather, the several opinions open the door to further Supreme Court tests and perhaps will increase the likelihood of comprehensive legislation.

Background on Prior Proceedings

This case arose from the 2008 conviction of Antoine Jones, owner of the Levels nightclub in Washington, DC, for possession with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 USC §§841 and 846. The district court sentenced Jones to life imprisonment.

Among the issues appealed to the D.C. Circuit was whether the "police violated the Fourth Amendment prohibition of 'unreasonable searches' by tracking his movements 24 hours a day for four weeks with a GPS device they had installed on his Jeep without a valid warrant." The government asserted that Jones was part of a conspiracy to distribute drugs operating out of a house at 9508 Potomac Drive, Ft. Washington, Maryland. The Court of Appeals found that the "GPS data were essential to the Government's case" in that by "combining them with Jones's cell phone records the Government was able to paint a picture of Jones's movements that made credible the allegation that he was involved in drug trafficking." For example, the government combined phone records showing numerous calls to conspirators at the house with GPS data showing that Jones's Jeep was going to the house at the time of the

Authors

Bruce L. McDonald
Senior Counsel
202.719.7014
bmcdonald@wiley.law

calls.

The government argued that there had been no “search” within the meaning of the Fourth Amendment. It relied on the Supreme Court's decision *United States v. Knotts*, 460 U.S. 276 (1983), in which the Court held the use of a beeper device installed in a container of chemicals to aid in tracking a suspect who was driving the container to a drug lab was not a search. The Court had reasoned that a “person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” The government contended that the GPS showed no more than such movements on public streets.

Judge Ginsburg's opinion, joined by Judges Tatel and Griffith, rejected that argument. They found *Knotts* not to be controlling because the Court there had expressly reserved the question of whether a warrant would be required for “twenty-four hour surveillance.” Judge Ginsburg went on to analyze the issue in terms of whether the use of GPS had violated Jones's “reasonable expectation of privacy,” a standard derived from Justice Harlan's concurring opinion *United States v. Katz*, 389 U.S. 347 (1967), where that Court ruled that a person using a public telephone booth was entitled to Fourth Amendment protection against the police attaching a device to the booth enabling them to listen.

Judge Ginsburg distinguished extensive GPS tracking from simple movement on a public street, which is exposed to the public, reasoning that “the whole of one's movements over the course of a month is not *actually* exposed to the public because the likelihood anyone will observe all those movements is nil.” Moreover, what is revealed by one's movements over the course of a month is more than what is revealed by individual movements, a difference not of “degree but of kind.” “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.” The opinion then went on to conclude that society “recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation.”

In that context and because the data were important in proving the government's case, Jones's conviction was reversed. *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010). The government's subsequent petition for rehearing *en banc* was denied, with four judges dissenting. 625 F.3d 766 (2010).

On to the Supreme Court

Faced with what could be read as a pretty broad ruling that police use of long-term GPS surveillance requires a warrant, the government sought and obtained Supreme Court review. In the Supreme Court the parties were joined by a cloud of *amici*, producing some 13 amicus briefs, all but one of which opposed the government.

The government sought a broad ruling that GPS tracking did not constitute a Fourth Amendment search, because it involved only collecting information that had been disclosed to the public. Its supporting *amicus*, the Center on the Administration of Criminal Law, sought such a rule because it “affords law enforcement the opportunity to strategically increase its presence in communities and thereby better allocate resources, including physical surveillance teams, to matters of priority focus.”

The Respondent, Jones, raised a number of arguments, not limited to supporting the D.C. Circuit's analysis, reflecting the priority of avoiding the conviction. These included that the government's actions constituted a "seizure" as well as a "search." The numerous supporting *amici* requested a range of rulings. For example, the Rutherford Institute urged the Court to deny the government "free reign to conduct high-tech surveillance absent judicial oversight through the warranting process." The ACLU, Center for Democracy & Technology, EPIC and the Owner-Operator Independent Drivers Association separately argued that use of GPS tracking constituted a Fourth Amendment search. The Constitution Project sought a "bright-line rule that law enforcement obtain a warrant prior to conducting GPS surveillance that exceeds a twenty-four-hour period, a single trip, or mere sense-augmentation."

The Cato Institute argued that "the conversion of the vehicle to the government's purposes was a seizure and the data-gathering conducted with the surveillance-enabled car a search." The Gun Owners of America contended that "the property-based principles of the original Fourth Amendment protects against both the installation and the use of the GPS tracking device," and the Yale Law School Information Society Project Scholars argued that "use of GPS technology in this case required a warrant to 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'"

In the midst of that wide variety of perspectives and arguments, the Supreme Court issued its decision.

The Supreme Court's Decision

All nine Supreme Court Justices agreed that the government's conduct in this case constituted a Fourth Amendment search, but for different reasons. Thus, while the judgment of the D.C. Circuit was affirmed, the broader consequences of the decision are less clear.

Justice Scalia delivered the majority opinion, in which Chief Justice Roberts and Justices Kennedy, Thomas and Sotomayor joined. Their analysis did not apply the *Katz* test but instead relied on what constituted a search "within the meaning of the Fourth Amendment when it was adopted." That type of search occurred when the "Government physically occupied private property for the purpose of obtaining information." Here, "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements constitute a 'search.'"

Justice Scalia noted that the *Katz* standard had been developed to address situations where there was no trespass, but because there was a trespass here, there was no need to apply the *Katz* analysis, and the majority did not do so.

Justice Alito authored a concurring opinion joined by Justices Ginsburg, Breyer and Kagan. In their view, *Katz* "did away with the old approach" based on trespass, so that the *Katz* standard is the only standard, not one of two alternative standards. They further expressed concern that the majority's approach may imply that prolonged GPS tracking enjoys no Fourth Amendment protection in the event no trespass were involved.

Justice Alito, while preferring the *Katz* expectation-of-privacy test, found “it is not without its own difficulties,” including that it “involves a degree of circularity” and “judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks.” While suggesting that the legislature may be better suited “to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way,” Justice Alito recognized that has not happened, so “the best that we can do” is “ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.” In that context, “short-term monitoring of a person’s movements on public streets” accords with reasonable expectations of privacy but not long-term monitoring. “We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark.” And if they have trouble guessing where the line is, “the police may always seek a warrant.”

Justice Sotomayor, while joining the majority, wrote a separate concurrence in which she foresaw that with “increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner- installed vehicle tracking devices or GPS-enabled smartphones.” She agreed with Justice Alito that, “at the very least, ‘longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.’” She expressed concern that GPS tracking can reveal “a wealth of detail” about “familial, political, professional, religious, and sexual associations” in a form the government can store and mine “for information years into the future.” Moreover, “GPS monitoring is cheap” and, thus, is less constrained by limited police resources. She would “consider the appropriateness of entrusting to the Executive” a “tool so amenable to misuse.”

In that context, she foresaw the need to reconsider the Fourth Amendment tests that have been used. Specifically, “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.” However, addressing such “difficult questions in this case is unnecessary.”

So Where Do Things Stand?

Clearly the government did not get what it wanted—freedom to use GPS surveillance of the highways without Fourth Amendment restraints. While the majority holding may seem narrow, it surely will not escape notice that all 12 appellate judges who ruled on the government’s use of GPS here found it to constitute a Fourth Amendment search. Moreover, it seems clear that at least five Supreme Court Justices would be prepared in an appropriate case to find additional constitutional limits on surveillance by GPS and perhaps other emerging technologies.

At the same time, those who sought broad or bright-line constitutional rulings also were disappointed. And it appears that the Justices on today’s Court are likely to continue to rule narrowly in similar future cases. However, the expressed concern of the concurring Justices over today’s standards for analysis and their apparent hostility to the government’s use of GPS and similar technologies to engage in broad surveillance of the public seem like invitations to find more test cases, invitations that likely will not be overlooked.