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## **United States v. Jones and the Future of Privacy Law: The Potential Far-Reaching Implications of the GPS Surveillance Case**



BY DANIEL J. SOLOVE

**T**he U.S. Supreme Court's recent decision in *United States v. Jones*, No. 10-1259 (U.S. Jan. 23, 2012) is a profound decision in Fourth Amendment jurisprudence as well as in privacy law more generally. In this case, FBI agents installed a global positioning system (GPS) tracking device on Jones's car and monitored where he drove for a month without a warrant. Antoine Jones challenged the warrantless GPS surveillance as a violation of the Fourth Amendment, and the U.S. Court of Appeals for the D.C. Circuit agreed (*United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010)). Other federal circuit courts have reached conflicting conclusions on GPS, and the Supreme Court stepped in to resolve the conflict.

In an astonishing set of opinions, the Court concluded 9-0 that the installation of a GPS tracking device on a car is a Fourth Amendment search. The opinions are quite surprising, not just because they take the law in new directions from the court's existing precedent, but also because they advance some new theories of Fourth Amendment jurisprudence that might reshape

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the way it is interpreted and have reverberations throughout a much broader swath of privacy law.

### **Fourth Amendment Law Prior to *Jones***

The Supreme Court has long held that there is no reasonable expectation of privacy in public for the purposes of the Fourth Amendment. Because the Fourth Amendment turns on the existence of a reasonable expectation of privacy, the Court's logic means that the Fourth Amendment provides no protection to surveillance in public. In *United States v. Jones*, the Court was forced to confront just how far this logic can extend. Would the Court revisit its view about the lack of privacy in public given the changing capabilities of technology? Or would it follow its tortured logic to the end, and maintain its wooden and antiquated rule of no expectation of privacy in public?

On its face, the D.C. Circuit opinion appeared to clash with the Supreme Court's decision in *United States v. Knotts*, 460 U.S. 276 (1983), where the police installed a much simpler tracking device (referred to as a "beeper") on a person's car. The Court concluded that the Fourth Amendment did not apply to the beeper because a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements."

The D.C. Circuit distinguished *Knotts* because the Supreme Court noted in *Knotts* that the beeper surveillance was limited, and explicitly noted that more pervasive surveillance might be treated differently. In concluding that the Fourth Amendment requires a warrant to engage in extensive GPS surveillance, the D.C. Circuit noted that "[w]hen it comes to privacy . . . the whole may be more revealing than the parts." As the court reasoned:

It is one thing for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again the next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person's hitherto private routine.

This theory in the D.C. Circuit case—called the "mosaic theory"—avoids simplistic rules such as the oft-relied upon rule that there can be no privacy in public.

But would it be workable enough for the Supreme Court? Would the Court really distinguish *Knotts*? Would the Court finally depart from its simplistic view of no reasonable expectation of privacy in public? Would the Court finally rethink privacy in light of modern technology? These were the important questions that were swirling about the case and that had everyone waiting eagerly for the decision.

### The Court's Majority Opinion in *Jones*

The decision in *Jones* is now here, and it has many contradictory qualities. It is a very narrow decision, yet it strikes new ground in reaching its narrow conclusion. At first blush, one might think it so narrow as to be unimportant, but when read with the concurring opinions, an entirely different picture emerges.

The majority managed to sidestep most of the difficult issues. Writing for the majority, Justice Antonin Scalia bases the Fourth Amendment analysis on a property rationale that had not been used much after the reasonable expectation of privacy test became the approach to determining whether there was a Fourth Amendment search. The reasonable expectation of privacy test, first articulated by Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967), departed from the Court's previous approach for determining whether there was a Fourth Amendment search—by looking to whether there was a physical trespass to property.

The *Jones* Court notes that *Katz* shouldn't be interpreted as having the reasonable expectation of privacy test supplant and replace the physical trespass approach. Instead, the reasonable expectation of privacy test should be seen as a supplement to the physical trespass approach. By placing the GPS device on the defendant's car, the "Government physically occupied private property for the purpose of obtaining information." *Jones*, slip op. at 4. And this constitutes a "search" for the purposes of the Fourth Amendment.

Thus, after the majority opinion in *Jones*, a Fourth Amendment search occurs if there is either a privacy invasion or a trespass to property in order to obtain information.

The majority does not analyze whether there was a reasonable expectation of privacy in this case, opting instead to conclude that there was a Fourth Amendment search based on the trespass.

This is a narrow way of deciding the case, for it focuses on the attachment of the GPS device to a car and does not focus on the data involved. The location data gleaned from the GPS device could readily be obtained by issuing a subpoena to a company providing the GPS services. The Court's decision fails to address the broader issue of whether obtaining extensive location data is a search.

### The Concurring Opinions

Despite being narrow, the majority opinion is quite interesting and surprising as it revives the old property theories of the Fourth Amendment, reinvigorates them, and adds them as additional ways to find a search beyond the reasonable expectation of privacy test. But in addition to this new twist by the majority, the concurring opinions proffer an even bolder approach, one that rethinks the way the reasonable expectation of privacy

test is applied. And, interestingly, there are five votes on the Court for this new approach.

In one concurring opinion, Justice Samuel A. Alito, joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer, and Elena Kagan, rejects the property rationale of the majority and instead concludes that there was a reasonable expectation of privacy in this case. Justice Alito notes that the Court's reasoning "largely disregards what is really important (the use of a GPS for the purpose of long-term tracking) and instead attaches great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation)."

According to Justice Alito, applying the reasonable expectation of privacy test to GPS surveillance:

Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.

This passage pushes beyond the simplistic rules the Court has been using for so long when it comes to the reasonable expectation of privacy test. Justice Alito recognizes that privacy is not a simple black-and-white matter, it is not merely whether surveillance occurs in public or private spaces, but it is far more complex—it involves the quantity and quality of the surveillance.

This idea is recognized by Justice Sonia Sotomayor in her concurring opinion, and thus it has five votes. Justice Sotomayor agrees with both the majority opinion and Justice Alito's concurring opinion, and she embraces both the property theory and the privacy theory in the case. She explicitly concurs with Justice Alito in the above-quoted passage, and she even quotes from this passage. She also suggests that many other considerations should also be weighed in applying the reasonable expectation of privacy test, such as the danger of chilling speech, creating a record of one's associations, and creating risks of abuse of power. She also notes that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."

Thus, although Justice Sotomayor joins in the majority opinion, she is actually closer in her views of the Fourth Amendment to Justice Alito's concurrence. In fact, she appears willing to go beyond Justice Alito's progressive view and rethink major pillars of the reasonable expectation of privacy jurisprudence.

### The Potentially Profound Implications of *Jones*

The more contextual and open-ended view of privacy articulated by Justice Alito has five votes on the Court. This is a sophisticated view of privacy, one that departs from the antiquated notions to which the Court often has clung. If this view works its way through Fourth Amendment law, the implications could be quite profound. So many of the Court's rationales under the reasonable expectation of privacy test fail to comprehend

how technology changes the dynamic of information gathering, making it ruthlessly efficient and making surveillance pervasive and more penetrating. We might be seeing the stirrings of a more modern Fourth Amendment jurisprudence, one that no longer seems impervious to technological development.

*Jones* has implications that extend far beyond the Fourth Amendment. A considerable amount of common law, statutes, and policymaking—as well as federal constitutional law in other areas and state constitutional law—looks to Fourth Amendment jurisprudence for guidance about what constitutes privacy. Foreign law also is influenced by this jurisprudence. A new direction in the Court's thinking when it comes to privacy will likely have effects on this law, opening the door to more progressive and nuanced conceptions of privacy.

Courts have long clung to the antiquated notions that the Court has articulated, failing to see privacy in public places, viewing information exposed to others as no longer private, and so on. I have referred to this view as the “secrecy paradigm”—the notion that a privacy violation occurs only when something completely hidden is revealed.<sup>1</sup> For example, tort privacy cases involving surveillance in public have often failed because courts have concluded that there was no invasion of privacy.<sup>2</sup>

<sup>1</sup> See DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 42-44 (2004).

<sup>2</sup> See, e.g., *Furman v. Sheppard*, 744 A.2d 583, 586 (Md. App. 2000) (finding defendant not liable under intrusion upon seclusion tort for trespassing into a private club to engage in video surveillance of plaintiff because the club was not a secluded place); *Forster v. Manchester*, 189 A.2d 147, 149 (Pa. 1963) (finding no intrusion liability when private investigator

Will the recognition by five justices that long-term surveillance can constitute a privacy violation even in public change other areas of law? I think it might. Will other courts and legislatures begin to recognize that aggregating small details about a person's behavior over the course of time might upend expectations of privacy? I believe so. A majority of justices on the Supreme Court are willing to break away from the secrecy paradigm, and this fact is significant enough to spark considerable rethinking about privacy in many areas of law.

In *Katz*, the majority opinion was important, but the greatest impact stemmed from the Justice Harlan's concurring opinion. The same might be true for *Jones*. Harlan's articulation of the reasonable expectation of privacy test became the backbone of Fourth Amendment law, and the concept of a reasonable expectation of privacy spread through many other areas of law. Subsequent to *Katz*, the Court articulated views of privacy that were narrow, leading to significant criticism by commentators. But now, there are five votes for a broader understanding of privacy, one that might start having ripple effects in other areas of law.

followed and surveilled plaintiff because plaintiff was out in public).