

RELEASE IN PART
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From: Koh, Harold Hongju <KohHH@state.gov>
Sent: Tuesday, January 24, 2012 6:57 AM
To: H
Subject: Fw: United States v. Antoine Jones

----- Original Message -----

From: Harold Koh [redacted]
Sent: Tuesday, January 24, 2012 06:34 AM
To: Koh, Harold Hongju
Subject: United States v. Antoine Jones

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As you probably heard, in a landmark case for the digital era, *United States v. Jones*, the Supreme Court yesterday ruled unanimously that the police violated the Fourth Amendment when it conducts a warrantless placement of a GPS (Global Positioning System) tracking device on a suspect's car and monitors its movements for 28 days. Curiously, there were essentially two overlapping majority opinions.

In the unusual lead majority opinion, Justice Scalia, joined by Roberts, Kennedy, Thomas and Sotomayor, JJ.) held that the Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment. Curiously, the majority opinion seemed fixated on the notion of a physical government trespass on private property: "The government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." Justice Sotomayor agreed, in her separate concurrence, arguing that a search within the meaning of the Fourth Amendment occurs, at a minimum, where, as here, the Government obtains information by physically intruding on a constitutionally protected area," in this case private property.

In his concurrence for four justices, Justice Alito (joined by Ginsburg, Breyer and Kagan JJ.) criticized the physical invasion approach, saying that what matters is that "the use of longer-term GPS monitoring in investigations of most offenses,... [This] "impinges on expectations of privacy" which rose to the level of a search some time before the search went four weeks. Significantly, although Justice Sotomayor joined the majority, she effectively made clear that she would have joined Justice Alito's analysis had there been no physical intrusion, adding "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.... I, for one, doubt that people would accept without complaint the warrantless disclosure to the government of a list of every Web site they had visited in the last week, or month, or year."

This odd alignment of Justices leaves two questions unanswered.

First, does the "search" caused by installing a GPS device require a warrant? The answer may be no, given that no member of the Court squarely concludes it does and the four members of the Court who joined the Alito concurrence declined to hold that it constitutes a search at all. And second, assuming no warrant is required for installation, is a warrant required for short-term monitoring of the GPS device? Justice Alito's opinion said a warrant was required well before 28 days, but did not indicate when the constitutional requirement was triggered. Because five justices expressed discomfort with the government's use of or access to modern technologies to gather information in more public places, including video surveillance, EZ pass systems on highways, location data from cellphone towers and records kept by online vendors, Monday's decision will require significant reevaluation of many currently used law enforcement surveillance techniques, though the authorities remain free to seek warrants from judges authorizing the surveillance.

Particularly because the outcome is unanimous, the Jones case will also surely be a touchstone for future privacy cases and will inevitably come up during the ongoing discussions with the EU regarding Viviane Reding's Data Privacy Directive.