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Technology has given the police an unprecedented ability to gather information about people. With increasing frequency courts face the question of when technological monitoring without a warrant violates the Constitution. Imagine, for example, that law enforcement uses a drone to track someone's movements or to gather images of what is going on in a backyard, or even within the home. Does that constitute a search for purposes of the Fourth Amendment?

The Supreme Court has yet to begin to develop an analytical approach to deal with such situations. This should not be surprising; it took the Court a long time to enter the 20th century. The Court first considered whether wiretapping constituted a search in 1928 in *Olmstead v. United States*. The Court held that electronic eavesdropping is not a search unless police physically trespass on a person's property. In other words, it was not a search so long as the police could tap the phone without entering the home. It was not until 1967, in *Katz v. United States*, that the Court departed from this narrow approach and held that in determining whether a search had occurred the focus must be on whether there was an invasion of the reasonable expectation of privacy.

The hope is that the Supreme Court will much more quickly adapt the Fourth Amendment to the new technology of the 21st century, but its recent decision in *United States v. Jones* provides little basis for optimism. In *Jones*, the Supreme Court considered whether the police, in placing a GPS device on a person's car and tracking its movements, had violated the Fourth

Amendment when there was not a warrant authorizing this action. The case involved Antoine Jones, who the police suspected of cocaine trafficking. The investigation included visual surveillance of Jones and the area around his nightclub, the installation of a fixed camera near the nightclub, a pen register which showed phone numbers of people called or receiving calls from Jones's phone, and a wiretap for Jones's cellular phone.

Additionally, the police obtained a warrant authorizing them to covertly install and monitor a GPS tracking device on a Jeep Grand Cherokee registered to Jones's wife, but used extensively by Jones. The warrant required that the device be installed within a 10-day period and only in the District of Columbia. Police installed it on the eleventh day and while the car was in Maryland. Both sides thus agreed that this was a warrantless planting and monitoring of the device. This could turn out to be very relevant in the Supreme Court's decision: it shows that the police can easily get warrants for the use of such tracking devices.

The police used the device over a four week period. Based on all of the information gained, the police obtained and executed a search warrant and cash and drugs were found.

After Jones was indicted, he moved to suppress the information gained from the GPS tracking device. The district court held that the information gained from the movement of the car on public roads was admissible, but that any data gained from the car while it was parked in Jones's garage at home had to be suppressed. Jones was

tried and acquitted on multiple charges, but the jury could not reach a verdict on the conspiracy charge, and on that a mistrial was declared. Jones was then retried for conspiracy to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base. The GPS logs were important at trial in that they were used to link Jones to the “stash house.” This time, the jury convicted Jones of the conspiracy for which he had been indicted. The district court sentenced Jones to life imprisonment and ordered him to forfeit \$1,000, 000 in drug proceeds. The United States Court of Appeals for the District of Columbia Circuit found that the warrantless following of Jones via the GPS device was a search within the meaning of the Fourth Amendment. The Court of Appeals denied en banc review over the dissent of four justices.

I have long believed that the best predictor of whether the Supreme Court will find a violation of the Fourth Amendment is whether the justices can imagine the action happening to them. I was the confident in predicting the outcome when a justice at oral argument asked the government lawyer whether the government’s position meant that a police officer could put a GPS device on a justice’s car and track its movements. Another justice asked if it meant that a police officer could slip a GPS device in his pocket without a warrant.

The Supreme Court ruled 9-0 that placing the GPS device on Antoine Jones’ car and tracking its movements for 28 days without a warrant violated the Fourth Amendment. But the Court’s approach was remarkably unhelpful in dealing with issues of technological surveillance and the Fourth Amendment. Justice Scalia wrote a majority opinion joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor. Justice Scalia found the government’s action to violate the Fourth Amendment based on a 1765 English decision, *Entick v. Carrington*, under which the planting of the device would have been regarded as a trespass.

Justice Alito wrote an opinion concurring in the judgment – which was joined by Justices Ginsburg, Breyer, and Kagan -- in which he sharply criticized the majority’s approach. He said that the answer to when technological surveillance is a search cannot be found in 18th Century English law. He focused on the reasonable expectation of privacy and how this is violated when police track a person’s movements for 28 days without a warrant. Yet, his approach depended on how long the police used the GPS device, which makes the question of whether there is a search depend on an arbitrary distinction about time.

Justice Sotomayor interestingly joined Justice Scalia’s opinion rather than Justice Alito’s. She said that she agreed that a trespass on someone’s property – placing the GPS device on the car – was a search. Also, she likely was troubled by the arbitrary line-drawing in Justice

Alito’s approach. Justice Sotomayor emphasized the key question that the other opinions obscured: when is the government’s gathering of information about a person a search within the meaning of the Fourth Amendment? Unfortunately, *Jones* provides little guidance to an issue that is arising constantly in many different ways.

Indeed, neither the approach of Justice Scalia or Justice Alito is likely to be useful in deciding when the use of a satellite or a drone to gather information is a search within the meaning of the Fourth Amendment. Eighteenth century English law is certain to yield nothing useful for this analysis. But nor is focusing on the reasonable expectation of privacy likely to be useful. We have no expectation of privacy when we are driving on public roads; the police could have followed Jones’ movements by using undercover officers without ever needing a warrant. In *United States v. Knotts*, the Court said 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 Court needs to develop a new approach to deciding when the gathering of information about a person is a search within the meaning of the Fourth Amendment. An approach taken in California privacy law might be useful. California law creates the notion of a technological trespass. Under California law, it is an invasion of privacy to use technology to gather information that otherwise would have required a physical trespass. If what is going on inside a house is monitored using technology, but otherwise the information only could have been gained by entering the home, that should be regarded as a search within the meaning of the Fourth Amendment.

It took the Supreme Court until 1967 to recognize that wiretapping is inherently a search because it violates the reasonable expectation of privacy. The Supreme Court needs to do a much better job in dealing with the sophisticated new technology of the 21st century. Unfortunately, *United States v. Jones* offers little basis for optimism.

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