

Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice/Search and Seizure

United States v. Jones, 565 U.S. ____ (2012)

The FBI suspected Antoine Jones was a drug dealer. In 2005, federal agents obtained a warrant permitting them to install a Global-Positioning-System (GPS) tracking device on the Jeep Grand Cherokee that Jones frequently drove. While the warrant required the device be installed and used in Washington, DC, agents installed and used the device in Maryland. Based on information obtained in part by the GPS device, Jones was charged with violating federal drug laws. He was found guilty and sentenced to life in prison. The Court of Appeals for the District of Columbia reversed that decision on the ground that federal officials violated the Fourteenth Amendment when they installed the GPS device in Maryland. The United States appealed on the ground that no warrant is needed to install a GPS device in a car.

The Supreme Court unanimously ruled that Jones had been unconstitutionally convicted. Justice Scalia's majority opinion asserted that any physical invasion of a person's property for the purpose of obtaining evidence is a search that requires a warrant under the Fourth Amendment. Justice Alito's concurring opinion insisted that the warrantless use of the GPS violated reasonable expectations of privacy. What are the strengths and weaknesses of each analysis of the rights at stake when government employs GPS technologies to track suspects? What explains the unanimous judicial decision? Justice Scalia and Justice Alito frequently vote together. Why did they divide in this case?

JUSTICE SCALIA delivered the opinion of the Court.

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It is important to be clear about what occurred in this case: 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. *Entick v. Carrington* (1765). . . .

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous.

Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. *Kyllo v. United States* (2001). . . .

[I]t is quite irrelevant whether there was an 18th-century analog [to a GPS system]. Whatever new methods of investigation may be devised, our task, at a minimum, is to decide whether the action in question would have constituted a "search" within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.

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The Government . . . points to our exposition in *New York v. Class* (1986), that "[t]he exterior of a car . . . is thrust into the public eye, and thus to examine it does not constitute a 'search.'" That statement is of marginal relevance here since, as the Government acknowledges, "the officers in this case did more than conduct a visual inspection of respondent's vehicle." By attaching the device to the Jeep, officers encroached on a protected area.

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The concurrence begins by accusing us of applying “18th-century tort law.” That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide at a minimum the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply exclusively *Katz v. United States’s* (1967) reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed.

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In fact, it is the concurrence’s insistence on the exclusivity of the *Katz* test that needlessly leads us into “particularly vexing problems” in the present case. This Court has to date not deviated from the understanding that mere visual observation does not constitute a search. . . . Thus, even assuming that the concurrence is correct to say that “[t]raditional surveillance” of Jones for a 4-week period “would have required a large team of agents, multiple vehicles, and perhaps aerial assistance,” our cases suggest that such visual observation is constitutionally permissible. It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.

And answering it affirmatively leads us needlessly into additional thorny problems. The concurrence posits that “relatively short-term monitoring of a person’s movements on public streets” is okay, but that “the use of longer term GPS monitoring in investigations of most offenses “ is no good. That introduces yet another novelty into our jurisprudence. There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated. And even accepting that novelty, it remains unexplained why a 4-week investigation is “surely” too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an “extraordinary offens[e]” which may permit longer observation. What of a 2-day monitoring of a suspected purveyor of stolen electronics? Or of a 6-month monitoring of a suspected terrorist? We may have to grapple with these “vexing problems” in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.

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JUSTICE SOTOMAYOR, concurring.

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Of course, the Fourth Amendment is not concerned only with trespassory intrusions on property. Rather, even in the absence of a trespass, “a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.” In *Katz*, this Court enlarged its then-prevailing focus on property rights by announcing that the reach of the Fourth Amendment does not “turn upon the presence or absence of a physical intrusion.” As the majority’s opinion makes clear, however, *Katz’s* reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it. . . . When the Government physically invades personal property to gather information, a search occurs. The reaffirmation of that principle suffices to decide this case.

Nonetheless, as Justice ALITO notes, physical intrusion is now unnecessary to many forms of surveillance. 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. In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion’s trespassory test may provide little guidance. But “[s]ituations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis.” As Justice ALITO incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations. Under that rubric, I agree with Justice ALITO that, at the very least, “longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”

In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. The Government can store such records and efficiently mine them for information years into the future. And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility."

Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society."

I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on. I do not regard as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent "a too permeating police surveillance."

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. . . . I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection. . . .

JUSTICE ALITO, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN join, concurring in the judgment.

I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.

The Court argues—and I agree—that "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" But it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?) . . .

[T]he 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). Attaching such an object is generally regarded as so trivial that it does not provide a basis for recovery under modern tort law. But under the Court's reasoning, this conduct may violate the Fourth Amendment. By contrast, if long-term monitoring can be accomplished without

committing a technical trespass—suppose, for example, that the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car—the Court’s theory would provide no protection.

The *Katz* expectation-of-privacy test avoids the problems and complications noted above, but it is not without its own difficulties. 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. In addition, the *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.

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[R]elatively 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. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. 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. Other cases may present more difficult questions. But where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant. We also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy. In such cases, long-term tracking might have been mounted using previously available techniques.



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