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Newsroom

Sack on Supreme Court GPS Decision

Professor Emily Sack talks to Lawyers Weekly about a new U.S. Supreme Court decision on the use of GPS tracking devices by law enforcement officials.

From RHODE ISLAND LAWYERS WEEKLY: "GPS ruling breaks new ground on privacy rights" by Albert Turco and Kimberly Atkins



February 9th, 2012: After punting on the issue in the past, the U.S. Supreme Court has again waded into the choppy waters of privacy protection in the digital age in a case involving the warrantless use of a GPS device on a suspect's car.

But while still not ruling on the privacy issue directly, this time five justices gave a strong indication that individuals' privacy interests may be entitled to constitutional protection.

In *U.S. v. Jones*, the unanimous court held that the installation and use of a GPS device by police to track a car's movements constituted a search under the Fourth Amendment.

But the court was split on the basis for that conclusion. A five-member majority held that the GPS use constituted a physical trespass under centuries-old common law principles.

"It is important to be clear about what occurred in this case: The government physically occupied private property for the purpose of obtaining information," Justice Antonin Scalia wrote. "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."

But in a strongly worded concurrence joined by three other justices, Justice Samuel A. Alito Jr. argued that the court should have reached its conclusion by examining “whether respondent’s reasonable expectations of privacy were violated.”

“Ironically, the Court has chosen to decide this case based on 18th-century tort law. ... This holding, in my judgment, is unwise,” Alito wrote. “It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial.”

In what may prove to be the key opinion in the case, Justice Sonia Sotomayor — who also joined in Scalia’s trespass analysis — wrote a separate concurrence stating that privacy interests were also implicated and suggesting a willingness to engage in a privacy analysis in future cases involving advancing technologies.

“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,” Sotomayor wrote.



The nearly evenly split court illustrates the difficulty courts around the country have in applying Fourth Amendment principles to new technology, **said Emily J. Sack, a professor at Roger Williams University School of Law.**

Unanswered questions

The case was marked by some unusual twists from the outset.

As part of a broader surveillance operation, police obtained a warrant to install a GPS device on the car of suspected drug trafficker Antoine Jones. The warrant stipulated that the device be installed in the District of Columbia within 10 days. For unexplained reasons, the police waited 11 days and then installed the device in Maryland.

The device tracked Jones' travels for about a month, including trips to a suspected stash house, where police were later able to recover cash, cocaine, weapons and drug paraphernalia.

Jones was ultimately convicted of conspiracy to distribute cocaine, but the U.S. Court of Appeals for the D.C. Circuit threw out his conviction, finding that the use of the GPS device without a valid warrant violated his Fourth Amendment rights.

The Supreme Court took the case and affirmed the D.C. Circuit's ruling in a way that puts lower courts on notice that both traditional trespass principles and privacy rights can be implicated by warrantless GPS use.

But that leaves lower court judges facing a difficult task. They need to figure out what kind of warrantless GPS tracking will run afoul of Fourth Amendment principles. In Jones, the surveillance lasted a month. But what if the tracking lasts for only a matter of days or hours or minutes?

Jones "is a fact-based decision," said Andrew Pincus, a partner in the Washington office of Mayer Brown and author of an amicus brief in the case on behalf of the Center for Democracy and Technology. "How far down the spectrum does the ruling apply?"

New directions

Sack describes Jones as a preview of how the court will handle Fourth Amendment privacy rights in the years ahead.

While no justice drew a bright line between the improper warrantless GPS use identified in Jones and what the Fourth Amendment would allow, **Sack noted** that Alito cited a 1983 Supreme Court case to describe permissible warrantless tracking.

In that case, *U.S. v. Knotts*, the police used an electronic pager to follow a suspect's car on a single trip.

Sack said the court decided that the short duration of the surveillance did not implicate any privacy expectation.

However, Sotomayor distinguished between the cases, reasoning that Jones involved more sophisticated technology than *Knotts*. **Sack said** that could mean that, without a warrant, placing a tracking device on a suspect's vehicle would amount to an illegal search.

But Sotomayor's Fourth Amendment analysis went beyond physical intrusions to suggest the court reconsider the precedent that a person has no reasonable expectation of privacy in information even voluntarily shared with a third party, in the context of Internet accounts and online transactions.

As a result, **Sack said**, attorneys could cite to Sotomayor's opinion to argue that any warrantless GPS tracking violates the Fourth Amendment.

Sotomayor embraced both the trespass and privacy expectation arguments in Jones because she saw the limits of both and wanted the court to remain flexible enough to account for ever-developing technology, **Sack said**.

In contrast, Scalia's reliance on the trespass concept was an attempt to "take a step backwards" in interpreting constitutional privacy rights, **she said**.

Scalia claimed to be supplementing the reasonable expectation of privacy test of 1967's *Katz v. U.S.*, not substituting for it, but that was likely because Scalia used the Katz test himself not long ago," **Sack said**.

In 2001, Scalia wrote the opinion of the court in *Kyllo v. U.S.*, holding that police officers' use of thermal imaging to obtain details they would not otherwise have discovered without entering homes violated the Fourth Amendment based on homeowners' reasonable expectation of privacy, Sack said.

"It's hard for him to step away from the *Katz* test because of *Kyllo*," **she said**. "And I do think that Scalia's opinion raises concerns because he seems to be focusing on physical intrusion as opposed to the more important conceptual privacy concerns."

Whereas Pincus said the questions raised by Jones could spur congressional action, **Sack predicted** that the court will be on the lookout for more cases in which to continue to interpret contemporary Fourth Amendment rights.

Immediate effect

Deputy Public Defender Barbara Hurst said though she knew of no Rhode Island cases addressing the constitutionality of GPS tracking, Jones makes it clear that police need a warrant in situations in which there is "any physical touching or attaching of a GPS device to property."

But Hurst said the question of warrantless GPS tracking without any physical contact, such as monitoring someone's location via cell phone tracking, remains an open question.

Hurst said she would "certainly analogize to Jones to argue that such tracking is a violation of the Fourth Amendment," but acknowledged that the success of that argument could depend on how long police tracked a suspect.

When the court discussed the reasonable expectation of privacy, they emphasized the duration of the tracking, she noted.

Hurst added that she would be surprised to find police attempting searches without warrants in Rhode Island where Article I, Section 6, of the state constitution includes greater protections against unnecessary search and seizure than the U.S. Constitution.

“Section 6 says that all warrants have to be in writing,” Hurst said. “I think Rhode Island defense attorneys who encounter warrantless GPS tracking would be well advised to look at both constitutions.”

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