

High Court: Warrant Needed For GPS Tracking Device

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The U.S. Supreme Court ruled Monday that police must obtain a warrant from a judge before placing a GPS tracking device on a vehicle. The court's decision was unanimous, but three separate opinions on the legal rationale demonstrate that even Supreme Court justices have conflicting views of privacy in the information age.

The ruling came in the case of Washington, D.C., nightclub owner Antoine Jones, sentenced to life in prison on drug trafficking charges. In the course of investigating Jones, the FBI placed a GPS tracking device on his car. For 28 days, every time the Jeep moved it was tracked by satellite, with the information sent every 10 seconds to the FBI. The tracking led to the seizure of 97 kilos of cocaine and \$850,000 in cash.

On Monday, the Supreme Court reversed the conviction because law enforcement authorities had failed to get a valid warrant before installing the tracking device.

While the court's decision was unanimous, its reasoning was not, nor did the justices line up along the usual liberal/conservative lines. Justice Antonin Scalia, usually classified as a conservative, wrote the court's opinion, declaring that because the tracking device was physically placed on Jones' property, "at a minimum" it was a search within the original meaning of the Constitution's ban on searches of property without a warrant.

Justice Sonia Sotomayor, usually categorized as a liberal, provided the fifth vote for that rationale but suggested that in the modern information age, she may be willing to go much further.

And four justices, led by the usually conservative Justice Samuel Alito, said the property rationale makes no sense and disregards a half-century of Supreme Court doctrine. To approach the issue as a question of trespass on private property, said Alito, is simply "unwise." What matters, he said, is the reasonable expectation of privacy in a modern world.

What good is it, he asked, if a warrant is required to put a GPS device on a car for a short period, but no warrant is required when a person can be tracked for a much longer period by remote control or with aerial surveillance?

Unanswered Digital Privacy Questions

The bottom line is that at least for now, the court's decision is a narrow one and leaves open some of the most vexing privacy issues in the digital age.

Smartphones, for instance, can disclose an individual's location unless the internal locator devices are

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turned off, and email contacts are similarly recorded by providers. But today's ruling provided no definitive answers as to whether the government must obtain a warrant for access to either.

"It leaves open how the Fourth Amendment applies to cellular phones," says George Washington University law professor Orin Kerr, an expert in the field of technology and privacy. "It leaves out how the Fourth Amendment applies to email. It leaves open all these questions of high-tech surveillance that just don't happen to involve a trespass onto somebody's property."

David Kelley, who served as the top federal prosecutor in New York City during the Bush administration, said he was not surprised by the court's ruling. He said most federal prosecutors had long assumed they needed a court-authorized warrant to attach a GPS tracking device to a car. But beyond that, he said there is nothing in Monday's opinion to prevent high-tech surveillance techniques without a warrant.

"Once you choose to operate and drive out in the public, and knowing — as we all do — that there is various surveillance equipment out there, you kind of waive any sort of expectation of privacy you might otherwise have," Kelley said.

But professor Kerr says the court has quite deliberately not resolved that question.

"This is nine justices trying to figure out how does the Fourth Amendment apply in a new technological world, and the answers are really uncertain," he said.

Uniting People 'On Both Ends Of The Spectrum'

Indeed, while Justice Scalia in his opinion seemed to push for a narrow and clear line that would limit privacy claims, Justice Alito observed that the Scalia opinion "ironically" decides a 21st century case based on 18th century tort law.

And Justice Sotomayor, while signing on to the Scalia opinion, suggested that the entire framework used in the past may well be "ill-suited to the digital age." She said that because people now "reveal a great deal of information about themselves in order to carry out mundane tasks," it may be time to reconsider past decisions that allow police to get information without a warrant from third parties like phone companies or banks or email providers.

Nevertheless, in an era where "dramatic technological change" is the norm, Justice Alito said that Congress, rather than the court, is better "situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way."

Technology and privacy experts said that this is one area where Congress might in fact be able to overcome the usual partisan divide.

"You can look at this as an issue that unites some people on both ends of the spectrum: Tea Party people who worry about government intrusion into their lives, and some more traditional progressives," says Andrew Pincus, a Yale Law School lecturer who filed a brief on behalf of technology and privacy

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Professor Kerr agrees. "A lot of people think, 'Oh, it's the Roberts court. It's a conservative court. It's a pro-law enforcement court.' That's true in some cases, but it sure wasn't true today," he said. "We see here a court that is grappling with and trying to apply timeless principles of the Fourth Amendment to new technologies and seem to be looking for new answers."

"It's going to be a wild ride," he says.

Separate Ruling On California Slaughterhouses

In a separate decision released Monday, the court struck down a California law that required slaughterhouses to euthanize animals that are too sick to stand up. The ruling is a victory for the meat industry, which argued that the state law interfered with existing federal regulations.

Justice Elena Kagan, writing for a unanimous court, said that under the Federal Meat Inspection Act, the federal government has sole responsibility for slaughterhouse regulations, and the California law "runs smack into" the federal rules.

California strengthened its regulations against slaughtering nonambulatory, or "downer," animals in 2009, after an undercover video released by the Humane Society showed slaughterhouse workers "dragging, kicking, and electro-shocking sick and disabled cows in an effort to move them." The video led to the largest beef recall in American history.

Justice Kagan, however, wrote that the federal meat inspection law, enacted in 1906 after publication of Upton Sinclair's *The Jungle*, gave federal inspectors sole authority to decide what to do with downer animals, and the law prevents states from imposing "additional or different requirements."

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