

Thursday, November 10, 2011

Supreme Court Should Require Warrants for GPS Tracking

10:11 AM ET

JURIST Guest Columnist [Jim Harper](#), Director of Information Policy Studies at the [Cato Institute](#)

As technology advances — and law enforcement adapts these advancements to police work — courts will be asked to apply the Fourth Amendment's protections against unreasonable searches and seizures in new and varied situations. The Supreme Court should ensure that courts maintain oversight of Information Age policing.

In 2004, the FBI suspected Antoine Jones of dealing drugs. To verify their suspicions, agents secured a warrant allowing them to attach a GPS tracking device to Jones's car, but they attached the device after the warrant had expired, and in Maryland rather than Washington, DC, where the warrant was valid. The device monitored and recorded the car's every movement for nearly a month before law enforcement finally arrested Jones.

Can law enforcement track people's every move using high-tech devices like this without a warrant? The US Court of Appeals for the District of Columbia Circuit [found that the FBI's action was unconstitutional](#) because it violated Jones's "reasonable expectation of privacy" — the two-part Fourth Amendment standard developed in the landmark 1967 case of [Katz v. United States](#). The "reasonable expectation of privacy" doctrine holds that if a person has an actual, subjective expectation of privacy and that expectation is one society is prepared to accept, then the Fourth Amendment protects the object of that expectation. The court found that the long-term round-the-clock GPS surveillance, even of a vehicle always on public roads and in locations readily observable by a cop on the street, was qualitatively different than a temporary stakeout or other conventional surveillance. The government asked the Supreme Court to [review the case](#), and the Court has agreed, adding the issue of whether installing the GPS device was itself a Fourth Amendment violation, quite apart from the monitoring.

The Court should take this opportunity to strengthen Fourth Amendment protections by

finding unconstitutional the government's continuous and long-term tracking of someone's vehicle without a valid warrant, but not because it violates our "reasonable expectations of privacy." That language — which has dominated this area of law for over 40 years — is from the solo concurrence of Justice John Marshall Harlan, and it is a misinterpretation of *Katz* that has proven unworkable. The "reasonable expectation" test reverses the original focus of the Fourth Amendment, which asks whether government action, not private ordering, is reasonable.

The majority holding in *Katz* found constitutional protection for information because the defendant had shielded others from learning the information the government wanted to acquire and use. This is the standard that the Court should apply. If information is private — if the general public does not have access to it — law enforcement stands in the same shoes as everyone else. Using over-the-top technologies to deprive people of the privacy they have created in their lives is a search, and that kind of searching is unreasonable unless a judge has approved of it.

In this case, the government did not just collect information that was out there; it created data where none existed before, taking measurements at multi-second intervals of the whereabouts of their suspect for weeks. Nobody in the general public tracks anybody down to that much detail — except for stalkers. When service providers like cell phone companies do, it comes with contractual promises and regulations that keep information private.

The Court can simplify this area of law a great deal. Fourth Amendment protection should not be measured by "expectations," but by straightforward factual questions. Was the information available to the general public? Did the defendant take appropriate steps to shield information from the public and thus government agents, including relying on the physics, law and economics that keep information obscure?

A fascinating element of the case is the question of whether the government could convert Jones's vehicle into a surveillance system by attaching a GPS device to it. Doing so deprived Jones of an essential property right — the right to exclude others. Imagine if the Court does not recognize this as a seizure of property. Law enforcement might drop radio frequency identification tags in every coat pocket at a restaurant and learn through scanning these microchips on successive occasions who was at the restaurant and how

often they return.

Even if the Court continues to adhere to the "reasonable expectations of privacy" test, it should recognize the sanctity of Jones's property and find that surreptitious, highly intrusive surveillance using unfamiliar technologies like GPS is unconstitutional without a warrant.