NATIONAL REVIEW ONLINE

Big Brother GPS?

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November 8, 2011

Does the Fourth Amendment prohibit warrantless GPS surveillance?

Suspecting that Antoine Jones was dealing drugs, the FBI attached a global-positioning-system device to his car in a public parking lot — without his knowing. And, beginning in September 2005, it tracked his movements at all hours of the day for four weeks — without a warrant. Sure enough, the data showed that Jones, a resident of Washington, D.C., had frequented a stash house in Maryland. The bureau brought charges, and a federal jury convicted Jones of drug trafficking.

But Jones appealed, citing that oft-forgot middle child of the Bill of Rights, the Fourth Amendment. Warrantless GPS surveillance constituted an "unreasonable search" under the Constitution because "it [involved] a uniquely intrusive technology that [operated] by converting an individual's vehicle into a satellite-data transceiver at the government's service," Jones's lawyers argued. Luckily for them, the U.S Court of Appeals for the D.C. Circuit agreed.

Writing for the majority, Judge Douglas Ginsburg overturned Jones's conviction. True, Ginsburg acknowledged, the Supreme Court had held that "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements," but 24-hour surveillance was of a different nature. "A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups — and not just one such fact about a person, but all such facts," Ginsburg wrote.

Today, the Supreme Court is hearing oral arguments in the case *United States v. Jones*. Although conservative and libertarian scholars expect the government to win, they are divided over the proper victor.

The division stems from the fact that Fourth Amendment jurisprudence is hazy. The rule by which the Court determines whether a search is reasonable supposedly comes from Justice John Harlan's concurrence in the 1967 case, *Katz v. United States.* "There is a twofold requirement," Harlan wrote. "First that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

The notion that nine unelected judges are to discern our societal understanding of privacy makes Jim Harper, director of information-policy studies at the Cato Institute, queasy. (Cato has filed an amicus brief in favor of Jones.) "The best way to make the case against the government is to think about what the rule would be if the government were to win," Harper explains. "Law enforcement could go into a restaurant — let's say they thought the people in the restaurant were Mafiosi — and they could drop GPS chips into their coats to figure out who was in the restaurant and where they went."

Prof. Daniel Solove, author of *Nothing to Hide: The False Tradeoff Between Privacy and Security*, concurs. "The real question is: Do you want law enforcement to be able to stick a GPS device on your car and monitor your movements 24/7 for forever without any kind of judicial supervision?"

Orin Kerr, professor of law at George Washington University, however, disagrees. "I'm a Burkean conservative on these sorts of issues. I would clarify current law, but I would not adopt a brand new strategy."

On the popular blog Volokh Conspiracy, Kerr has pointed out the difficulties with the D.C. circuit court's approach. "In Fourth Amendment law, stuff inside — inside homes, inside cars, inside packages, and hidden from public view — is generally protected," Kerr wrote in an August 2010 post. "In contrast, stuff outside — stuff exposed to the public — is not protected." But in this instance, the court ruled that observing "stuff exposed to the public" for a prolonged period of time was unconstitutional. How are policemen to determine when they've crossed the line? "One month of surveillance is too long, the court says. But how about 2 weeks? 1 week? 1 day? 1 hour? I have no idea," Kerr wrote.

Yet Harper sees a way around this obstacle. In its brief, Cato calls the installation of the GPS device an "unreasonable seizure," for it appropriates a person's car for the government's purpose: surveillance. Solove, meanwhile, resists the temporal distinction entirely. "I would just say it's impermissible to start with. Before you turn on the GPS device, you get a warrant."

Solove acknowledges, however, that his preferred method of interpretation would require the Court to move more boldly than it has in the past. The question for the Court in every case, he says, is "Are you going up to the plate to do a bunt or are you going to actually swing the bat? And most of the time this court goes to bunt."

What's constitutional isn't necessarily what's desirable. It's merely the minimum amount of freedom guaranteed by the document. For instance, the Supreme Court found in *Smith v. Maryland* that it was constitutional for the government to reference a person's "pen register" — that is, the telephone company's catalog of calls from his number — without a warrant. After the Court so ruled, Congress enacted legislation requiring law enforcement to seek judicial permission for such requests. It could set a similar example here.