



Too much government surveillance

By NAT HENTOFF

February 1, 2012

I was thrilled to see this headline on the American Civil Liberties Union's website after the Supreme Court's unanimous Jan. 23 ruling on *United States v. Jones*: "Supreme Court GPS Ruling: Bringing the 4th Amendment Into the 21st Century" (aclu.org, Jan. 26). Wow!

And this dramatic praise from Marcia Hofmann, the senior staff attorney for leading digital civil liberties protector, the Electronic Frontier Foundation:

"The Supreme Court has unanimously confirmed that the Constitution prevents unbridled police use of new technologies to monitor our movements" ("Unanimous Supreme Court Ensures Americans Have Protections From GPS Surveillance," eff.org, Jan. 23).

Do you hear that, President Obama?

But as soon as I read Justice Antonin Scalia's decision, I knew the Supreme Court had committed no such all-encompassing attack on how George W. Bush, Dick Cheney and Barack Obama have turned us into a society constantly under surveillance by the government.

First, let's look at the actual case: In 2005, a joint FBI and Washington, D.C., police task force covertly placed a Global Positioning System (GPS) device on Antoine Jones' Jeep, which was parked in a public lot in Maryland. For four weeks, the GPS, using satellites, allowed the authorities to continuously monitor Jones' actions and movements as he drove his Jeep.

From what the authorities learned from the GPS's tracking, Jones was arrested and charged with conspiracy to distribute cocaine. Justice Scalia, joined by colleagues John Roberts, Anthony Kennedy, Clarence Thomas and Sonia Sotomayor, declared in the court's decision: "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."

Scalia is notably proud of being an "originalist" -- relying on the language of the Constitution when our founders were here. Accordingly, he adds that he is applying in this case "an 18th-century guarantee against unreasonable searches."

However, Justice Samuel Alito, in a concurring opinion with the three other justices, argues that "it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case ... the use of longer-term GPS monitoring in investigations of most offenses impinges on expectations of privacy."

All four justices maintain that the familiar "expectation of privacy" involves much more than government infringement of our private property rights.

Strongly agreeing with Alito, the Rutherford Institute's president, John W. Whitehead, an incisively alert constitutionalist, reminds us:

"The government's arsenal of surveillance technologies now includes a multitude of devices which enable it to comprehensively monitor an individual's private life without necessarily introducing the type of physical intrusion into his person or property covered by the (Jones) ruling" ("U.S. v. Jones: The Battle for the Fourth Amendment Continues," rutherford.org, Jan. 23).

Scalia did not ignore Alito's reminder of the century we live in, but he tried to have the high court postpone doing anything about it, saying: "It may be that achieving the same result through electronic means without an accompanying trespass (on private property) is (also) an unconstitutional invasion of privacy, but the present case does not require us to answer that question."

What about those of us who still care about our privacy, sir, which is increasingly limited by so many other means?

Justice Sotomayor, one of the justices to concur with the court's ruling, gently chides Scalia, writing:

"People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the email addresses with which they correspond to their Internet service providers; and the books, groceries and medications they purchase to online retailers.

"I, for one," she continues, "doubt that people would accept without complaint the warrantless disclosure to the government of a list of every website they had visited in the last week, or month, or year" -- without the government having physically occupied their property.

A growing number of Americans and I would like to ask Justice Scalia and his four "let's stop here" colleagues why they're waiting to rule on our expectations of privacy in this century and others to come.

To those who are greatly overstating the significance of this decidedly limited U.S. v. Jones decision, I bring back John W. Whitehead, who does not mince his words:

"We have entered a new and frightening age when advancing technology is erasing the Fourth Amendment. Thankfully, in recognizing that the placement of a GPS device on Antoine Jones' Jeep violated the Fourth Amendment's protection against unreasonable search and seizure, the U.S. Supreme Court has sent a resounding message to government officials -- especially law enforcement officials -- that there are limits to their powers" ("Victory: In 9-0 Ruling in U.S. v. Jones, U.S. Supreme Court Declares Warrantless GPS Use by Police Unconstitutional," rutherford.org, Jan. 23).

But it's not "a resounding message." In reporters' parlance, U.S. v. Jones is now a dead story. I'm not aware of any urgency on either side in Congress to address our Fourth Amendment expectations of privacy in such a way that will exceed the private property essence of U.S. v. Jones.

We know that President Obama, if re-elected, is tone-deaf on reviving the Fourth Amendment and certain other parts of the Bill of Rights, not to mention the separation of powers. (Obama, after all, was the government in this case.) And, watching the endless Republican presidential candidates' debates, I've not sensed any deep concern among them, with the exception of Ron Paul, about the flickering remnants of our personal privacy.

Next week, John W. Whitehead (despite calling this particular ruling "a resounding message") and others detail the frightening ways that swiftly advancing technology is tracking us far beyond the personal property limits on government surveillance in U.S. v. Jones.

Have you asked your children what their expectations of privacy are? How many of them can tell the compelling, tumultuous history of the Fourth Amendment since the 18th century? Shouldn't they know?

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