

## U.S. V. Jones: The Battle for the Fourth Amendment Continues

Written by John W. Whitehead  
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In a unanimous 9-0 ruling in *United States V. Jones*, the U.S. Supreme Court has declared that police must get a search warrant before using GPS technology to track criminal suspects. But what does this ruling, hailed as a victory by privacy advocates, really mean for the future of privacy and the Fourth Amendment?

While the Court rightly recognized that the government's *physical* attachment of a GPS device to Antoine Jones' vehicle for the purpose of tracking his movements constitutes a search under the Fourth Amendment, a careful reading of the court's opinion, written by Justice Antonin Scalia, shows that the battle over our privacy rights is far from over.

Given that the operable word throughout the ruling is "physical," the ruling does not go far enough. The court should have clearly delineated the boundaries of permissible surveillance within the context of rapidly evolving technologies and re-establishing the vitality of the Fourth Amendment. Instead, the justices relied on an "18th Century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted."

As Justice Samuel Alito recognizes in his concurring judgment, physical intrusion is now unnecessary to many forms of invasive surveillance. The government's arsenal of surveillance technologies now includes a multitude of devices that enable it to comprehensively monitor an individual's private life without necessarily introducing the type of *physical* intrusion into his

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person or property covered by the ruling. Thus, by failing to address the privacy ramifications of these new technologies, the court has done little to curb the government's ceaseless surveillance of innocent Americans.

In the spirit of the Court's ruling in *United States V. Jones*, the following surveillance technologies, now available to law enforcement, would not require government officials to engage in a physical trespass of one's property to engage in a search:

**Drones** – pilotless, remote-controlled aircraft that have been used extensively in Iraq, Afghanistan and Pakistan – are being used increasingly by domestic law enforcement. Law-enforcement officials promise to use drones to locate missing children and hunt illegal marijuana plants, but under many states' proposed rules, they could also be used to track citizens and closely monitor individuals based on the mere suspicions of law-enforcement officers. The precision with which drones can detect intimate activity is remarkable. For instance, a drone can tell whether a hiker eight miles away is carrying a backpack.

**Surveillance cameras** are an ever-growing presence in American cities. A member of the surveillance-camera industry states that "pretty soon, security cameras will be like smoke detectors: They'll be everywhere." The cameras, installed on office buildings, banks, stores, and private establishments, open the door to suspicion-less monitoring of innocent individuals that chill the exercise of First Amendment rights. For example, the New York Police Department has adopted the practice of videotaping individuals engaged in lawful public demonstrations. The government also uses traffic cameras as a form of visual surveillance to track individuals as they move about a city. In some areas, a network of traffic cameras provides a comprehensive view of the streets. In 2009, Chicago had 1,500 cameras set up throughout the city and actively used them to track persons of interest.

**Smart dust devices** are tiny wireless micro-electromechanical sensors that can detect light and movement. These "motes" could eventually be as tiny as a grain of sand but will still be capable of gathering massive amounts of data, running computations and communicating that information using two-way band radio between motes as far as 1,000 feet away. The goal for researchers is to reduce these chips from their current size of 5 millimeters to a size of 1 millimeter per side. In the near future, law-enforcement officials will be able to use these tiny devices to maintain covert surveillance operations on unsuspecting citizens.

**RFIDs**, Radio Frequency Identifications, have the ability to contain or transmit information

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wirelessly using radio waves. These devices can be as small as a grain of rice and can be attached to virtually anything, from a piece of clothing to a vehicle. If manufacturers and other distributors of clothing, personal electronics, and other items begin to tag their products with RFID, any law-enforcement officer armed with an RFID reader could covertly search an individual without his or her knowledge.

**Cell phones**, increasingly, contain tracking chips that enable cellular providers to collect data on and identify the location of the user. The collected geodata is stored on the device, anonymized with a random identification number, and transmitted over an encrypted Wi-Fi network to the cell-phone provider. It is reasonable to expect that government will eventually attempt to tap the troves of information maintained by these cell-phone providers.

**Collection of Wi-Fi Data:** Recently, a professor at Stevens Institute of Technology invented for a mere \$600 an aerial drone that can spy on even private Wi-Fi networks. The drone the professor created was a mere 18 inches long. Such a device could be used to detect financial information, personal correspondence, and any other data transmitted over the wireless network. Coupled with the visual component of the aerial drones, these drones will be capable of detecting almost all intimate or personal activity.

**Facial-recognition software** is another tool in police forces' surveillance arsenal in which police take a photograph of a person's face, then compare the biometrics to other photographs in a database. Such a system can easily be placed onto the back of a smart phone and only weighs 12.5 ounces. Facial-recognition software is currently being used in conjunction with public-surveillance cameras at airports and major public events to spot suspected terrorists or criminals. Cities such as Tampa have attempted to use this technology on busy sidewalks and in public places.

**Iris scanners** have quickly moved from the realm of science fiction into everyday public use by governments and private businesses. Iris recognition is rarely impeded by contact lenses or eyeglasses, and can work with blind individuals as well. The scanners, which have been used by some American police departments, can scan up to 50 people a minute without requiring the individuals to stop and stand in front of the scanners. The introduction of sophisticated iris scanners in a number of public locations, including train stations, shopping centers, medical centers, and banks in Leon, Mexico, is merely a foreshadowing of what is coming to the U.S. The information gathered from the scanners is sent to a central database that can be used to track any individual's movement throughout the city.

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As this list shows, the current state of technology enables government agents to monitor unsuspecting citizens in virtually any situation. One of the hallmarks of citizenship in a free society is the expectation that one's personal affairs and physical person are inviolable so long as one conforms his or her conduct to the law. Otherwise, we are all suspects in a police state. Any meaningful conception of liberty encompasses freedom from constant and covert government surveillance – whether that intrusion is physical or tangible and whether it occurs in public or private. Thus, unchecked technological surveillance is objectionable simply because government has no legitimate authority to covertly monitor the totality of a citizen's daily activities. The root of the problem is not that government is doing something inherently harmful, but rather that government is doing something it has no lawful basis to be doing.

Unfortunately, by failing to establish a Fourth Amendment framework that includes protection against pervasive electronic spying methods that are physically unintrusive and monitor a person's activities in public, the court has ensured that the core values within the Fourth Amendment will continue to be fundamentally undermined. New technologies that enable the radical expansion of police surveillance operations require correspondingly robust legal frameworks to maintain the scope of freedom from authoritarian oversight envisioned by the Constitution's framers.

Obviously, the new era of technology, one that was completely unimaginable to the men who drafted the Constitution and the Bill of Rights, requires an updated legal code to enshrine the right to privacy. The courts, first of all, must interpret the Fourth Amendment protection against unreasonable search and seizure as a check against GPS technology as well as future technologies that threaten privacy. Second, as Justice Alito recognized, "the best solution to privacy concerns may be legislative. A legislative body is well-situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." I would take that one step further and propose that Congress enact a technological Bill of Rights to protect us from the long arm of the surveillance state. This would provide needed guidance to law-enforcement agencies, quell litigation, protect civil liberties including cherished First Amendment rights, and ensure the viability of the Fourth Amendment even at the dawn of a new age of surveillance technology.

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