



## The Supreme Court, GPS Darts & George Orwell

By Christopher Hopkins, Chair, Law Practice Technology Committee

The case of *U.S. v. Jones* is set for oral argument before the U.S. Supreme Court this month and may resolve whether police may physically attach a GPS transmitter on a person's car to track its movements for an extended period – without a warrant. If so, taken to an extreme, could the government then track all cars? The *New York Times* proclaimed that the Orwellian conundrum in *Jones* was “the most important Fourth Amendment case in a decade.” Is 2011 the new 1984?

Before we dive into the fractious argument of totalitarianism versus anonymity, take the following quiz regarding, “the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...” Constitutional scholars, criminal law attorneys, and fans of *The Wire* may have an advantage. *Can this be done without a warrant? Answer “true” or “false.”*

1. Police may implant a transmitter in a container to track its movements along a 100+ mile trip across state lines.
2. Police may install and monitor a device attached to the outside of a public phone booth which can overhear the person inside.
3. Police may use thermal imaging of a house to detect radiating heat as evidence of a drug “grow house.”
4. Police may search trash bags left at the curbside of a house.
5. In an area with normal air traffic, police may not circle above a Florida house to look for marijuana growing in the backyard.
6. Border patrol police may squeeze luggage in an overhead bus rack to determine whether it contains a “brick” of drugs.
7. True or False: Only Spiderman has the ability to shoot a miniature GPS-enabled dart with a glue adhesive at a moving vehicle to track its location.
8. Police may record the telephone numbers dialed from a person's phone.
9. Police may briefly detain a person whom they reasonably suspect is involved in criminal activity.
10. There is no presumption that a warrant is required, unless infeasible, for a search to be reasonable.

If you responded “true” to 1, 4, 8, and 9 (your score being “1984”) then you are likely as sharp as the 80% who passed the recent July bar exam.

In the pending case, the High Court will hear about the largest cocaine bust in the history of the District of Columbia which was accomplished through surveillance enhanced by GPS. Specifically, police physically implanted a GPS transmitter on the suspect's car while it was parked in public and then tracked its travels on public roadways for a month. Ultimately, that led to evidence of a conspiracy to distribute drugs since the suspect was tracked traveling to/from a drug lab.

The pertinent issues in warrantless GPS-search-and-seizure cases appear to include: (1) whether the physical touching of

the car to implant the transmitter is permitted, (2) the duration of the surveillance, (3) whether police obtained information beyond the car's travels on public roadways, and (4) the proper interpretation of the phrase “dragnet-type law enforcement practices” used in *U.S. v. Knotts*. In that case, the Court held that a transmitter attached to a canister of chemicals did not violate a person's reasonable expectation of privacy when it was transported on a single-but-lengthy trip.

In *Jones*, however, the issue of GPS surveillance is further complicated beyond the facts of *Knotts* since the GPS was transmitting for a month. The U.S. Court of Appeals for the D.C. Circuit distinguished a “discrete journey” from “prolonged surveillance,” finding that “unlike one's movements during a single journey, the whole of one's movements over the course of a month is not *actually* exposed to the public because the likelihood anyone will observe all those movements is effectively nil.” Moreover, the D.C. Court held, the “whole of one's movements” creates a “mosaic” which reveals more than short-term surveillance. The underlying case, *U.S. v. Maynard*, is here: <http://bit.ly/qBkAnk>

Advocates for GPS surveillance note that the technology merely enhances (or simplifies) the same information which prolonged visual surveillance might provide and that people on public roads have no reasonable expectation of privacy regarding their movements. Detractors voice the concern that lengthy GPS surveillance enables a Big Brother scenario where citizens' daily lives can be recorded through our routine travels.

On rehearing, the D.C. Court did not decide whether reasonable suspicion or probable cause would have allowed the use of GPS and further denied that its decision had called into question the viability of prolonged traditional surveillance. The dissenting judges averred that there was no difference between *Knotts* and *Jones* except “the volume of information obtained is greater.” That order is here: <http://bit.ly/p8vepf>

The Government's Petition to the U.S. Supreme Court for a Writ of Certiorari and Jones' Opposition can be found here: <http://bit.ly/oRNpEk> To follow the briefing schedule, the Court's docket is here: <http://bit.ly/nrSrx8>.

In the *Times*' article, “Court Case Asks if ‘Big Brother’ is Spelled GPS,” it is suggested that “judges around the country have been citing George Orwell's ‘1984’ to sound an alarm.” While arguably true, a quick search in FastCase reveals that only a surprising few Florida court opinions reference Orwell, who himself was once a police officer. For further reading, consider the recent Fourth District Court of Appeal decision in *Tracey v. State of Florida*, involving the use of cell site location information to track a person's cell phone, <http://bit.ly/ocjg4G>

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