Supreme Court Holds that Warrantless "Trespass" in Placement of GPS Device on Vehicle Constitutes an Unreasonable Search Violative of the Fourth Amendment

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The Chinese Year of the Dragon started with a bang as the Supreme Court issued a much anticipated ruling in this Fourth Amendment case that was neither brave nor innovative. In *United States v. Antoine Jones* the Court chose to affirm the district and circuit courts' Fourth Amendment ruling on extremely narrow grounds. Left for another day is the question of the durational limits of covert electronic law enforcement monitoring of a criminal suspect's public movements. Fourth Amendment connoisseurs who were expecting a blockbuster decision defining the breadth of a person's privacy rights in the "digital age" must be disappointed.

Essentially, the five member plurality, consisting of Scalia (writing for the majority), Thomas, Roberts, and Kennedy, with Sotomayor concurring, held that the warrantless placement of a GPS device on a suspect's vehicle violated the Fourth Amendment in that the suspect Jones' right of privacy was violated when the federal agent's "trespassed" by attaching the GPS device to his vehicle in an attempt to gather information. The majority rejected an analysis of the Fourth Amendment claim under the "reasonable-expectations-of-privacy" test set forth in *Katz v. United States*, 389 U.S. 347, 351 (1967) as unnecessary when the Government here has "engage[d] in physical intrusion of a constitutionally protected area in order to obtain information," quoting from the concurring opinion in *Katz.*

Both Sotomayor, a former federal prosecutor, and the Justices who concurred in the result (Alito, Ginsberg, Breyer and Kagan) would have found that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." As such, Sotomayor, and the result concurring minority, would consider whether to reject as inconsistent with the digital age, the previously established principal in *Katz* that "an individual has no reasonable expectation in information voluntarily disclosed to third parties." Justice Alito, also a former federal prosecutor, writing in a separate concurrence, concluded that under the *Katz* approach, the GPS tracking "involved degree of intrusion that a reasonable person would not have anticipated" because the vehicle's movements were monitored continuously for four weeks. For Alito, this duration "surely crossed" the "reasonable expectation of privacy line." While Alito suggests that state and federal legislation is the best solution to define privacy concerns, he acknowledges the potential impracticability of such legislation given the constant state of technological change and that most states and Congress "have not enacted statues regulation the use of GPS tracking technology for law enforcement purposes." It is a least curious that the two former federal prosecutors on the bench would have chosen to apply an amorphous and undefined durational standard (with 4 weeks constituting a bright line for Justice Alito) for law enforcement officers to decipher when using digital surveillance techniques. Such squishy

standards usually are anathema to the police who seek well defined and reliable evidence gathering rules to guarantee subsequent admissibility.

So where does all this leave law enforcement? Plainly, durational search warrants will have to be obtained before officers affix electronic surveillance to a suspect's property. More vexing for law enforcement officers, however, will be what to do in instances where long term electronic monitoring does not involve a trespass. Will affixing a pole camera on public property impinge upon an individual's reasonable expectation of privacy simply because it is capable of secretly monitoring, for an indeterminate period, every movement and the comings and goings of a suspect on his property and possibly revealing his political and religious beliefs and sexual habits, now require a warrant? Absent congressional or state legislative action (which seems unlikely) that question, and others like it, will continue to occupy the time of courts, prosecutors and defense attorneys at least until the issue is again visited by the Supreme Court.