High Court Hears Argument in GPS Fourth Amendment Case

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In August 2010, a unanimous panel of the U.S. Court of Appeals for the D.C. Circuit ruled that if police wish to attach a GPS device to a criminal suspect's car without a warrant, they first need to go to a judge and obtain a warrant based on probable cause.

The act of attaching such a device to a vehicle, the court said, is a "search" that requires a warrant under the Fourth Amendment because this type of surveillance is so pervasive and invasive that no one would have a reasonable expectation that it would occur. At the time, we expressed agreement with the appeals court's ruling, and we continue to hold that view.

On November 8, 2011, the U.S. Supreme Court heard argument on this important case, in which 21st-century technology came face to face with the constitutional requirements of the Fourth Amendment. The case is *United States v. Jones,* No. 10-1259, and grows out of the placing by D.C. police of a GPS tracker on the Jeep Cherokee belonging to Antoine Jones, then a nightclub owner in the District of Columbia. The surveillance led to the seizure of 97 kilograms of cocaine and $850,000 in cash, but the D.C. Circuit threw out the conviction.

The justices did not seem to tip their hand for either side in the argument, asking difficult questions both to the attorney from the U.S. solicitor general's office who argued in favor of the surveillance and to the lawyer for the arguing in favor of Jones.
Justice Samuel Alito put the question very clearly early in the argument: "It seems to me the heart of the problem that's presented by this case and will be presented by other cases involving new technology is that in the pre-computer, pre-Internet age much of the privacy . . . that people enjoyed was not the result of legal protections or constitutional protections; it was the result simply of the difficulty of traveling around and gathering up information."

"But with computers," Justice Alito continued, "it's now so simple to amass an enormous amount of information about people that consists of things that could have been observed on the streets, information that was made available to the public. . . . So how do we deal with this? Do we just say, well, nothing is changed, so that all the information that people expose to the public – is fair game? There is no search or seizure when that is obtained, because there isn't a reasonable expectation of privacy?"

Michael Dreeben of the SG's office replied that this case actually does not involve a "particularly dramatic change," and that if society wishes to deal with GPS surveillance directly, the remedy would be in the passage of legislation.

Later, in response to vigorous questioning by the Justices, Stephen Leckar, arguing for Jones, said, "I think the workable rule and the simplest rule that should be adopted is this. I think the Court should say to the law enforcement agency: You came here looking for a rule; we are going to give you a rule. If you want to use GPS devices, get a warrant, absent exigent circumstances or another recognized exception to the Fourth Amendment."

Leckar's view continues to make sense to us. It is very difficult, based on the argument, to predict what the high court will actually do.

Crime in the Suites is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

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