



## High Court: Police Tracking of Suspect Via GPS Requires Warrant

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Last November, we discussed the U.S. Supreme Court's oral argument in *United States v. Jones*, which posed the question of whether police need to obtain a warrant before attaching a GPS device to a suspect's vehicle during a criminal investigation.

[We noted that in this case, 21st-century technology had come face to face with the constitutional requirements of the Fourth Amendment.](#) We were hoping that the high court would uphold the U.S. Court of Appeals for the D.C. Circuit and hold that this action is a search that requires a warrant, but we took a pass on predicting what the Court would actually do.

On January 23, 2012, the Court decided the case – unanimously against the government and in favor of defendant Antoine Jones. The decision is fairly gratifying for those of us who believe it desirable to curb prosecutors' power by imposing restrictions upon it, including, where appropriate, the requirement of a judge-issued warrant.

It turns out that both the advocates of the original-intent approach to constitutional interpretation, epitomized here and in general by Justice Antonin Scalia, and those who prefer the doctrine of the "living Constitution," led here by Justice Samuel Alito, agree that the use of a GPS device by the government constitutes a search and requires a warrant.

Scalia, writing for a majority of the Justices, observed that prosecutors had intruded upon Jones' property in way that would have been a "trespass" under common law.

Prosecutors "physically occupied private property for the purpose of obtaining information," Scalia wrote. "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." And for Scalia, that fact alone was enough to decide the case.

Alito, joined by three Justices who concurred in the result, used quite a different line of reasoning and sharply criticized Scalia's majority opinion, saying that ironically, it relied upon 18th-century tort law to decide a case involving 21st-century technology.



“This holding, in my judgment, is unwise,” Alito wrote. “It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial.”

Instead, Alito wrote, he “would analyze the question presented in this case by asking whether [Jones’] reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.” Alito observed that for decades, the Court has invoked the concept of “reasonable expectations of privacy” in a number of cases to define the nature of a “search” under the Fourth Amendment and to expand the definition of “search” to actions that do not involve a trespass to someone’s property.

Even though Alito is often identified with the pro-prosecution, conservative wing of the Court, he took the defendant’s side in this case. As our blog post last November noted, at oral argument Alito expressed concern about how easy it is these days “to amass an enormous amount of information about people” by the use of today’s technology.

Alito’s opinion followed similar lines. In the absence of legislation about police use of GPS tracking, he wrote, “The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.”

This is good news for constitutional rights and for defendants. Whatever approach one takes to the Fourth Amendment, it’s clear that prosecutors can’t attach a GPS to a suspect’s car without a warrant.

*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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