

SYMPOSIUM ISSUE[†]

A REASONABLENESS APPROACH TO SEARCHES AFTER THE *JONES* GPS TRACKING CASE

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In the oral argument this fall in *United States v. Jones*,¹ several Supreme Court Justices struggled with the government's view that it can place Global Positioning System (GPS) tracking devices on cars without a warrant or other Fourth Amendment limit. Chief Justice Roberts asked: "You think there would also not be a search if you put a GPS device on all of [the Justices'] cars, monitored our movements for a month?"² (The lawyer for the government said yes.) Justice Breyer remarked: "[I]f you win this case, then there is nothing to prevent the police or the government from monitoring 24 hours a day the public movement of every citizen of the United States."³ He added: "[I]f you win, you suddenly produce what sounds like 1984 . . ."⁴

Perhaps not surprisingly in light of these questions, on January 23, the Supreme Court voted unanimously that, given the circumstances presented in the case, a search had indeed occurred. The Justices split badly, however, on their reasoning. Five Justices held that it was the physical attachment of the device to the car that constituted a search under the Fourth Amendment. Four Justices

[†] The Privacy Paradox: Privacy and Its Conflicting Values.

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1. *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *cert. granted sub nom. United States v. Jones*, 131 S. Ct. 3064 (June 27, 2011) (No. 10-1259).

2. Transcript of Oral Argument at 9, *United States v. Jones*, 565 U.S. __ (2012) (No. 10-1259).

3. *Id.* at 13.

4. *Id.*

concluded in the judgment, finding instead that it was a search because it violated the defendant's reasonable expectation of privacy.

The split in the Court revealed ongoing uncertainty about the broader questions raised in the *Jones* argument—particularly regarding how “to prevent the police or the government from monitoring 24 hours a day.” *Jones* could be decided narrowly because the case involved a physical intrusion of a defendant's car. Much of modern surveillance, however, occurs without any similar type of physical intrusion. The unanswered questions from the *Jones* argument thus suggest that the Court is seeking a new, as-yet unarticulated way to constrain police and government discretion to conduct unprecedented surveillance.

The proposal here is that the answer lies in addressing what the Supreme Court in *Delaware v. Prouse* called “standardless and unconstrained discretion,”⁵ and what Justice Sotomayor called “unfettered discretion” in her concurrence in *Jones*.⁶ Supreme Court precedent contains powerful methods for limiting this sort of discretion, primarily in the second step of Fourth Amendment analysis. The first step, and the focus of the dueling opinions in *Jones*, concerns the definition of what constitutes a “search or seizure.” The second step, once a “search or seizure” exists, is to define its reasonableness. The thesis here is that the reasonableness doctrine offers the best opportunity to respond to the Justices' concern about unconstrained discretion in high-tech searches. Longstanding precedents under this doctrine require “minimization” of intrusive surveillance and procedural checks against standardless or discriminatory surveillance.

A. Background

In *Jones*, the police placed a physical GPS device on the defendant's car. As is often the case with electronic surveillance, the police had time to get a warrant in advance, but the police went outside the scope of the warrant that was issued. The GPS device recorded the car's movements for over a month. *Jones* challenged the constitutionality of the tracking, and the D.C. Circuit upheld the challenge, finding that the extent of surveillance in the case invaded the defendant's reasonable expectation of privacy.

On appeal, the government argued that no search or seizure existed. The car was moving on public roads, the government emphasized, and there was no intrusion into the limited private zones where the Fourth Amendment applies, such as a home, the interior of a car, or a person's telephone calls. Earlier cases had found no search or seizure when government agents looked through a person's garbage, trespassed onto open fields behind a home, or placed an electronic beeper on a physical container (except where the container happened to

5. *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

6. *United States v. Jones*, No. 10-1259, slip op. at 4 (U.S. Jan. 23, 2012) (Sotomayor, J., concurring).

go into a house).⁷ For the government, the case was simple—the car was in “public,” thus no Fourth Amendment limits applied to tracking the car.

The Supreme Court unanimously affirmed, but with three distinct options. Justice Scalia, who wrote for Chief Justice Roberts and Justices Kennedy, Sotomayor, and Thomas, focused on the physical attachment of the GPS device to the vehicle. Justice 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.”⁸

Justice Alito, writing for Justices Breyer, Ginsburg, and Kagan, emphasized the “reasonable expectation of privacy” test for a search first enunciated in *Katz v. United States*.⁹ Without providing any detailed guidance to lower courts about where lines should be drawn, Justice Alito concluded: “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.”¹⁰

Justice Sotomayor, in her concurrence, expressed concerns about the risks created by “the Government’s unrestrained power to assemble data” and its “unfettered discretion” to track individuals, which potentially “may ‘alter the relationship between citizen and government in a way that is inimical to democratic society.’”¹¹ Resolution of such difficult questions in the *Jones* case was unnecessary, however, because “the Government’s physical intrusion on Jones’ Jeep supplie[d] a narrower basis for decision.”¹²

B. *The Two Steps of Fourth Amendment Analysis*

The briefs and decisions in *Jones* focused on the first step of Fourth Amendment analysis, defining where a “search or seizure” takes place. By contrast, the best answers to the problem of unfettered discretion exist at the second step, the safeguards that should apply once a court determines that a “search or seizure” exists.

All nine Justices agreed that a “search” existed on the *Jones* facts. Interestingly, none of the decisions explicitly stated what sort of procedures were thus required to make such a search “reasonable” under the Fourth Amendment. The civil libertarian position has long focused on the Warrant Clause, which states, “no Warrants shall issue, but upon probable cause, supported by Oath or af-

7. *California v. Greenwood*, 486 U.S. 35, 40 (1988) (garbage bags); *United States v. Karo*, 468 U.S. 705, 713 (1984) (beeper on items when not in a residence); *Oliver v. United States*, 466 U.S. 170, 176 (1984) (open fields).

8. *Jones*, slip op. at 4 (majority opinion).

9. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

10. *Jones*, slip op. at 13 (Alito, J., concurring in the judgment).

11. *Jones*, slip op. at 3-4 (Sotomayor, J., concurring) (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

12. *Id.* at 6.

firmation, and particularly describing the place to be searched, and the persons or things to be seized.”¹³ Some “searches,” however, do not require warrants under existing case law. For instance, the mechanism of court review of new technologies could be similar to that for a *Terry* stop, the brief detention of a person by police based on reasonable suspicion. For *Terry* stops, the initial decision about reasonableness is made by law enforcement officials. The role of the courts is to review the reasonableness of the police behavior after the fact. The existence of a “search,” therefore, does not compel a particular finding about how constitutional reasonableness is enforced.

Whatever happens at the first step, the Court should rely on the Fourth Amendment’s general prohibition on “unreasonable searches and seizures.” I argue that standardless and unconstrained discretion in surveillance such as GPS tracking is unreasonable and thus violates the Fourth Amendment. This approach articulates a clear doctrinal basis for addressing the concerns expressed at oral argument by multiple Justices, and by Justice Sotomayor in her concurrence.

C. Defining “Reasonableness” for High-Tech Searches

The Supreme Court has emphasized the importance of procedural regularity under the Fourth Amendment in a line of cases that involves police stops of automobiles. In *Delaware v. Prouse*, the state argued that police could stop automobiles at their discretion, much as the government in *Jones* argued that police can place tracking devices on automobiles at their discretion. The Supreme Court in *Prouse* found these sorts of “standardless and discretionary” stops to be unreasonable under the Fourth Amendment, at least absent a reasonable suspicion about a particular automobile or individual. In the wake of *Prouse*, the Supreme Court upheld sobriety checkpoints in *Michigan Department of State Police v. Sitz*¹⁴ and immigration checkpoints in *United States v. Martinez-Fuerte*.¹⁵ Importantly, the checkpoints in both cases were operated under detailed rules that constrained police discretion. Indeed, criminal law scholars Bernard Harcourt and Tracey Meares unify recent Fourth Amendment reasonableness jurisprudence around a two-part requirement: “the amount of suspicion underlying a search or seizure” and “the extent of evenhandedness law enforcers employ when engaging in searches and seizures.”¹⁶ This approach precisely tracks what I am suggesting in the wake of *Jones*—a trigger for defining a “search” as well as protections against standardless and discretionary actions.

13. U.S. CONST. amend. IV.

14. 496 U.S. 444 (1990).

15. 428 U.S. 543 (1976).

16. Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 815 (2011).

Minimization is a second doctrinal area under the Fourth Amendment that addresses standardless discretion in surveillance. In the classic case of *Berger v. New York*, the Supreme Court struck down a state wiretap statute for failing to minimize the scope of surveillance.¹⁷ The statute failed to describe with particularity the conversations sought, and the Court stated: “As with general warrants this leaves too much to the discretion of the officer executing the order.”¹⁸ The Court’s concern with unconstrained discretion also applied to the length of time for the wiretap and standardless extensions of the time limit, concluding: “In short, the statute’s blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures.”¹⁹ After *Berger*, minimization requirements were included in federal statutes authorizing both law enforcement and national security wiretaps, and they apply as well in other areas, such as listening to prisoners’ conversations with their attorneys.

Along with the checkpoint and minimization precedents, I have previously written in some detail about the jurisprudential basis for applying procedural regularity under the Fourth Amendment to high-tech searches.²⁰ That discussion draws on a variety of sources to explain why courts appropriately should require such procedures, including the scholarship of Akhil Amar and Anthony Amsterdam and the Supreme Court’s own decisions concerning both law enforcement and national security wiretaps. I also highlight how the European Union has required this sort of procedural regularity in its own decisions about high-tech surveillance. Under Article 8 of the European Convention on Human Rights, surveillance must be done “in accordance with the law,” which roughly means that standards must be formulated in advance for the conduct of the surveillance. Interpretation of the European Convention, of course, is not direct authority for interpretation of the Fourth Amendment; nonetheless, it is striking that other major democracies have found it workable to insist on the creation of reasonable procedures as an integral component of high-tech surveillance.

For nonphysical surveillance after *Jones*, such as the GPS cellphone tracking discussed by Justice Alito, reasonable procedures could address factors such as the time period of surveillance, its intrusiveness, minimization procedures, and other measures to cabin the risk of standardless and unconstrained discretion. The Supreme Court would not need to describe the precise procedures. Instead, the mechanism of judicial review could track that which is currently used for *Terry* stops, where courts review the reasonableness of the police behavior after the fact. Similarly, the reasonableness of procedures for GPS tracking or other searches would be assessed by law enforcement initially. Courts would test that reasonableness only in a concrete case, after surveillance was conducted pursuant to the procedures.

17. *Berger v. New York*, 388 U.S. 41 (1967).

18. *Id.* at 59.

19. *Id.* at 60.

20. Peter P. Swire, *Katz Is Dead. Long Live Katz*, 102 MICH. L. REV. 904 (2004).

CONCLUSION

At oral argument in *Jones*, the Justices seemed to be seeking a path between the civil libertarian hope for a warrant for each use of high-tech surveillance and the government's position that the Fourth Amendment simply does not apply to vast swathes of modern life. *Jones* has attracted so much attention due to the realization that the GPS tracking there is only one instance of many new surveillance techniques that are coming into use due to new technology. Much of the new surveillance occurs without the physical intrusion that the majority found dispositive in *Jones*. The Court, in no small part through its questions in the *Jones* argument, has signaled the need for a more general and principled way to assess new technologies under the Fourth Amendment.

The automobile stop and minimization precedents show how the problem of standardless and unconstrained discretion has been addressed previously in Fourth Amendment case law. Effective procedures for a type of surveillance can and should be crafted in advance. Where a prior judicial warrant is not required, "reasonableness" should still be required of police officers at the time of the action, and then tested after the fact by judicial scrutiny. Failure to craft procedures will often not be reasonable, nor will failure to comply with established procedures.

This approach not only addresses the historic concern about general searches, but also fits well with the problems posed by new surveillance technologies. GPS tracking is merely one example of a new technology or system for gathering and processing information about individuals. Reasonable measures for these technologies should exist to provide the "adequate judicial supervision or protective procedures" that the Court announced as a Fourth Amendment requirement in *Berger*.