

SCOTUS AND GPS TRACKING: US V. JONES AND SECRET PATRIOT

As I read the transcript of the SCOTUS hearing in the US v. Jones yesterday, I was most interested in what the comments suggest about the government's secret use of the PATRIOT Act to—presumably—use phone geolocation to track people. (Here's Dahlia Lithwick, Orrin Kerr, Julian Sanchez, Lyle Denniston, and Kashmir Hill on the hearing itself.)

Mind you, the facts in Jones are totally different from what we think may be happening with Secret PATRIOT (I'll borrow Julian Sanchez' speculation on what Secret PATRIOT does for this post). In Jones, a suspected drug dealer had a GPS device placed on his car after the 10-day warrant authorizing the cops to do so had already expired. As such, Jones tests generally whether the government needs an active warrant to track a suspect using GPS.

Whereas with Secret PATRIOT, the government is probably using Section 215 to collect the geolocation data from a large group of people—most of them totally innocent—to learn whom suspected terrorists are hanging around with. Not only does Secret PATRIOT probably use the geolocation of people not suspected of any crime (Section 215 requires only that the data be relevant to an investigation into terrorists, not that the people whose records they collect have any tie to a suspected terrorist), but it collects that information using a device—a cell phone—that people consensually choose to carry. Moreover, whereas in Jones, the government was tracking his car in “public” (though Justice Sotomayor challenges that to a degree), Secret PATRIOT probably tracks the location of people in private space, as well. Another significant difference is that, in Jones, the government is doing the tracking themselves; in Secret PATRIOT they probably get tracking data under the guise

of business records from cell phone companies.

Nevertheless, the concerns expressed by the Justices seem to be directly relevant to Secret PATRIOT. After all, Chief Justice Roberts almost immediately highlighted that the government's argument—that the use of GPS to track cars on public streets was not a search and therefore it did not need probable cause to use it on anyone—meant that the government could also use GPS trackers on the Justices themselves.

CHIEF JUSTICE ROBERTS: You think there would also not be a search if you put a GPS device on all of our cars, monitored our movements for a month? You think you're entitled to do that under your theory?

MR. DREEBEN: The justices of this Court?

CHIEF JUSTICE ROBERTS: Yes.

(Laughter.)

MR. DREEBEN: Under our theory and under this Court's cases, the justices of this Court when driving on public roadways have no greater expectation

CHIEF JUSTICE ROBERTS: So your answer is yes, you could tomorrow decide that you put a GPS device on every one of our cars, follow us for a month; no problem under the Constitution?

[snip]

CHIEF JUSTICE ROBERTS: Well, then you're -you're moving away from your argument. Your argument is, it doesn't depend how much suspicion you have, it doesn't depend on how urgent it is. Your argument is you can do it, period. You don't have to give any reason. It doesn't have to be limited in any way, right?

MR. DREEBEN: That is correct, Mr. Chief Justice.

And that possible application is mighty interesting given that it seems—if Sanchez’ guess on Secret PATRIOT is right—that the government did with this case what they did with Paul Clement in *Hamdi* and Ted Olson in *In re Sealed Case*, which is to send a lawyer before the courts who was compartmented out of and therefore ignorant of key details on the government’s counterterrorism program. After all, if he knew the government is currently tracking innocent people’s location in their homes, Deputy Solicitor General Michael Dreeben probably would not have suggested that the government couldn’t use a GPS tracker in a place where a person had a reasonable expectation of privacy.

JUSTICE KENNEDY: Well, under that rationale, could you put a beeper surreptitiously on the man’s overcoat or sport coat?

MR. DREEBEN: Probably not, Justice Kennedy; and the reason is that this Court in *Karo v. United States* – *United States v. Karo* –specifically distinguished the possibility of following a car on a public roadways from determining the location of an object in a place where a person has a reasonable expectation of privacy.

And he probably would not have suggested that SCOTUS had carved out Fourth Amendment protection for the interior of people’s homes (though Justice Ginsburg’s emphasis on third party involvement—the government’s use of phone company records, which is what we think the government is doing in Secret PATRIOT—would effectively limit that privacy right).

JUSTICE GINSBURG: But it – it is a third party involved in the telephone – in the pen register case. And here, it’s the police. Essentially, I think you answered the question that the government’s position would mean that

any of us could be monitored whenever we leave our – our homes, so the only thing secure is the home. Is – I mean, this is – that is the end point of your argument, that an electronic device, as long as it's not used inside the house, is okay.

MR. DREEBEN: Well, we are talking here about monitoring somebody's movements in public. We are not talking about monitoring their conversations, their telephone calls, the interior of their cars, their private letters or packages. So there are enclaves of Fourth Amendment protection that this Court has recognized.

This tension is most explicit when Justice Sotomayor lays out where this is logically heading.

JUSTICE SOTOMAYOR: You're – you're now suggesting [i]n answer to Justice Kennedy's question, which is it would be okay to take this computer chip, put it on somebody's overcoat and follow every citizen everywhere they go indefinitely. So – under your theory, and the theory espoused in your brief, you could monitor and track every person through their cell phone, because today the smartphones emit signals that police can pick up and use to follow someone anywhere they go. Your theory is so long as the – that all -that what is being monitored is the movement of person, of a person, they have no reasonable expectation that their possessions will not be used by you. That's really the bottom line –

MR. DREEBEN: I think that –

JUSTICE SOTOMAYOR: – to track them, to invade their sense of integrity in their choices about who they want to see or

use their things. That's really argument you're making.

MR. DREEBEN: Well, Justice Sotomayor, I think that that goes considerably farther than our position in this case, because our position is not that the Court should overrule *United States v. Karo* and permit monitoring within a private residence. That is off limits absent a warrant or exigent circumstances plus probable cause.

But therein lies the tension in this case. Justices Roberts, Breyer, Sotomayor, and Kagan all raised explicit concerns about the GPS tracking of innocent people which would seem to say that—whatever they think of the GPS use in this case, which involved a criminal suspect—they would vehemently object to the government's presumed use of Secret PATRIOT. Ginsburg and Kennedy seemed offended by that possibility too, though in ways the government could exploit to justify their program (because Ginsburg appealed to the use of third party records and Kennedy focused on the consensual aspect of carrying a tracking device).

What a few of the Justices—Scalia and Breyer most explicitly—seem most inclined to do is to throw this back to Congress for guidance.

But therein lies the problem. Justice Breyer envisions the problem with this kind of tracking that the government is probably already doing with Secret PATRIOT.

JUSTICE BREYER: Start with the other end. Start, what would a democratic society look like if a large number of people did think that the government was tracking their every movement over long periods of time. And once you reject that, you have to have a reason under the Fourth Amendment and a principle.

But at the same time he seems inclined to trust

Congress to provide guidelines on when the government can use GPS.

JUSTICE BREYER: Can you take it to Congress the other way? I mean, can you say that a general search of this kind is not constitutional under the Fourth Amendment, but should Congress pick out a subset thereof, say the – terrorism or where there is reasonable cause or like the FISA court or special courts to issue special kinds of warrants, that that's a different question which we could decide at a later time? That's a negative way of – I mean that way favors you in the result, but I've – I've been looking for if there is a way of going to Congress to create the situations where they can do it, rather than the situations where they can't.

But in doing so, Breyer gets us precisely where DOJ claims we currently are: with Congress having approved Secret PATRIOT, and in the name of reasonable searches in the name of terrorism, searching, potentially, everyone.

The outcome of this is really unclear: the government has a sound argument, but a clear majority of the Justices seem offended by the implications of their argument (and even Scalia objects on more narrow grounds).

Yet it also seems clear that a majority of Justices also object to the very idea that seems to be realized in Secret PATRIOT. But at the same time, they seem most likely to write a decision—sending this back to Congress in some fashion—that will get us precisely where we are, with Congress approving, by not disapproving, of the second-hand GPS tracking (through phone records) of just about anyone.

Update: In a post calling for Congress to act regardless of what SCOTUS decides, Ron Wyden emphasizes the Secret PATRIOT questions that won't be answered with this ruling.

A police department, for example, might not have the resources to follow everyone that lives within a city block for a month, but they can request every resident's cell phone location history, or place tracking devices on all of the residents' cars.

[snip]

The Supreme Court is being asked to decide the fate of Antoine Jones, who was convicted of drug conspiracy charges after federal agents used a tracking device to follow him to a house where drugs and money were kept. In all likelihood, the Court will settle the narrow question of whether or not government agents need to get a warrant before installing a tracking device on a suspect's car. And the justices may also consider whether government-installed GPS tracking devices require warrants in general. But what about all of the other questions that the Supreme Court won't be considering?

What about the use of similar tracking devices by private citizens? A government agent may or may not have to get a warrant to track a suspect, but is it illegal for a stalker to place a tracking device on a young woman's car? Right now the law isn't clear.

What if instead of installing a tracking device, a government agent (or a private citizen) secretly uses a person's cell phone or GPS navigation device to ascertain that person's location? Is a warrant required for that? If so, should there be different rules for real-time tracking and getting records of someone's past movements?

More broadly, when should a cellular company give law enforcement access to a customer's geolocation records? What if

instead of giving law enforcement access to its customers' location records, that cellular company wants to sell those records to another company? What are the rules then? [my emphasis]