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Supreme Court Divided on Fundamental Privacy Rights in the Information Age

In its first case dealing with communications technology since a narrow opinion on government "alphanumeric pagers" was issued in June of 2010, the Supreme Court on Monday published a series of concurring opinions in *U.S. v. Jones*.[1] The Court's reluctance to address emerging technologies, which was clearly stated in the aforementioned case (*City of Ontario v. Quon*),[2] appears to be eroding. Here, the Court has offered three contrasting opinions seeking to answer not just the legality of the GPS tracking in question, but the very essence of Fourth Amendment rights in the Information Age.

Justice Scalia's majority opinion (joined by Chief Justice Roberts, Justice Thomas, Justice Sotomayor, and Justice Kennedy) concludes that common law dating back as far as 1765 provides a sufficient basis for the Court to rule in this case that: the attachment of the GPS tracking unit constituted a physical trespass to private property and, at a minimum (as most of the Justices agreed), trespass to private property and the failure to issue a warrant violated the Fourth Amendment. At the same time, however, Justice Scalia notes that "property rights are not the sole measure of Fourth Amendment violations," leaving the door open for future restrictions on advanced electronic surveillance that may not require physical contact or proximity. The opinion is largely consistent with the caution expressed in *Quon* (which, curiously enough, was not cited by any of the Justices), but in contrast, expresses a willingness to consider evolving societal expectations of high-tech privacy.

Justice Sotomayor, in her concurring opinion, agrees with the majority that a physical trespass by law enforcement violates the Fourth Amendment. However, there is an additional sense of urgency and concern in her questioning of whether "people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on," and a warning that this type of monitoring may threaten to "alter the relationship between citizen and government in a way that is inimical to democratic society." Moving beyond GPS issues, Justice Sotomayor also expressed her disagreement with what has been a foundational element of U.S. Internet jurisprudence: that information "voluntarily disclosed to third parties" is no longer private, something the Justice called "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."

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[1] *U.S. v. Jones*, --- S.Ct. ----, 2012 WL 171117 (2012).
[2] *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010).

The coalition of Justice Alito (who authored the third opinion), Justice Ginsburg, Justice Breyer, and Justice Kagan, sharply criticizes the majority's traditional property-based approach. Despite Justice Scalia's assurances that the Fourth Amendment will not be limited by property rights, Justice Alito notes the pronounced difficulty that courts have had with applying traditional notions of property, boundaries and trespass to computer systems. Instead, he and the concurring Justices favor the more modern approach for analyzing Fourth Amendment rights: asking whether the subject of a search or seizure has a "reasonable expectation of privacy." In this case, Justice Alito opined, the length of the tracking (four weeks), the amount of data reported, and the novelty of gathering evidence with a small electronic device in lieu of squad cars and aerial surveillance, in the absence of a valid warrant, all weigh in favor of finding a violation of the Fourth Amendment. Justice Scalia notes in the majority opinion that this type of analysis is case-specific and somewhat amorphous, which begs the question of whether the Supreme Court can realistically analyze and annunciate "reasonable" privacy expectations every time new information technology is developed.

In light of this drawback to a case-by-case approach, Justice Alito's opinion strongly urges the legislature to craft a comprehensive legal framework for privacy in the Information Age. This appeal to Congress, the unique alignment of the Justices, and the willingness to venture far beyond the facts of the case all indicate that the Court recognizes that a societal transformation is underway. The disagreement is what to do in response to that transformation: do we act with restraint, adapt existing jurisprudence, or establish an entirely new legal regime?

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