

9-19-2012

## Eighteenth Century Law, Twenty-First Century Problems: Jones, GPS Tracking, and the Future of Privacy

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### Recommended Citation

Lauren Millcarek, *Eighteenth Century Law, Twenty-First Century Problems: Jones, GPS Tracking, and the Future of Privacy*, 64 Fla. L. Rev. 1101 (2012).

Available at: <http://scholarship.law.ufl.edu/flr/vol64/iss4/7>

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CASE COMMENTS

EIGHTEENTH CENTURY LAW,  
TWENTY-FIRST CENTURY PROBLEMS:  
*JONES*, GPS TRACKING, AND THE FUTURE OF PRIVACY

*United States v. Jones*, 132 S. Ct. 945 (2012)

*Lauren Millcarek*\*

In 2004, law enforcement officers began investigating Antoine Jones, a Washington, D.C. nightclub owner, for suspected drug trafficking.<sup>1</sup> After gathering information through stakeouts, cameras, and a wiretap on Jones' phone, the officers obtained a warrant to place a Global Positioning System (GPS) tracker on Jones' wife's car, which Jones possessed and used regularly.<sup>2</sup> However, the officers failed to comply with the precise terms of the warrant,<sup>3</sup> making the installation and use of the tracker warrantless. The officers tracked the car's every movement, twenty-four hours per day, for an entire month.<sup>4</sup> The data linked Jones to a stash house containing a great deal of cash and cocaine.<sup>5</sup>

Based partially on this evidence, the Government charged Jones in the U.S. District Court for the District of Columbia with conspiracy to distribute and possess cocaine.<sup>6</sup> Jones moved to suppress the GPS tracking evidence.<sup>7</sup> The trial court granted Jones' motion in part: it suppressed the tracking evidence obtained while the car was parked at his house, but it admitted the evidence obtained while he was driving.<sup>8</sup>

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\* J.D. 2012, University of Florida Levin College of Law; B.A. 2009, University of Florida. I thank the members and staff of the *Florida Law Review*, with whom it was a pleasure and privilege to have worked for the past two years. I am truly honored to have a piece published in this distinguished journal.

1. *United States v. Jones*, 132 S. Ct. 945, 948 (2012).

2. *Id.* The Court briefly determined that there was no standing issue regarding Jones' status as only a user and not the owner of the car. *Id.* at 949 n.2.

3. *Id.* at 948. The warrant allowed for the tracker to be placed on the car in D.C. and within ten days of the warrant's issue. However, the officers placed the tracker in Maryland and on the eleventh day. *Id.* The Government conceded that the officers did not comply with the warrant. *Id.* at 948 n.1.

4. *Id.* at 948. The tracker produced 2,000 pages of data over the course of twenty-eight days. *Id.*

5. *Id.* at 948–49. By “great deal,” I mean more than three-quarters of a million dollars in cash and nearly 100 kilograms of cocaine. *Id.*

6. *Id.* at 948.

7. *Id.*

8. *Id.* This split ruling was based on the law created by the beeper tracker cases, which held that tracking an item's movements on public roads was not a search, but tracking an item into the privacy of a home was a search. *See United States v. Knotts*, 460 U.S. 276, 281, 285

The trial resulted in a hung jury, but when Jones was indicted again on the same charges, he was convicted and sentenced to life in prison.<sup>9</sup>

The U.S. Court of Appeals for the District of Columbia Circuit reversed the conviction, reasoning that the warrantless search violated the Fourth Amendment.<sup>10</sup> The circuit court denied an en banc rehearing, and the U.S. Supreme Court granted certiorari.<sup>11</sup> The issue in the case was whether the installation of the GPS device on the car and the use of the device to monitor the car for a month was a “search” within the ambit of the Fourth Amendment.<sup>12</sup> The unanimous<sup>13</sup> Court answered that question in the affirmative, holding that the attachment coupled with the use of the GPS device was a “search.”<sup>14</sup> The Court did not, however, answer the larger question as to whether the use, by itself, of GPS trackers was constitutionally permissible; but the concurring opinions point to where the Court may soon end up on that issue.<sup>15</sup>

To answer the very narrow question on which it actually based its decision, the Court resorted to some very old jurisprudence: trespass doctrine. This doctrine was first created in the 1928 case of *Olmstead v. United States*,<sup>16</sup> in which the defendants violated Prohibition by conspiring to “import, possess and sell” alcohol.<sup>17</sup> Federal officers warrantlessly wiretapped the defendants’ telephones from outside their houses, without physically trespassing onto the defendants’ property; the conversations intercepted by the wiretaps led to the defendants’ arrests.<sup>18</sup> The Court held that because there was no trespass—that is, no “actual physical invasion” of the defendants’ property—there was no Fourth Amendment search.<sup>19</sup>

This doctrine persisted for nearly forty years, until *Olmstead* was overruled by *Katz v. United States*.<sup>20</sup> In *Katz*, the defendant was

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(1983); *United States v. Karo*, 468 U.S. 705, 715–18 (1984). For a fuller discussion of *Knotts*, see *infra* notes 34–40 and accompanying text.

9. *Jones*, 132 S. Ct. at 948–49.

10. *Id.* at 949.

11. *Id.*

12. *Id.* at 948.

13. The decision was unanimous, but there were three separate opinions: a five-Justice majority opinion written by Justice Antonin Scalia, a concurrence written by Justice Sonia Sotomayor (who also joined the majority), and a concurrence in judgment written by Justice Samuel A. Alito and joined by the three other Justices in the minority. See *infra* notes 41, 53, 68.

14. *Jones*, 132 S. Ct. at 949.

15. See *infra* notes 82–84 and accompanying text.

16. 277 U.S. 438 (1928), overruled by *Katz v. United States*, 389 U.S. 347 (1967).

17. *Id.* at 455.

18. *Id.* at 456–57.

19. *Id.* at 466.

20. 389 U.S. at 347.

convicted of placing interstate telephone bets.<sup>21</sup> He made the bets from a public phone booth, without knowing that federal agents had attached an electronic listening device to the outside of the booth, without physically entering into it.<sup>22</sup> The appellate court affirmed the defendant's conviction on the basis of *Olmstead* because no physical trespass had occurred.<sup>23</sup> The Supreme Court reversed, holding that because the defendant sought to preserve the privacy of his conversation by entering and closing the door of the phone booth,<sup>24</sup> rather than "knowingly expos[ing the conversation] to the public,"<sup>25</sup> the conversation was protected and a Fourth Amendment search occurred when the agents intercepted it.<sup>26</sup> The Court emphasized that "the Fourth Amendment protects people, not places,"<sup>27</sup> and so "[t]he fact that the electronic device employed to achieve [the interception of the private conversation] did not happen to penetrate the wall of the booth can have no constitutional significance."<sup>28</sup> Therefore, the Court overruled *Olmstead* and stated that "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion,"<sup>29</sup> apparently laying the trespass doctrine to rest.

The concurrence by Justice John Marshall Harlan II formed the real takeaway<sup>30</sup> from *Katz*.<sup>31</sup> He set forth a two-pronged test for determining when a Fourth Amendment search occurs, which came to be the prevailing standard: first, the defendant must have "an actual (subjective) expectation of privacy," and second, that expectation must "be one that society is prepared to recognize as 'reasonable.'"<sup>32</sup> Because the defendant in *Katz* clearly expected his conversation to be private (as

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21. *Id.* at 348.

22. *Id.*

23. *Id.* at 348–49.

24. *Id.* at 352.

25. *Id.* at 351.

26. *Id.* at 359.

27. *Id.* at 351. The argument between the Government and the defendant in *Katz* was actually focused on another issue: whether the phone booth was a constitutionally protected area. *Id.* Because the Court decided that it was the private conversation conveyed by the person that was protected, not the space itself, that question was never answered. Ironically, the reinvigoration of trespass doctrine by the Court in the instant case has again raised the (as-yet unanswered) question of whether a phone booth is considered a constitutionally protected place.

28. *Id.* at 353 (emphasis added).

29. *Id.*

30. It is worth noting that Justice Harlan read the *Katz* majority opinion to hold "that electronic *as well as* physical intrusion into a place" may be a search. *Id.* at 360 (Harlan, J., concurring) (emphasis added). While many may have believed that the overruling of *Olmstead* and the language of the majority opinion in *Katz* closed the book on the trespass doctrine, Justice Harlan's language suggests otherwise and, in that sense, left the page marked, allowing the doctrine to be later revitalized.

31. *Id.*

32. *Id.* at 361.

he shut the door to the phone booth), and society would generally agree that a phone booth “is a temporarily private place whose momentary occupants’ expectations of freedom from intrusion are recognized as reasonable,” a search had occurred.<sup>33</sup>

*United States v. Knotts*<sup>34</sup> clarified the *Katz* test as it applied to the use of electronic tracking devices. In *Knotts*, police placed a beeper tracker<sup>35</sup> into a tub of chloroform that was then sold to the defendant; the tracker was placed in the tub before purchase with the seller’s consent.<sup>36</sup> The police tracked the tub (and its accompanying vehicle) over public roadways to the defendant’s cabin, where he was running a meth lab.<sup>37</sup> The Court held that “[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”<sup>38</sup> The movements of the tub and the vehicle were visible to anyone and “voluntarily conveyed” to the public;<sup>39</sup> so, the Court reasoned, the tracking of these movements did not violate any “legitimate expectation of privacy” and did not constitute a search under *Katz*.<sup>40</sup>

Coming into the instant case, it appeared as if the *Katz* “reasonable expectation of privacy” formulation would decide the issue of whether the installation and use of the GPS tracker was a search; after *Knotts*, it seemed that tracking a vehicle in public places was reasonable and constitutionally permissible. However, the *Jones* Court, in a majority opinion written by Justice Antonin Scalia,<sup>41</sup> looked much further back than *Katz*: all the way back to the meaning of the Fourth Amendment at the time of its adoption.<sup>42</sup> According to this original meaning, a search was only a “search” if it involved physical trespass onto the defendant’s

33. *Id.*

34. 460 U.S. 276 (1983).

35. A beeper tracker “is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver.” *Id.* at 277. Essentially, beeper trackers are the technological forerunners of GPS trackers.

36. *Id.* at 278.

37. *Id.* at 278–79.

38. *Id.* at 281.

39. *Id.*

40. *Id.* at 285. In *United States v. Karo*, 468 U.S. 705, 715–18 (1984), the other major beeper tracker case, the Court held that tracking an item into the privacy of the home constituted a search. See *supra* note 8 for a joint statement of the holdings of *Knotts* and *Karo*. The *Jones* Court dismissed the Government’s reliance on both *Knotts* and *Karo* (which together suggested that the use of a tracker to track a vehicle in public was permissible) because the trackers in those cases were installed on the items before they came into the defendants’ possession, unlike in *Jones*. See *infra* notes 47–48 and accompanying text.

41. Justice Scalia was joined by Chief Justice John G. Roberts and Justices Anthony Kennedy, Clarence Thomas, and Sonia Sotomayor, the latter of whom also wrote a lengthy concurrence. *United States v. Jones*, 132 S. Ct. 945, 947 (2012).

42. *Id.* at 949.

property<sup>43</sup>—the logic posited by the overruled *Olmstead*. The Court noted the *Katz* test’s deviation from the traditional trespass-based jurisprudence, but contended that “*Katz* did not repudiate” the trespass test;<sup>44</sup> instead, it argued, the *Katz* “test has been *added to*, not *substituted for*, the common-law trespassory test.”<sup>45</sup> The Court held that there must *either* be a physical trespass *or* a violation of a reasonable expectation of privacy in order for there to be a Fourth Amendment “search.”<sup>46</sup>

The Court then explained the distinction that allowed its holding without overturning *Knotts*: in *Knotts*, the tracker was installed *before* the object came into the defendant’s possession, whereas the opposite was true in the instant case.<sup>47</sup> This, according to the Court, placed the defendant “on much different footing”<sup>48</sup> than in previous electronic tracking cases. Because the installation of the tracker was a physical trespass that occurred *during* the defendant’s possession of the vehicle, there was a “search.”

The Court put two important limitations on this old (but actually new) trespass test. First, a simple trespass alone is not enough—the trespass must be done *for the purpose* of obtaining information.<sup>49</sup> The Court also noted that the trespass must be onto a protected area enumerated by the Fourth Amendment—that is, persons, houses, papers, or effects.<sup>50</sup> Because in this case there was (1) a physical trespass (2) during the defendant’s possession (3) onto a constitutionally protected area (the car<sup>51</sup>) (4) for the purpose of gathering information, there was a “search.” Thus, the Court affirmed the appellate court and reversed Jones’ conviction.<sup>52</sup>

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43. *Id.*

44. *Id.* at 950.

45. *Id.* at 952.

46. *Id.* at 950.

47. *Id.* at 951–52.

48. *Id.* at 952.

49. *Id.* at 951 n.5. For instance, if a policeman simply fell over onto a person’s property by accident, that would not constitute a “search,” though it may technically be a “trespass.”

50. *Id.* at 953; U.S. CONST. amend. IV. This limitation preserves the Court’s open fields doctrine, which was created by *Oliver v. United States*, 466 U.S. 170 (1984), and provides that law enforcement officers’ entrance for investigative purposes onto the open fields of one’s property, even though it may be a technical trespass, does not constitute a Fourth Amendment “search” because the fields surrounding one’s property are not part of the constitutionally protected area of the “house.”

51. A car is an “effect” for Fourth Amendment purposes. *Jones*, 132 S. Ct. at 949 (citing *United States v. Chadwick*, 433 U.S. 1, 12 (1977), *abrogated in part on other grounds by California v. Acevedo*, 500 U.S. 565, 573 (1991)).

52. *Id.* at 954. The Court did not delve further into whether this particular search was unreasonable and unconstitutional. Thus, the question of whether the police need a warrant to install a GPS tracker remains open. *See, e.g.*, Orin Kerr, *What Jones Does Not Hold*, VOLOKH

Justice Sonia Sotomayor concurred with the majority.<sup>53</sup> She agreed that the *Katz* test was meant to augment, not to replace, the trespass test,<sup>54</sup> concluding that the majority properly relied on the narrowest means of decision: “When the Government physically invades personal property to gather information, a search occurs. The reaffirmation of that principle suffices to decide this case.”<sup>55</sup>

However, in a carefully worded understatement, Justice Sotomayor also noted that “[i]n cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion’s trespassory test may provide little guidance.”<sup>56</sup> She reasoned that long-term GPS tracking interferes with expectations of privacy on a much deeper level than the majority was willing to recognize, rightly noting that such surveillance creates “a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”<sup>57</sup> Justice Sotomayor laid out some of the incredibly private movements that such invasive surveillance would capture and record for posterity: “trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.”<sup>58</sup> Her constitutional concern was that the public’s awareness that law enforcement may be monitoring and recording these activities “chills associational and expressive freedoms.”<sup>59</sup>

Justice Sotomayor offered some thoughts on how the *Katz* analysis is impacted by the in-depth, precise nature of GPS tracking technology.<sup>60</sup> She argued that the fact that electronic surveillance merely duplicates traditional surveillance is not dispositive as to whether there is a reasonable expectation of privacy.<sup>61</sup> Instead, she “would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to

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CONSPIRACY (Jan. 23, 2012, 12:50 PM), <http://volokh.com/2012/01/23/what-jones-does-not-hold/>.

53. *Jones*, 132 S. Ct. at 954 (Sotomayor, J., concurring).

54. *Id.* at 955.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* (quoting *People v. Weaver*, 909 N.E.2d 1195, 1199 (N.Y. 2009)) (internal quotation marks omitted).

59. *Id.* at 956. For a more general look at how police searches psychologically impact the public, see Nancy Leong, *The Open Road and the Traffic Stop: Narratives and Counter-Narratives of the American Dream*, 64 FLA. L. REV. 305, 335 (2012).

60. *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring).

61. *Id.* at 956.

ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.”<sup>62</sup>

The Justice also indicated her willingness to rethink the “premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”<sup>63</sup> Here, she reasserted a “degrees of privacy” argument first made by Justice Thurgood Marshall in dissent more than thirty years ago in *Smith v. Maryland*.<sup>64</sup> Based on the *Katz* “knowingly exposed” formulation, the Court has long held that people have no reasonable expectation of privacy in the information that they “voluntarily” disclose to third parties—including the phone numbers they dial, the Web sites they visit, and their financial records.<sup>65</sup> Justice Marshall dissented when the Court created this third-party disclosure approach in *Smith*, arguing that people still expect *some* degree of privacy in such information, despite its voluntary disclosure to certain entities.<sup>66</sup> Justice Sotomayor similarly reasoned that this third-party disclosure, all-or-nothing approach “is 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.”<sup>67</sup> The notion that we can simply avoid privacy disclosures altogether is unrealistic in modern society, so the assumption-of-risk argument underpinning the premise of the third-party disclosure doctrine is fundamentally flawed. Just as one cannot avoid information disclosures to one’s phone company, Internet service provider, and bank, one similarly cannot avoid the disclosure of personal details collected in the sum total of one’s movements on public roadways. Thus, while Justice Sotomayor joined the backward-looking majority, her concurrence demonstrates the most forward-thinking rationale in the instant case.

Justice Samuel A. Alito, in an opinion that falls between the majority and Justice Sotomayor on the spectrum of privacy rights, concurred in the judgment.<sup>68</sup> He believed that *Katz* foreclosed the old trespass-based approach, and he would reinstitute the *Katz* test as the exclusive test for whether a Fourth Amendment search has occurred.<sup>69</sup> Justice Alito accused the majority of using eighteenth century law to solve a twenty-first century problem.<sup>70</sup> While Justice Scalia posited that

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62. *Id.*

63. *Id.* at 957.

64. *Id.* (citing 442 U.S. 735, 749 (1979) (Marshall, J., dissenting)).

65. *Id.*

66. 442 U.S. at 748 (Marshall, J., dissenting).

67. *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring).

68. *Id.* (Alito, J., concurring in judgment). Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan joined Justice Alito’s opinion. *Id.*

69. *Id.* at 959–60.

70. *Id.* at 957.

something analogous to twenty-four hour GPS surveillance could have been accomplished at the time of the Fourth Amendment's adoption by "a constable's concealing himself in the target's coach in order to track its movements,"<sup>71</sup> Justice Alito flippantly dismissed that hypothetical as requiring "a very tiny constable . . . with incredible fortitude and patience."<sup>72</sup>

Instead of the *installation* of the tracker being a search, Justice Alito argued, it is the *use* of the tracker that is of concern.<sup>73</sup> He noted that such a triviality as "attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation" is not actually interfering with the car owner's possessory interest and so is essentially meaningless under trespass law, yet would constitute a search under the majority's test.<sup>74</sup> On the other hand, if "the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car," the use of such a tracker—without an accompanying installation—would not constitute a search.<sup>75</sup> The Justice found this approach to be logically upside-down.

Justice Alito's approach would apply the *Katz* test to the instant case in a somewhat peculiar way, though. He believed that the four-week tracking in the instant case *definitely* violated society's reasonable expectation of privacy, but he also posited that short-term tracking does *not* do so (and failed to explain where and when the line would be crossed).<sup>76</sup> Because Justice Alito does not believe the installation itself of the device was a search, the implication is that warrantless installation and short-term tracking would not constitute a search under his theory. The Justice also noted that even long-term tracking may be reasonable if the crime is severe enough.<sup>77</sup> (Presumably, he would require something more serious than the lifetime-imprisonment drug conspiracy in the instant case, though it is unclear what crime that would be.) While Justice Alito disagreed with the majority's test, he believed that the long-term tracking in the instant case violated society's reasonable expectation of privacy under the *Katz* test and concurred with the majority that a search occurred.<sup>78</sup>

So while the result was unanimous—a search occurred here—the reasoning was split 5–4, with the majority reinstating the trespass test and Justice Alito's faction preferring the *Katz* test exclusively.

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71. *Id.* at 950 n.3 (majority opinion).

72. *Id.* at 958 n.3 (Alito, J., concurring in judgment).

73. *Id.* at 958.

74. *Id.* at 961.

75. *Id.*

76. *Id.* at 964.

77. *Id.*

78. *Id.*

Undoubtedly, though, the warrantless installation together with the long-term use of a GPS tracker is a search. Unfortunately, the *Jones* case raises many more questions than this very specific one it answers.<sup>79</sup>

First, is the trespass distinction necessary? After all, the law of trespass, in itself, is arguably a legally embodied (and therefore reasonable) expectation of privacy. Theoretically, then, the *Katz* test encompasses the trespass test and renders it unnecessary.<sup>80</sup> This, however, is a mostly academic train of thought and one unlikely to make much of an impact on the Court.

More importantly, the trespass test is ambiguous in one key respect: what is an enumerated protected area? That is, what exactly are the contours of “persons, houses, papers, and effects”? What about the archetypal *Katz* phone booth (if such a thing still exists)? And what about other analogues: is a hotel room, for instance, a temporary “house”? The Court gives us no guidance on this front, and *Katz* left this issue very much open.<sup>81</sup>

And once one decides that installation of the device *is* a search of a protected area, then one must decide if it is unreasonable and unconstitutional. The presumption is that a warrantless search is unreasonable.<sup>82</sup> The warrant requirement is inextricably intertwined here, yet the state of that law is left unsettled: the future weight of this decision on the warrant issue hinges on whether one of the Justices could cross camps in deciding whether warrantless installation coupled with *short-term* monitoring constitutes an unreasonable search.

After all, the four-Justice concurrence in judgment already believes that the installation of the tracker on its own is not a search at all, let alone an unreasonable one. Just one member of the five-Justice majority would have to decide that even if the installation is a search, the short-term monitoring is “sufficiently minor to not require a warrant,”<sup>83</sup> making the search reasonable. If that happens, law enforcement can install trackers and monitor them in the short-term with *carte blanche*.

79. See, e.g., Tom Goldstein, *Jones Confounds the Press*, SCOTUSBLOG (Jan. 25, 2012, 11:30 AM), <http://www.scotusblog.com/2012/01/jones-confounds-the-press/>; Orin Kerr, *Why United States v. Jones Is Subject to So Many Different Interpretations*, VOLOKH CONSPIRACY (Jan. 30, 2012, 4:59 PM), <http://volokh.com/2012/01/30/why-united-states-v-jones-is-subject-to-so-many-different-interpretations/>.

80. This would, of course, throw the open fields doctrine into question, which is a not-insubstantial wrinkle in this navel-gazing exercise. For an explanation of the open fields doctrine, see *supra* note 50.

81. See *supra* note 27 and accompanying text. I thank Professor John Stinneford for pointing out this open question and for his helpful comments.

82. See *Katz v. United States*, 389 U.S. 347, 357 (1967). This presumption is, of course, subject to myriad exceptions.

83. Tom Goldstein, *Reactions to Jones v. United States: The Government Fared Much Better than Everyone Realizes*, SCOTUSBLOG (Jan. 23, 2012, 4:07 PM), <http://www.scotusblog.com/?p=137698>.

And because the ideological breakdown of the Justices in *Jones* is cross-political, with several conservatives siding with the majority, it seems quite likely that one of them will eventually be willing to switch camps and side with the police to determine that warrantless installation with short-term monitoring constitutes a reasonable, constitutional search.<sup>84</sup> The warrant jurisprudence is vast and murky, and *Jones* offers a glimpse at a possible near-future.

Most essentially, however, the majority punted on the *real* question raised by the instant case: what do we do about the invasive, long-term invasion of privacy created by limitless, technologically powered government surveillance?<sup>85</sup> Under *Jones*, the police can still install trackers into your electronics before you come into possession of them and track you theoretically *ad infinitum*, without consequences. The GPS on your phone? Trackable. Your car's built-in GPS? Trackable. Forever. As long as you are in public, you have no reasonable expectation of privacy over that information—so the police would not even be *doing* a “search,” under either *Jones* or *Katz*. You would have zero Fourth Amendment protection. So while *Jones* may seem, on its face, like a pro-privacy decision (police, you should probably get a warrant before you install a GPS tracker!), its implications cut very much the other way.<sup>86</sup>

And yet, “the significance of *Jones* in this area of the law will fade pretty quickly.”<sup>87</sup> Technology is constantly getting more sophisticated and law enforcement soon will no longer need to physically attach a tracker to property in order to perform round-the-clock surveillance.<sup>88</sup>

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84. *See id.* (arguing that the Government “is more likely than not to prevail in a later case in which it installs a GPS monitor without a warrant and tracks the individual for only a couple of days”). However, it appears that the Government is less than certain about its eventual victory. After *Jones* came down, the Federal Bureau of Investigation turned off some 3,000 GPS trackers it had in use—a move prompted, in part, by the concerns raised by the concurring Justices. Julia Angwin, *FBI Turns Off Thousands of GPS Devices After Supreme Court Ruling*, WALL ST. J. BLOGS: DIGITS (Feb. 25, 2012, 3:36 PM), <http://blogs.wsj.com/digits/2012/02/25/fbi-turns-off-thousands-of-gps-devices-after-supreme-court-ruling/>.

85. *See* Dahlia Lithwick, *Alito vs. Scalia*, SLATE (Jan. 23, 2012, 6:38 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/01/u\\_s\\_v\\_jones\\_supreme\\_court\\_justices\\_alito\\_and\\_scalia\\_brawl\\_over\\_technology\\_and\\_privacy\\_2.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/01/u_s_v_jones_supreme_court_justices_alito_and_scalia_brawl_over_technology_and_privacy_2.html) (noting that “[i]t is [Justice Sotomayor] who seems best to understand that [intrusive surveillance] is the real problem the court should be focused on, even though she refuses to address it today”).

86. *See* Tom Goldstein, *Why Jones Is Still Less of a Pro-Privacy Decision than Most Thought*, SCOTUSBLOG (Jan. 30, 2012, 10:53 AM), <http://www.scotusblog.com/?p=138066>.

87. *Id.*

88. Some of this technology is already in use: drones, omnipresent security cameras, “smart dust devices” (does a tracker the size of a dust mote landing on you count as a “trespass?”), and facial- and iris-recognition software. *See* John W. Whitehead, *U.S. v. Jones: The Battle for the Fourth Amendment Continues*, HUFFINGTON POST (Jan. 24, 2012, 7:02 PM), [http://www.huffingtonpost.com/john-w-whitehead/us-v-jones-surveillance-technology\\_b\\_1224660.html](http://www.huffingtonpost.com/john-w-whitehead/us-v-jones-surveillance-technology_b_1224660.html).

Thus, this will likely turn out to be an important opinion by Justice Sotomayor, providing crucial clarifying dicta as to how to think about *Katz* and privacy in a time where technology is evolving much more rapidly than the law.<sup>89</sup> Though she joins the majority, her pro-privacy stance creates a five-Justice majority with Justice Alito's anti-Big Brother concurrence. If the right case were to come along, with no technical trespass but nonetheless a technologically created, unreasonable infringement on society's privacy expectations, the privacy advocates could win the day. So while *Jones* clearly is not the last word in privacy and GPS surveillance, the unique breakdown of the Justices provides an intriguing hint as to where the Court's Fourth Amendment jurisprudence may go next.

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89. See Goldstein, *supra* note 86.