

Insider Briefing

Defending Privacy Before the US Supreme Court

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Why EFF Got Involved in *US v. Jones*

In 2009, when EFF first decided to wade into *U.S. v. Jones*, we knew the case posed significant questions with potentially far-reaching ramifications for the Fourth Amendment. But we didn't know it would be, as *Slate.com* said, "certainly the most important pronouncement about privacy, technology, and the scope of the Fourth Amendment right of the people."

At issue was whether law enforcement officers had violated the Fourth Amendment by secretly installing a Global Positioning Satellite (GPS) tracking device on a vehicle and monitoring it for nearly a month without a warrant. The device, which was smaller than a credit card, allowed agents to track every move of nightclub operator Antoine Jones. Through the use of satellite data, investigators were able to log the location of Jones' car every 10 seconds for 28 days. Prosecutors used the information to secure a drug conviction and a life sentence for Jones. Jones' attorney appealed the decision, arguing that the GPS evidence was gathered through unconstitutional means.

We were approached by Jones' attorney when the case reached the federal appeals court in Washington, DC. The government took the position that legal precedent established by U.S. Supreme Court cases from the 1980s – *U.S. v. Karo* and *U.S. v. Knotts* – suggested that people never have a reasonable expectation of privacy in their movements on public streets, so no warrant was needed for installing and monitoring a GPS device. Those cases involved the use of beeper technology to augment investigators' visual surveillance of suspects.

EFF partnered with the ACLU-National Capital Area to write a "friend of the court," or "amicus," brief explaining that the capabilities of antiquated beeper technology pale in comparison to modern GPS. We pointed out that GPS satellite data enables investigators to pinpoint an individual's location 24 hours a day, seven days a week – regardless of how far away he is from a police officer – and at a very low cost. This detailed location information can, in turn, create a detailed portrait of a person's life, potentially revealing where he prays, what kinds of doctors he sees, his political beliefs, and much more. If police are allowed to collect this highly sensitive data without a warrant, we argued, what's to stop them from tracking any and all citizens on a whim at any given time?

"Certainly the most important pronouncement about privacy, technology, and the scope of the Fourth Amendment right of the people" – *Slate.com*

Why the Supreme Court Took Notice

The DC Court of Appeals agreed and found that satellite tracking of Jones' vehicle was a violation of the Fourth Amendment, because a citizen has a privacy interest in the whole of his or her actions over time. The government decided to appeal the case and asked the U.S. Supreme Court to review the decision through a petition for certiorari.

When two or more federal appeals courts have different interpretations of the law, there is said to be a "circuit split." Often the U.S. Supreme Court is asked to settle the split by deciding a case that is binding nationwide. That's exactly what happened with the GPS

surveillance cases. While the DC circuit in *U.S. v. Jones* found a strong privacy right in the aggregate of a person's actions, courts in the 7th, 8th and 9th circuits had all held that GPS surveillance did not violate the Fourth Amendment in similar cases. The Supreme Court granted the government's petition for certiorari in *U.S. v. Jones* on June 27, 2011.

Once the case reached the U.S. Supreme Court, public interest intensified, and EFF recognized the opportunity to achieve a strong precedent on privacy that could potentially affect the outcome of future and contemporaneous vehicle tracking cases involving various different technologies. National news outlets started paying attention to the case, and a host of civil liberties and legal organizations began focusing on it.

In partnership with the Center for Democracy and Technology, the Yale Law School Supreme Court Clinic, and several prominent technologists, EFF prepared a new amicus brief for the Supreme Court, explaining exactly how GPS technology works, how it differs from beepers and other older technologies, and why the Court should regard this kind of tracking with a fresh set of eyes.

"The Supreme Court has unanimously confirmed that the Constitution prevents unbridled police use of new technologies to monitor our movements."

Marcia Hoffman, EFF

To bolster the arguments presented in our brief, which were very technical, we reached out to an individual who could be considered the world's foremost authority on GPS technology: the primary inventor himself, Roger Easton, Sr. Mr. Easton's invention had equipped the U.S. Navy with a technological edge in the 1940s and 50s, many decades before GPS became a household tool in the era of smartphones and online mapping. Two intrepid EFF volunteers even traveled to the elderly Mr. Easton's home to explain the case to him in person and found him in enthusiastic support of EFF's position. The fact that the inventor of GPS technology was weighing in on a high-profile Supreme Court case concerning locational tracking generated news headlines.

During the Supreme Court hearing, there were signs that our amicus brief had made an impression. At one point, Justice John Roberts demonstrated an understanding of how GPS works, suggesting that EFF's brief was part of the information the judges took into account.

The Court's Opinions and What They Mean

While all Supreme Court Justices agreed that law enforcement's actions were unconstitutional, they offered different opinions about why. In his majority opinion, Justice Antonin Scalia did not address whether Jones had a reasonable expectation of privacy but stated that the collection of GPS data constituted a search, because placing the device on his vehicle amounted to a trespass on personal property. This revived a "trespass" theory of Fourth

Amendment protection that EFF can use later.

Justice Samuel Alito rejected Scalia's argument and accused him of relying on 18th Century trespass law to solve a 21st Century privacy problem. For his part, Alito insisted that the case ought to be viewed in terms of the reasonable expectation of privacy, and that attachment of the GPS device for a month violated this expectation.

Justice Sonia Sotomayor agreed with Scalia's majority opinion, yet noted that there are countless ways in which government surveillance no longer actually requires any physical intrusion, a point that Justice Alito acknowledged as well. Justice Sotomayor even noted that these technological advances may require the court to reconsider a troubling doctrine from the 1970s, which found that people have a reduced privacy interest in data that third parties collect about them. This point is encouraging for the wide breadth of work EFF has undertaken to protect Fourth Amendment rights guaranteeing privacy with regard to email, cellphone locations, geographic tracking over time, uses of social networks like Twitter, and other forms of electronic information that offer a window into the details of citizens' day to day lives.

In the end, the Supreme Court recognized the dire effect that unchecked police use of technology could have on privacy rights and made a strong ruling to protect those rights.