

5th International Conference on Information Law & Ethics (ICIL)-2012

***United States v Jones*¹**

And the New Paradigm of Fourth Amendment Jurisprudence

Anna Tsiftoglou

PhD Candidate, University of Athens, Greece

Abstract

The US Supreme Court recently ruled on the issue of government surveillance. A GPS tracking device illegally installed on a suspect's vehicle by the FBI and thereby used in criminal investigations initiated a new dialogue on the topic. This case takes us back to some basic doctrines on the Fourth Amendment of the US Constitution. We analyze the key points of the SCOTUS decision and give emphasis to the developing notion of *informational privacy*. What privacy transformations do we view in relation to criminal law? Can illegally obtained evidence be judicially permitted? And what are the current trends here?

At the same time, we look beyond informational privacy discourses and focus on judicial behavior in the context of public security. Questions raised involve: a) how have Supreme Court justices reacted to technology challenges? And b) are particular interpretations preferred within the law enforcement context? We use the idea of the 'living constitution' as a driving force in judicial hermeneutics. Concurring opinions are discussed to show divergences.

Finally, certain institutional questions arise from this ruling. What political dynamics shape such decisions? Have SCOTUS justices deferred to the executive in security matters? Is technological change 'a scapegoat' used to refrain from strict scrutiny? And what kind of balances do we see in the judicial review of government surveillance?

¹ 565 U.S. (2012), 23.01.2012

References

ALIVIZATOS N., *Who Decides in Last Resort? Elected Officials and Judges in Historical Perspective*, Lecture given at the University of Michigan, Sept. 15, 2011, available at www.constitutionalism.gr

ANGWIN J., *FBI Turns Off Thousands of GPS Devices after Supreme Court Ruling*, *The Wall Street Journal Digits Blog*, February 25, 2012

CATE F. / LITAN R., 2001, *Constitutional Issues in Information Privacy*, AEI-Brookings Joint Center for Regulatory Studies Working Paper 01-11

CHEMERINSKY E., 2006, *Constitutional Law: Principles and Policies*, 3rd Edition, New York, NY: Aspen Publishers

FABBRINI F., *The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice*, *Yearbook of European Law* (2009), pp. 664-697

FRIEDMAN B., *Privacy, Technology and Law*, *The New York Times*, January 28, 2012

GERAPETRITIS G., *Fear over Rights: The Recent Case Law of the US Supreme Court*, *RHDI* (2003), pp. 475-492

GUARNIERI C. / PEDERZOLI P. (EDS.), 2001, *The Power of Judges: A Comparative Study of Courts and Democracy*, Oxford: OUP

KERR O., *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, *Mich. L. Rev.* (2004), pp. 801-888

KOMESAR N., 2001, *Law's Limits: The Rule of Law and the Supply and Demand of Rights*, Cambridge: CUP

KYRITSIS D., *Principles, Policies and the Power of Courts*, *Can. J. L. & Jurisprudence* (2007), pp.379-397

NOTE, *Foreign Intelligence Surveillance and the Fourth Amendment*, *Harv. L. Rev.* (1974), pp.976-1000

O'CONNOR S.-D., *Balancing Security, Democracy and Human Rights in an Age of Terrorism*, *Colum. J. Transnat'l L.* (2008), pp. 6-15

POSNER E. / VERMEULE A., 2007, *Terror in the Balance: Security, Liberty and the Courts*, Oxford: OUP

REHNQUIST W.H. , *The Notion of a Living Constitution*, *Tex. L. Rev.* (1976), pp. 693-706

SLOBOGIN C., *Is the Fourth Amendment Relevant in a Technological Age?* In: ROSEN J. / WITTES B. (eds.), 2011, *Constitution 3.0: Freedom and Technological Change*, Washington, D.C.: Brookings Institution

SOLOVE D., 2011, *Nothing to Hide: The False Tradeoff between Privacy & Security*, New Haven: Yale University Press

SOTTIAUX S., 2008, *Terrorism and the Limitation of Rights: The European Convention on Human Rights and the United States Constitution*, Oxford: Hart

STANLEY J., 2010, *The Crisis in Fourth Amendment Jurisprudence*, ACS Issue Brief available online at <http://www.acslaw.org/publications/issue-briefs/the-crisis-in-fourth-amendment-jurisprudence-0>

SUNSTEIN C., 1999, *One Case at a Time: Judicial Minimalism on the Supreme Court*, Cambridge: Harvard University Press

TROPER M., *The Judicial Power and Democracy*, *EJLS* (2007), 1:2

TSAKYRAKIS S., *Proportionality: An Assault on Human Rights?*, *Jean Monnet Working Paper No.09/2008*, NYU School of Law

TSIFTSOGLOU A., *Corporate Political Speech and Democracy*, *Administrative Law Journal* (2009), pp. 800-804 [in Greek]

TUSHNET M., 2010, *Why Constitution Matters*, New Haven: Yale University Press

Vrontakis M., *The Justice as a Judge of Balances, Values and Legislative Choices*, *Lecture of Vice President of the Hellenic Council of State (honoris causa) at Aristotle University of Thessaloniki School of Law*, 28.02.2011, available at www.constitutionalism.gr [in Greek]

WALTER C. ET AL (EDS.), 2004, *Terrorism as a Challenge for National and International Law: Security v Liberty?*, Heidelberg: Springer

Yoo J., *FDR, Civil Liberties and the War on Terrorism* in: D. FARBER (ed.), 2008, *Security v Liberty: Conflicts between Civil Liberties and National Security in American History*, New York: The Russell Sage Foundation