

***United States v Jones* and the New Paradigm of Fourth Amendment Jurisprudence¹**

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Abstract

The US Supreme Court (SCOTUS) recently ruled on the issue of government surveillance. A Global Positioning System (GPS) device illegally installed on a suspect's vehicle and thereby used in criminal investigations initiated a new dialogue on the topic. This case takes us back to some basic doctrines regarding the Fourth Amendment of the American Constitution. We analyze the key points of the decision and give emphasis to the notion of *informational privacy*. Concurring opinions are discussed to show divergences in constitutional interpretation. Finally, we critically approach certain institutional questions arising from this important ruling.

I. Introduction

It takes a vehicle, a GPS device and a few FBI men to cause nine justices in Washington, DC to stir constitutional waves again. With *United States v Jones*, decided unanimously last January, the Supreme Court of the United States revisited its privacy theories, pondered on technology challenges and offered interesting hints on institutional matters. The case also gave us insights into judicial interpretation in the *security* context. While GPS surveillance has emerged recently as a prominent issue, principles developed historically may offer courts guidance to tackle it more effectively in the future.

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II. The Facts of the Case

The facts of the case were simple. Antoine Jones, a nightclub owner in DC, was considered a suspect for drug trafficking. The FBI and the Metropolitan Police, eager to pursue information gathering, applied for the issuing of a surveillance warrant. The latter judicially authorized the *installation* and *use* of a GPS device on Jones's car but with two limitations: a) on duration (only for 10 days), and b) on location (only in DC).

The agents secretly installed the GPS tracking device on the 11th day in Maryland. For the following 28 days they tracked all the suspect's movements via geo-location technology and collected thousands of pages of information over a month's span.

With this evidence, Antoine Jones and his conspirators were indicted on several charges. Jones, convicted to life by the District Court, challenged his sentence, among others, on *illegally obtained evidence* grounds. The Appellate Court accepted the *exclusionary rule* remedy, famously pronounced in the '60s case *Mapp v Ohio*, and upheld Jones' claim.

III. *Scalia v Alito* or the 'Italian' debate over privacy

When the case finally reached the Supreme Court, the privacy issue came up again. The nine justices unanimously found that the *installation* and *use* of the GPS device on Jones' car constituted a 'search' under the Fourth Amendment. Thus, it was unconstitutional.

Despite the unanimity on the holding of the case, two blocks of justices debated the interpretation of the 4th Amendment to the US Constitution. The first one was led by the conservative –and longest serving- **Justice Scalia**, who wrote the majority opinion, to which Justices Kennedy, Thomas, Sotomayor and President Roberts joined. The second one was led by the other conservative / libertarian **Justice Alito**, author of another concurrence, to which Justices Ginsburg, Breyer and –recent appointee- Kagan joined. For reasons of practicality, and given that both Justices Scalia and Alito have Italian heritage, we shall refer to this debate figuratively as the '*Italian Debate over privacy*'.

a. The *Scalia* Approach: History & Consolidation

Justice Scalia, the veteran of the Court, is well-known for his love for textualism and originalism (O' Donnell, 2010). Thus, a strict adherence to the text of the Constitution and to the will of the Founding Fathers should guide us to the optimal interpretation.

This approach, as applied to privacy in our case, has surprisingly worked in two ways: a) *it provided a supplement* to the prevailing post-*Katz* privacy discourse and b) *it strengthened privacy overall* by offering judges more objective criteria to play with. The Scalia block, it seems, 'reinvented' Fourth Amendment jurisprudence by embracing constitutional history again (Goldberg, 2012, 62, 68-9; Friedman, 2012).

The Fourth Amendment Jurisprudence is roughly divided into two periods: the *pre-Katz* and the *post-Katz*, with *Katz v. United States* (1967) considered as the turning point.

In the *pre-Katz* period, dating back as far as the 18th Century, Fourth Amendment judicial interpretation was mainly inspired by English common-law property theories. The constitutional text offered much space for the application of the trespass to chattels torts. Its 1791 formulation in the celebrated US Bill of Rights reads as follows:

‘The right of the people to be secure in their *persons, houses, papers, and effects, against unreasonable searches and seizures*, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized’.

Property theories during the *pre-Katz* period seemed thus a perfect fit. Long before the information technology revolution, the prevalent doctrine was protection against *physical* intrusions to “persons, houses, papers or effects”. The meaning of “search” thus had a *physical, property-based rationale*. And that theory had guided justices for over a century (Kerr, 2004, 808-818; Solove, 2011, 96-98; Slobogin, 2011, 12-19).

In the landmark 1967 case *Katz v. United States*, things changed. The Supreme Court realized that searches may no longer be physical, but otherwise. The Court also realized that the Fourth Amendment protects ‘*people, not places*’ and shifted its focus towards developing a more responsive-to-technology interpretation. The *Katz* case, dealing with wiretapping on public telephone booths, presented justices an excellent opportunity to elaborate on the issue of privacy in the public sphere. There, Justice Harlan famously concurred by saying the Fourth Amendment applies whenever there are ‘*reasonable expectations of privacy*’. Thus, the Court passed from physical to empirical metrics.

The “Reasonableness” doctrine has not been that revolutionary. Though hailed by some as a turning point in Fourth Amendment jurisprudence, it has become the object of fierce criticism (Kerr, 2004, 838-839; Slobogin, 2011, 12-19; Solove, 2011, 116-118; Stanley, 2010, 4-6). Mostly, since it brings very subjective connotations to privacy protection. When exactly society’s privacy expectations are deemed “reasonable”? Isn’t such a standard contingent on technology evolution? And, at the end of the day, should justices be the final arbiters here and play with such a subjective and very *circular* notion?

Moreover, the application of the *Katz* doctrine is not sufficient to provide realistic answers in an era of ubiquitous surveillance. As Justice Scalia remarks, ‘*at bottom, we must assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted*’. Thus, the standard set historically against physical intrusions ought to be preserved even against novel technological challenges.

The Supreme Court, instead, has so far relied on the Katz ‘reasonableness’ and developed less privacy-friendly jurisprudence. For instance, according to *United States v Knotts* (1983), concerning a *beeper* installation on one’s car parked on a public street, the car owner does not have ‘reasonable expectations of privacy’ for activities committed in public. The application of such doctrine here would mean that attaching a *GPS device* to someone’s car -while parked outside- and using it to track his movements in the public sphere would not be considered a breach of privacy! But here is the paradox: How could we even compare the surveillance capabilities of a *GPS device* with a *beeper’s*? And how rational is it to build privacy protection on the empirical statements of each court? Reliance on what the ‘society’ (or the judges at hand) considers or ‘expects’ as ‘reasonable’ for privacy protections may create massively diverse jurisprudence. And, given technological evolution, can Harlan’s fluctuating standard really protect privacy? It then turns, altogether, a matter of personal taste. A judge in 2012 may find ‘reasonable’ to post your children’s photos on Facebook just as he finds reasonable to conduct a month of GPS surveillance on a suspect. Another judge may disagree and so it goes.

The circularity and randomness embedded in this standard only contribute to the bigger fragmentation of Fourth Amendment protection in the US. Its underlying ‘communitarian’ philosophy (Etzioni, 1999, 203-215) and its prevalence over other conflicting rights (Gerapetritis, 2003, 488- 490) may not help resolve this fragmentation. Due to emergence of irrationalities such as the ‘third party doctrine’ or the ‘secrecy paradigm’ (any sharing divests you from privacy) judges should seek other avenues to interpretation (Solove, 2011, 93-110). Especially in the era of cloud computing.

Thus the pressing need **to remake the Fourth Amendment relevant for the digital age**. Modern judicial readings have seemingly failed to capture its hard core, the very concept of ‘search’. The Scalia block rightly suggests that even the Katz supporters cannot deny its property roots: ‘We have embodied that preservation of past rights in our very definition of ‘reasonable expectation of privacy’ which we have said to be an expectation *that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society (...)* **Katz did not narrow the Fourth Amendment’s scope**’. Scalia’s originalist reading of the Constitution here may indeed be helpful. Scalia doesn’t reject the Katz doctrine but rather blends it with the pre-Katz jurisprudence through the property link. The text of the Fourth amendment itself provides the answer. As another famous judge, Richard Posner, has written: “The *vaguer* or more *general* the constitutional text and precedents that create and define the right, *the more elastic its scope*, enabling judges to change that scope without overruling any precedent and thus... without changing the law” (Posner, 2006, 23). The Fourth Amendment may date from the 18th century, but it still has the power to tackle issues of the 21st century, such as GPS surveillance.

Overall, Scalia's interpretation may 'restore our faith' in the Fourth Amendment, since: a) it offers justices concrete and *objective criteria* to decide with, b) it seamlessly unites the *pre-Katz* and the *post-Katz* doctrine and c) it resurrects the *property* roots of search (Goldberg, 2012). Even virtual searches (such as CCTV surveillance or accessing records from a computer) could be covered under Scalia's interpretation. Scalia here is taking an 'activist' stance by incorporating old and new privacy discourses into a novel constitutional interpretation for the future. Such stance may not rival others, such as his controversial one in the landmark and pro-corporate *Citizens United* case (Tsiftoglou, 2009, 804). Nevertheless Scalia's approach is a pro-privacy, paradigm-shifting one.

b. The Alito Approach: A Living Constitution?

Justice Alito, on his own concurrence, supported an alternative view. According to him, Fourth Amendment should be interpreted so as to adapt rapidly to technological change. In this respect, he criticized Justice Scalia's originalist approach as outdated. Reliance on '18th-century tort law' is inadequate, according to Alito, to provide solutions to 'searches' that do not have any physical connotations, such as electronic searches. Alito proposed, instead, to endorse the Katz doctrine, entailing the 'reasonable expectations of privacy'.

Alito insists on the Katz 'reasonable expectations' test but admits it may not always be an objective or reliable 'compass' for the judge, as both society and technology are constantly changing: '(...) *Judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the Katz test looks (...)* In addition, the Katz test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations' (Alito Concurrence, 10)

By applying the Katz test, the Alito block performs a different interpretation. Alito evaluates the surveillance at issue, among others, in terms of *time*. 'Long-term' GPS surveillance, even in public streets, may be impinging on the 'reasonable expectations of privacy', while 'short-term' may not. The threshold between the two is certainly not clear and thus the Scalia criticism on the circularity of the test. In addition, Alito's insistence on the exclusivity of Harlan's standard only makes things worse. It deprives courts from objective evaluation criteria and opens the floor for all kinds of personal judgments.

The *living constitution*, endorsed by Alito, may provide justices legal avenues to deal with such challenges. Justice Alito's critique of Scalia's originalism is targeted inter alia: a) on the evolving Fourth Amendment jurisprudence ('...do these recent decisions represent a change in the law or simply the application of the old tort to new situations?') or b) on technological revolution as a factor of evolving constitutional interpretation ('...The Availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements').

Regarding privacy, a living constitution interpretation would treat the Fourth Amendment as a 'living' text in relation to current and future technological threats. Thus, it could allow constitutional interpretation to evolve in areas and ways not even envisioned by the Founding Fathers (Balkin, 2005; Strauss, 2010). Alito's approach here treats the famous Katz doctrine as part of this 'living' interpretation: the 'reasonable expectations of privacy' will be shaped in accordance with technological evolution. Fourth Amendment jurisprudence should, therefore, evolve in parallel to societal and technological developments. Any other doctrines conforming to the original understandings of privacy do not seem suitable (Kerr, 2004, 827-37). Scalia's originalism may seem irrelevant.

However, every constitution incorporates particular value judgments made through the political process, which are enacted through positive law. Such value judgments cannot be easily 'altered' by unelected judges. The 'living constitution' approach always entails great judicial *subjectivity*, and allows for the diffusion of certain ideologies into law beyond democratic deliberation. Justice Rehnquist, in a widely cited 1976 lecture has said: "I know of no other method compatible with political theory basic to democratic society by which *one's own conscientious belief may be translated into positive law and thereby obtain the only general moral imprimatur permissible in a pluralistic, democratic society*" (Rehnquist, 2006, 407, 414). Thus, the 'living constitution', while a driving force in judicial hermeneutics, may alter the original establishment if judges apply it expansively. Jack Balkin from Yale correctly notes, nevertheless, that the 'real engine' behind the 'living constitution' is the evolving American nation itself: *'The great engine of constitutional evolution has not been judges who think they know better than the American people. It has been the evolving views of the American people themselves about what rights and liberties they regard as most important to them'* (Balkin, 2005).

The adaptable 'living constitution' (Strauss, 2010) could be possibly reconciled with Scalia's originalism if viewed, as Scalia suggests, as complementary. Since privacy is founded on the physical concept of 'search' and the 'expectations of privacy' develop in accordance with technological and societal developments, a judge could use both criteria and apply the most suitable- depending on the nature of 'search'. As Slobogin remarks, reverting 'back to first principles' and remaking a 'technologically-sensitive' Fourth Amendment will 'restore' (it) to its 'primary-arbiter' place (Slobogin, 2011,31).

IV. *Courts v Congress* or the 'American' debate over regulation

Beyond the 'Italian' debate over privacy, the *Jones* case offers its readers a glimpse of another crucial debate concerning technological regulation: the one over *institutional competence*. Are the *Courts* or the *Congress* more competent to decide on such issues? Or, viewed otherwise, *'who decides best in last resort'* and *why?* (Alivizatos, 2011)

In Justice Alito's concurrence we read the following:

"[...] [C]oncern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions. This is what ultimately happened with respect to wiretapping. After *Katz*, Congress did not leave it to the courts to develop a body of Fourth Amendment case law governing the complex subject. Instead, Congress promptly enacted a comprehensive statute [...] and since that time, the regulation of wiretapping has been governed *primarily by statute and not by case law*". (Alito Concurrence, 10-11)

"[...] In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative [...] A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way". (Alito Concurrence, 13)

So, what are the pros and cons of *legislative v. judicial* decision-making re: technology?

Technology moves fast, while law doesn't. The legislatures may be more effective decision-makers as they adapt to changes more rapidly. Orin Kerr has argued that *Congress* has created 'what is in effect *a parallel Fourth Amendment* to regulate many areas of privacy when technology is in flux'. Moreover, that statutory law, as opposed to common law, is the 'primary' source of privacy rules (Kerr, 2005, 2, 14; 2004, 838). Indeed, in some states like California, privacy laws provide stronger protection (Stanley, 2010, 1-2, 17-20). On the contrary, the Supreme Court has developed Fourth Amendment jurisprudence on a different pace, generating vague interpretations. 'The absence of a case and controversy requirement allows Congress to set the best rule for current technology; in contrast, judicial efforts to hit a moving target force the courts to keep the law uncertain to maintain flexibility for future technological change' (Kerr, 2005, 6). Judge Posner has a slightly different view. Changed circumstances in technology may be a deciding factor, but both statutory and case-law tend to lag in their responses to them. The difference between courts and legislators lies in their very perception of rulemaking: '... [A] Legislature can and sometimes does change course abruptly, with no felt sense of obligation to maintain continuity with previous legislation. Judges are more reluctant to overrule their "legislative" product, that is, their previous decision. To do is to acknowledge error...' (Posner, 2006, 21) However prominent the argument of legislative flexibility or effectiveness may be, it cannot be absolute. An example just reported from the area of mobile telecommunications surveillance is revealing. Law enforcement attention in the US has lately shifted towards the collection of location data or data stored 'in the cloud' (entrusted to third parties) to which 'reasonable expectations of privacy' do not apply (due to the 'third-party doctrine'). This data is easier to obtain and without any warrant requirement. However, Congress has yet not revised the current legal framework to better protect privacy (Op-Ed, New York Times, 2012)

This also relates to *ex ante* v *ex post* decision-making. In a sense, legislators may act early to regulate new technologies, whereas courts decide *ex post*, and only if and when a particular issue may arise and on a case-by-case fashion (Kerr, 2004, 868-870).

Another deciding factor in this debate is *information asymmetries*. Legislators often operate in a richer information environment than courts. Especially in the field of technology, they may seek the assistance of experts and other feedback during the drafting process. Given this richer institutional environment, 'the legislative process tends to generate more informed rules governing developing technologies than is likely to result from the closed environment of the judicial process' (Kerr, 2005, 6-10; 2004, 875). Courts function differently. Usually judges don't have/seek external assistance and usually fail to grasp even the basics of technology. Such institutional disadvantage affects judicial rulemaking. In fact, lack of information often leads to *decisional minimalism*. As Cass Sunstein further points, 'Sometimes the minimalist approach is the best way to minimize the sum of error costs and decision costs' (Sunstein, 1999, 5, 49).

Nevertheless, judges are important decision-makers, particularly in the Supreme Court. The 'judicialization of politics' has emerged as a popular phenomenon in modern democracies (Guarnieri, 2001, 185-188; Tushnet, 2010, 126-132). Given the inherent difficulties in amending the US constitution, judges are pragmatically entrusted a more active role in the evolution of law. It may seem more reasonable for judges to have the last word on *human rights* issues and leave hardly defined *political questions* to elected officials (Alivizatos, 2011, 11-2). Thus, even on technological matters, with radiating effects on fundamental rights like privacy or freedom of speech, judges should still be considered big players. Impeding factors such as lack of flexibility, information asymmetries or *ex post* decision-making may influence but not diminish their mission.

Moreover, judicial review is crucial for a well-functioning system of checks & balances. Courts act as guardians and they may not always be favorites, as judicial independence 'brings *inertia* and *political transaction costs*, which at some level outweigh the benefits' (Calabresi, 2002). Technology rules may be shaped by state or federal legislators, but courts hold the validating power to 'decide on last resort'. Thus, the justice's role as a *judge of values* should not be underestimated anyhow (Vrontakis, 2011). Judicial review of technology rules, like any rules, always entails some risk, though. As Judge Posner claims, 'when the Supreme Court, in the name of the Constitution, invalidates the act of another branch of government, it stifles a *social experiment*- by doing so *it deprives itself as well as the nation of critical information* concerning the consequences of the experiment for liberty, privacy, safety, diversity and other values' (Posner, 2006, 27). The *democratic nature* of judicial decision-making power, including judicial review, will depend, according to Troper, 'on the definitions of democracy' (Troper, 2007, 12).

V. Towards a *New Paradigm* of Fourth Amendment Jurisprudence?

So where does this case lead us to? Is there a *new privacy paradigm* to follow?

Reading the news headlines a few weeks after the ruling came out, we could even talk about the *Jones effect*: FBI forced to limit GPS surveillance (Wall Street Journal, 2012). Thus, on a practical level, law enforcement officials may start being more cautious.

On a judicial level, things have changed too. The SCOTUS unanimously created precedent: the *attachment* and *use* of a GPS device on one's vehicle to monitor his movements constitutes a 'search', thus a privacy violation, under the Fourth Amendment.

Very recently Orin Kerr suggested a novel approach. According to his 'Mosaic Theory' (Kerr, 2012), the *Jones* case introduces a brand new reading of the Fourth Amendment. Judges -here the Alito block joined by Justice Sotomayor- treat government surveillance activity *collectively* (as a 'mosaic') to determine 'search' and thus privacy violations. Such approach may have several implications, if applied, and is viewed with skepticism.

At any rate, the biggest contribution of this case is on the field of *judicial interpretation*. The 'Italian' privacy debate exposed two alternative visions on the Fourth Amendment. Justice Alito endorsed the *living constitution* and supported the exclusive application of the *Katz* doctrine to resolve technological quizzes. Justice Scalia, on the other hand, though a conservative and originalist, endorsed a more *holistic* interpretation and encompassed both old and new doctrines. In Scalia's mind, a 'search' can occur both on physical grounds and as a breach of one's reasonable expectations of privacy. A judge, therefore, should be offered both objective and subjective criteria to decide with.

Justice Scalia's 'history and consolidation' formula, followed by the court's majority, may be considered a shift of paradigm for Fourth Amendment jurisprudence. Courts puzzled with technology shall not have to decide on empirical grounds on surveillance. They may turn to the roots of the meaning of 'search', when needed, and resort to the *Katz* standard as a supplement. At the end of the day, judges should re-explore the Fourth Amendment's hidden forces to tackle problems of today. Viewed as such, Justice Antonin Scalia's interpretation may echo Larry Lessig's 'translation' approach which, as the latter admits, presents a big challenge to the interpreter: 'The Challenge of *Fidelity* in Constitutional Interpretation is *how broadly we allow that past to constrain us or who we as a nation will become*. Constitutional Tradition cannot sensibly adopt either of the two extremes (...) But *the sensible line between these two extremes* is not obvious, or stable, or protectable from manipulation – especially in the future' (Lessig, 2011, 253).

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