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Obama Admin. Argues for Warrantless Cellphone Tracking

In a document filed September 4 in the D.C. District Court, the Obama administration argues that there is no "reasonable expectation of privacy" in a person's cellphone GPS data. The president's lawyers argue that they do not need a warrant to request cellphone company records regarding a customer's movements and location as tracked by their signal towers.

In its argument against a motion filed to suppress the government's use of a defendant's cellphone location data, the Obama administration claims that the customer tracking records kept by cellphone service providers are no different from other business-related "third-party records" such as store receipts and bank account statements, and customers have no legal basis for any additional expectation of privacy.

The feds are making their case for warrantless tracking of citizens in a re-trial of an accused drug dealer whose conviction was thrown out by the Supreme Court in its decision in the case of *United States v. Jones*.

In the Jones case the high court held that warrantless installation of tracking devices on cars was unconstitutional. In light of that decision, lawyers for the federal government are shifting their focus to Jones's cellphone tracking data.

Wired describes the decision and the White House's reaction:

> The Supreme Court tossed that GPS data, along with Jones' conviction and life term on Jan. 23 in one of the biggest cases in recent years combining technology and the Fourth Amendment.
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> "We hold that the government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search,'" Justice Antonin Scalia wrote for the five-justice majority.
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> That decision, the Obama administration claimed, is "wholly inapplicable" when it comes to cell-site data.

The Obama administration continues making that point in its latest legal defense of warrantless surveillance:

> A customer's Fourth Amendment rights are not violated when the phone company reveals to the government its own records that were never in the possession of the customer. When a cell phone user transmits a signal to a cell tower for his call to be connected, he thereby assumes the risk that the cell phone provider will create its own internal record of which of the company's towers

> handles the call. Thus, it makes no difference if some users have never thought about how their cell phones work; a cell phone user can have no expectation of privacy in cell-site information.

In response to the Jones decision, *Wired* reports, "The FBI pulled the plug on 3,000 GPS-tracking devices."

As the government tries its litigious end run around the Constitution and the Supreme Court, Jones is arguing that the principles of privacy expressed in the Court's earlier decision regarding the government's need for a warrant before tracking his car should also apply to his cellphone.

"In this case, the government seeks to do with cell site data what it cannot do with the suppressed GPS data," argued Eduardo Balarezo, attorney for Antoine Jones.

The president's lawyers interpret the law differently:

> "Defendant's motion to suppress cell-site location records cannot succeed under any theory. To begin with, no reasonable expectation of privacy exists in the routine business records obtained from the wireless carrier in this case, both because they are third-party records and because in any event the cell-site location information obtained here is too imprecise to place a wireless phone inside a constitutionally protected space," they write in a letter to the judge presiding over the second trial.

In the motion they argue the same point:

> When the government merely compels a third-party service provider to produce routine business records in its custody, no physical intrusion occurs, and the rule in Jones is therefore wholly inapplicable.

This is a cop-out, according to some legal experts. As quoted in a story published by the *Wall Street Journal*, Susan Freiwald, a professor at the University of San Francisco School of Law, said that the Justice Department's arguments violate "the spirit, if not the letter, of the Jones decision."

It is this very legalistic distinction that is now before the Ninth Circuit in the case of *United States v. Pineda-Moreno*. The events at the center of this case occurred prior to the decision in *United States v. Jones*.

Pineda-Moreno's story goes like this, according to the AP:

> In May 2007, federal agents became suspicious of Mr. Pineda-Moreno after noticing he and a group of men had purchased a large quantity of fertilizer of a type commonly used to grow marijuana from a Home Depot store.
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> After a preliminary investigation, the agents slapped a mobile tracking device onto Mr. Pineda-Moreno's silver 1997 Jeep Grand Cherokee seven different times over a four-month period. Five times, the Jeep was parked in public. Twice it was parked in his driveway. The agents did not obtain a search warrant.
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> In September, agents pulled over Mr. Pineda-Moreno as he was leaving a suspected marijuana growing site. He was charged with manufacturing marijuana and engaging in a conspiracy to manufacture it.
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> Mr. Pineda-Moreno moved to suppress the evidence obtained by the GPS tracking device, arguing that agents violated his Fourth Amendment rights. In 2010, the Ninth Circuit denied his motion, arguing that he had no "reasonable expectation of privacy" in his driveway and while driving on

public roads.

The Supreme Court instructed the Ninth Circuit to reconsider the case in light of the Jones decision.

For its part, the Obama administration in its brief submitted to the Ninth Circuit argues that "requiring a warrant and probable cause would seriously impede the government's ability to investigate drug trafficking, terrorism and other crimes." Furthermore, following somebody's every move via satellite is only a "limited intrusion" into his privacy.

In an amici curiae brief filed in the Pineda-Moreno case, attorneys for the American Civil Liberties Union disagree. "The warrant requirement is especially important here given the extraordinary intrusiveness of modern-day electronic surveillance. Without a warrant requirement, the low cost of GPS tracking and data storage would permit the police to continuously track every driver," they argue.

In light of the Obama administration's arguments in the first and second Jones trials and the Pineda-Moreno case, the legalization of the continuous tracking of citizens seems to be the goal of the government.

If the feds get their way in the Jones re-trial, the never-blinking eye of Big Brother will watch and record every movement of every citizen so that no act of rebellion, no matter how small, will go unnoticed and unpunished. Fearful citizens must demonstrate unwavering obedience to the federal government in every e-mail, every conversation, every association, and every movement or face instant reprisal.