



Written by [Joe Wolverton, II, J.D.](#) on June 4, 2012

Obama Administration Argues No Warrant Required for GPS Tracking of Citizens

The [federal government informed an appeals court](#) on Thursday that it has the right and the power to place GPS tracking devices on the privately owned vehicles of citizens without obtaining a warrant. This is in open rebellion to a Supreme Court decision from January that held that such warrantless installation of tracking devices on cars was unconstitutional.



In a case being heard by the [Ninth Circuit Court of Appeals](#), the Obama administration argued that since the Supreme Court's ruling didn't specifically mandate the obtaining of a search warrant in all situations, then the justices intended to leave a loophole open — a loophole large enough to mount a tracking device.

According to the Justice Department's spokesperson, "A warrant is not needed for a GPS search, as the [Supreme] Court ... did not resolve that question." As quoted in an [article in the Wall Street Journal](#), the Justice Department has "advised agents and prosecutors going forward to take the most prudent steps and obtain a warrant for new or ongoing investigations," just in case.

This sort of circular reasoning is commonplace in Washington. The federal government claims that warrants are unnecessary, yet insists that its minions attempt to obtain them. This is precisely the vagueness and doubletalk that creates chaos and throws up a smokescreen behind which the palladium of American civil liberties is destroyed.

In fairness, the Supreme Court bears a portion of the blame for this confusion. The decision handed down in January in [the case of the United States v. Jones](#) left several critical constitutional questions unanswered — perhaps purposefully so.

Of course, as constitutionalists are aware, there is no need for the Supreme Court to sit as the ultimate arbiter of what does and does not conform to constitutional standards. As Alexander Hamilton wrote in [Federalist no. 33](#):

If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted [sic] to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed.... But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. [Emphasis in original.]



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That is to say, when the federal government enacts a measure purporting to be the law of the land, but that act is unconstitutional, it is merely a usurpation and of no force whatsoever.

Unfortunately, for generations Americans have been trained to look to the Supreme Court for guidance on issues of constitutional validity, and so it has gladly assumed that role.

The case of when agents of the federal government “legally” may attach a satellite-based tracking device to the car of a suspect is one of the areas now under the purview of the High Court.

Thankfully, there is a handful of privacy and civil liberties advocacy groups working to thwart the government’s seemingly endless quest to monitor and record each citizen’s every movement — online or in the real world.

Many of these organizations reckoned that the Supreme Court’s ruling in *Jones* would have inaugurated a gradual end to the warrantless installation of GPS tracking devices on the part of law enforcement. At the very least, they imagined that the standards elucidated by the court in *Jones* would have been voluntarily followed by those who formerly adhered to no formal procedures before initiating the electronic monitoring of a citizen.

Why these watchdogs would even entertain such hopes in the post-Patriot Act era is baffling, however. Under the applicable provisions of the Patriot Act, the location of cellphones and the content of e-mails may be tracked, tagged, and saved by police and federal law enforcement without a search warrant.

Again, the exercise of such a power is in direct, open, and hostile violation of the Constitution. The [Fourth Amendment to the Constitution](#) clearly states:

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.

While various telecommunications companies (AT&T and Google, among others) [are petitioning Congress](#) to establish clearer guidelines regarding when electronic communications may be searched and seized without a warrant, the malady lingers on.

In the *Jones* case, the Supreme Court unanimously held that law enforcement violated the Fourth Amendment by conducting “unreasonable searches and seizures” by installing a GPS tracking device to a suspect’s car without first obtaining a probable-cause warrant.

While such a statement seems clear enough, the confusion arises from the court’s pronouncement of the ruling that led to the decision. For example, writing for the majority (the opinions on the legal rationale for the ruling were split 5-4), Justice Antonin Scalia declared that the constitutional privation perpetrated by the police was the unwarranted attachment of the tracking device onto the property of a citizen. However, the minority opinion, penned by Justice Samuel Alito, explained that it was the violation of the suspect’s “reasonable expectation of privacy” that was the principal constitutional issue in the matter.

In the end, neither the majority nor the minority addressed a key argument forwarded by the Justice Department: GPS tracking, the feds argued, is just that and is not a search in the traditional sense whatsoever, therefore no warrant should be required. That is to say, police could accomplish the same end through another means — a means that doesn’t require a warrant (physical surveillance, for example) — therefore, a warrant need not be obtained before attaching a GPS device to the car of a



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suspect.

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 *U.S. 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.

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.

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.

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.

Not surprisingly, the American Civil Liberties Union (ACLU) disagrees. In [an amici curiae brief](#) filed in the Pineda-Moreno case, attorneys for the ACLU argue: "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."

And this is precisely the goal of the government. 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. Citizens are thus compelled to demonstrate unwavering obedience to the federal government in every e-mail, every conversation, every association, and every movement or face instant reprisal.

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