Written by **Joe Wolverton, II, J.D.** on January 23, 2013

DOJ Refuses to Disclose How it Tracks Citizens Using GPS

Following the pattern set by the National Security Agency (NSA), the Justice Department last week refused to disclose how, when, and how often the federal government uses GPS to track vehicles.

As a result of a Freedom of Information Act (FOIA) petition filed last July, on January 16 the American Civil Liberties Union (ACLU) received two internal Justice Department memos setting out the department's policies regarding tracking of citizens using GPS technology.

At least that's what the documents purported to reveal. In reality, the pair of memos sent to the ACLU by the DOJ were largely blacked out, leaving all but the barest of background information completely redacted.

As is customary among the participants in the government project to place every American under constant surveillance and make every citizen a suspect, Justice Department attorneys argue that the information requested by the ACLU in the FOIA petition could be used to help criminals escape capture by law enforcement.

The ACLU isn't convinced, however.

"The Justice Department's unfortunate decision leaves Americans with no clear understanding of when we will be subjected to tracking — possibly for months at a time — or whether the government will first get a warrant," writes ACLU attorney Catherine Crump. "Privacy law needs to keep up with technology, but how can that happen if the government won't even tell us what its policies are?"

The Supreme Court bears a portion of the blame for the confusion. The decision handed down in January in the case of *United States v. Jones* left several critical constitutional questions unanswered — perhaps purposefully so.

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.

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* 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.]

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. As creators of the federal government, states are within their rights to nullify — to declare invalid and of no legal force — any such federal act.

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.

As for nullification, it is difficult to find anyone who even knows what it is, much less how it works as a protection from federal statism.

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.

The ACLU and a handful of other civil liberties advocacy groups continue fighting 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.

The most important point in this matter is that 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.

And although several telecommunications companies (AT&T and Google, among others) have petitioned Congress to establish clearer guidelines regarding when electronic communications may be searched and seized without a warrant, the malady lingers on.

In the end, neither the majority nor the minority addressed a key argument forwarded by the Justice Department. The DOJ's lawyers argued that GPS tracking is not a search in the traditional sense and 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 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."

For now, the ACLU and others are left waiting on the federal government (most notably, the Supreme Court) to bring order to the Fourth Amendment chaos. They thought the memos would be a substantial step toward that goal.

"The ACLU is continuing to fight for release of the memos, and we will ask the court to order the Justice Department to release them because they are being improperly withheld," Crump wrote. "The purpose [of] FOIA is to make sure the government doesn't operate under secret law—and right now that's exactly what these memos are."

Not surprisingly, for now every branch of the federal government is stonewalling efforts to shine light into the shadowy recesses of the *Jones* case and the guidelines followed by agents of the surveillance state when it sets about monitoring and tracking the movements of citizens — citizens not suspected of any crime, other than potentially posing a threat to the unrestrained expansion of the federal panopticon.

Joe A. Wolverton, II, J.D. is a correspondent for The New American *and travels frequently nationwide speaking on topics of nullification, the NDAA, and the surveillance state. He can be reached at jwolverton@thenewamerican.com.*