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Back to previous page

Supreme Court's GPS case asks: How much privacy do we expect?

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In December 1967, the Supreme Court issued what many consider to be one of its greatest and most eloquent decisions, in *Katz v. United States*. That case, which is celebrated as saving privacy in the United States, articulated the principle that "the Fourth Amendment protects people, not places." The decision reversed a long erosion of privacy protection and required greater use of warrants by the government.

This past week, a different high court sat to hear a new privacy challenge in *Jones v. United States*. The issue this time is whether privacy protections are dying in the United States — and whether *Katz* may be to blame.

The *Jones* case involves one of the most ubiquitous pieces of technology in modern life: a Global Positioning System device. Antoine Joneswas convicted in the District of Columbia in 2008 on drug charges after police followed him for 28 days with a secretly installed GPS device that monitored his location.

This surveillance continued after a warrant had expired. But the Obama administration insists that no warrant should be required for the government to track the movements of citizens with such devices. The administration says that the new technology merely captures what can be observed, albeit in far greater detail. But the technology could allow the government to follow an almost limitless number of citizens in real time, all the time. If successful in its argument, the Justice Department would expand the powers of the government to spy on citizens to what Justice Stephen Breyer called Orwellian proportions.

Privacy appears to be in a vicious 40-year cycle. In *Katz*, the court was dealing with decades of increasing surveillance under the "trespass doctrine," established in 1928, which allowed the government to conduct warrantless surveillance so long as it did not physically trespass on the property of a citizen. When the court created the ill-conceived doctrine, technology was already making the trespass test meaningless. With new devices, agents could listen to conversations without entering a home or office. This is why the

court's pronouncement that the Constitution "protects people, not places" was such a victory for civil liberties. But what if the people don't care?

Under the *Katz* test, warrants would be needed when there is a "reasonable expectation of privacy" by a citizen. But that standard laid the foundation for the demise of privacy. As we come to expect less privacy, we are entitled to less of it.

As warrantless surveillance rises, our expectations fall, allowing such surveillance to become more common. The result is a move toward limitless police powers. Those declining expectations are at the heart of the Obama administration's argument in *Jones*, where it insists that the government is free to track citizens without warrants because citizens expect to be monitored.

The United States was once defined by an intense commitment to privacy, with far greater protection than was found in some of our closest allies, such as Britain. That was already changing, however, when the *Katz* decision was handed down. The erosion of privacy sped up as new rulings joined new technology in creating more transparency in society in the 1970s and 1980s. The court chipped away at citizens' expectations with a long line of exceptions to the rules for when a warrant is necessary — allowing the government to pat down citizens, review their bank records, intercept the telephone numbers they dial, search their cars, search travelers at borders and airports, and perform an array of other searches deemed "reasonable." Those exceptions have now swallowed the rule, so that more searches today are done without warrants than with them.

Beyond those exceptions, we are living with a growing network of public surveillance cameras on highways and city streets. Chicago alone has installed about 10,000 such cameras in the past few years. Britain still surpasses the United States with a state and private network of 1.85 million closed-circuit TV cameras. These systems often feature facial-recognition software that not only records the movement of citizens but can identify individuals.

Privacy is also under assault from private companies. In the years since the *Katz* decision, security cameras and other technology have multiplied; companies routinely watch customers and employees. Video surveillance is a $3.2 billion industry, one-third of the overall security market, according to 2007 data from the Security Industry Association.

When I teach *Katz* and privacy in a law school classroom, a university sign warns everyone that "this room is subject to surveillance." It is a telling reminder of how, even in discussing the loss of privacy, the lecture is being taped by the institution. Even elementary and high school students are now accustomed to being under surveillance on their buses and in their schools. For these children, continuous monitoring is just part of life.

Today, we are under surveillance as we drive from our houses in the morning, when we

stop to buy coffee, when we return to the road and when we enter our workplaces, where our phones are often monitored and our offices surveilled by video cameras. The monitoring only ends at home, when we close our doors — if we're lucky. In a 2001 case, the court ruled that the government couldn't use thermal imaging to track people inside their homes without a warrant, but that was a 5 to 4 vote.

After 9/11, President George W. Bush greatly expanded the scope of warrantless surveillance, and President Obama has maintained and even increased those powers. Citizens have largely accepted the false premise that privacy is the enemy of security and have supported ever-widening surveillance powers. The problem is that privacy remains an abstraction, while crime, or terrorism, is a concrete threat.

The *Jones* case, however, highlights the flaw in our legal understanding of privacy. The Obama administration is arguing that citizens expect that their second-by-second movements can be tracked. If the government goes too far, the administration told the court, the solution is not found in the Constitution but in Congress. That's a dangerous view, however, as Congress has historically been indifferent, if not hostile, to individual rights. Few members are willing pass laws to protect privacy over security demands, leaving many arguing for small government while ignoring the Big Brother that dwells within it.

Under *Katz*, it turns out, the problem is not with the government but with us. We are evolving into the perfect cellophane citizens for a new transparent society. We have grown accustomed to living under observation, even reassured by it. So much so that few are likely to notice, let alone mourn, privacy's passing.

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