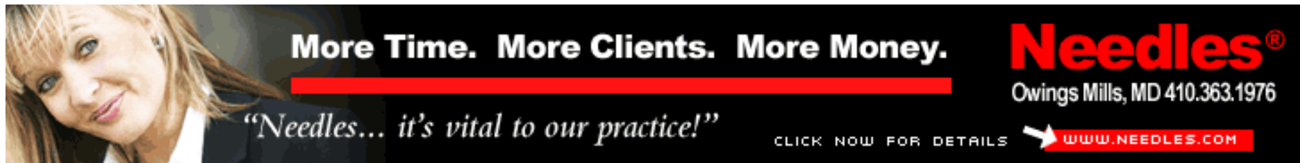

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Citing Orwell, Supreme Court Appears Wary of Police GPS Surveillance

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Police use of GPS surveillance and society's expectations of privacy clashed in the U.S. Supreme Court on Tuesday as justices weighed new technology and its impact on Fourth Amendment rights.

With multiple references to the novel "1984," a majority of the justices seemed uncomfortable with the federal government's defense of law enforcement's warrantless use of a GPS tracking device on a suspected drug dealer's car over a four-week period. But the justices also struggled to find a legal way to regulate that type of surveillance.

"If you win, there is nothing to prevent the police or the government from monitoring 24 hours a day the public movement of every citizen of the United States," suggested Justice Stephen Breyer to Deputy Solicitor General Michael Dreeben. "You suddenly produce what sounds like '1984.' What protection is there once we accept your view?"

Dreeben replied that the primary use of this type of surveillance is when the police do not have enough information to establish probable cause for a warrant but have a situation that calls for monitoring, for example an anonymous call about a bomb threat to a mosque. "If this Court believes that there is an excessive chill created by an actual law or universal practice of monitoring people through GPS, there are other constitutional principles that are available," he said, suggesting the First Amendment and equal protection clause.

Pressed again by other justices for a limit or test for police use of the GPS, Dreeben said the government recommends "reasonable suspicion" by law enforcement. The U.S. Court of Appeals for the District of Columbia reversed the conspiracy conviction of Antoine Jones after finding that the warrantless use of a GPS device to monitor Jones' whereabouts for 28 days violated the Fourth Amendment. The court concluded that, because of the duration and amount of information produced, Jones -- and the public generally -- have a reasonable expectation that the government will not monitor their activities in this way.

In arguments in *U.S. v. Jones* on Tuesday, Dreeben relied heavily on two Supreme Court precedents as he sought a reversal of the D.C. Circuit ruling. "Since this Court's decision in *Katz v. U.S.*, the Court has recognized a basic dichotomy under the Fourth Amendment," he argued. "What a person seeks to preserve as private in the enclave of his own home or in a private letter or inside of his vehicle when he is traveling is a subject of Fourth Amendment protection. But what he reveals to the world, such as his movements in a car on a public roadway, is not."

And in *Knotts v. U.S.*, Dreeben said, "This Court applied that principle to hold that visual and beeper surveillance of a

vehicle traveling on the public roadways infringed no Fourth Amendment expectation of privacy."

Chief Justice John Roberts Jr. noted that the beeper case was 30 years ago and GPS technology is "dramatically different." But Dreeben insisted that with GPS surveillance, nothing is exposed "that isn't already exposed to public view for anyone who wanted to watch."

Roberts asked Dreeben if, under the government's theory, there would be no "search" if GPS devices were put on the justices' cars to monitor their movements for a month. Dreeben replied that under the government's theory and the Court's precedents, the justices have no greater expectation of privacy when driving on public roadways.

Before the computer and internet age, much of the privacy that people enjoyed was not the result of legal or constitutional protections, said Justice Samuel Alito Jr., but the result of the difficulty of traveling and gathering information. Now it is much simpler to amass an enormous amount of information, he said, adding, "Do we just say, well, nothing is changed, so that all the information that people expose to the public is fair game? There is no search or seizure when that is obtained, because there isn't a reasonable expectation of privacy? But isn't there a real change in this regard?"

Dreeben said there has not been a particularly dramatic change. "It is possible to envision broader advances in technology that would allow more public information to be amassed and put into computer systems," he said. "But I think that the remedy is through legislation, just as when the Court held that amassing pen register data, all of the numbers that you dial on your telephone, the lengths of the times of the calls."

The justices gave an equally difficult time to Dreeben's opponent, Stephen Leckar of Washington's Shainis & Peltzman. Leckar argued that the case could be decided on a very narrow basis: When the police without a warrant install a GPS secretly on a car of any citizen of the United States and they want to use the evidence gained that way in a criminal trial, that is a seizure in violation of the Fourth Amendment.

Leckar said, "Society does not view as reasonable the concept that the United States government has the right to take a device that enables them to engage in pervasive, limitless, cost-free surveillance, that completely replaces the human equation."

Justice Ruth Bader Ginsburg countered, "But [Jones] wouldn't be protected against a surveillance camera that could get information, and is this really different in kind from the surveillance camera?"

Leckar said the placement of the GPS on Jones' car was a physical invasion of his property -- more intrusive than video or visual surveillance. And the use of the GPS was an unreasonable search. As the justices quizzed him for his bottom line on what they should do, he finally said the Court should tell law enforcement, "If you want to use GPS devices, get a warrant, absent exigent circumstances or another recognized exception to the Fourth Amendment, because of their capacity to collect data that you couldn't realistically get; because of the vanishingly low cost, because of their pervasive nature."

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