A step back for rights; Supreme Court failed to take bold action on civil liberties in GPS monitoring decision

Renee Hutchins

I really wanted to love the Supreme Court’s decision Monday in United States v. Jones. As one deeply committed to personal liberty and restrained government, what’s not to love when the nation’s highest court finds the police must obtain a warrant before continuously tracking the citizenry with installed GPS devices? Unfortunately, the answer is “plenty.”

The Supreme Court in Jones could have categorically denounced intrusive government in the mold of the Orwellian state. It didn’t. And so, while the result in Jones is being roundly celebrated in many quarters, there remain good reasons for privacy fans to hold our applause.

Acting on suspicions that Antoine Jones was selling drugs, the government attached a GPS device to his car. From that device, police computers received a steady stream of information about the car’s location for 28 days. In all, more than 2,000 pages of location data were transmitted. Some of the data linked Mr. Jones to a house where substantial quantities of drugs and money were found. Mr. Jones was consequently charged with drug trafficking offenses. The trial court held that most of the data gleaned from the GPS device was admissible.

Commendably, the Supreme Court reversed that decision and declared the GPS monitoring of Mr. Jones unconstitutional. In doing so, however, the court refused to answer the long-standing question of constitutional limits on the Orwellian state. The case was an opportunity for the court to announce that round-the-clock surveillance of citizens without a warrant offends Fourth Amendment guarantees. Instead, the court based its analysis upon the narrower observation that the police attached a device to Mr. Jones’ car. The Supreme Court’s reluctance is understandable; the broader questions are complex and not easily resolved. But, now more than ever, advances in technology make pressing the need to confront the questions head on.

The court’s refusal to tell us whether the Constitution protects us from suspicion-less government monitoring is alone cause for frustration. But perhaps as troubling is the language the court used to accomplish its elusion.

Writing for the majority, Justice Antonin Scalia revitalized what had been widely viewed as a dead (or at least dying) branch of Fourth Amendment analysis. Using as his starting point a Supreme Court case decided in 1765, Justice Scalia wrote that the Fourth Amendment has
historic anchors in notions of physical intrusion. Building upon this foundation, he determined that the government trespass necessary to install the GPS device on Mr. Jones’ vehicle (rather than the government’s use of the device to monitor Mr. Jones) made law enforcement’s action constitutionally offensive.

Why does it matter that the court reached back to early trespass notions to justify its decision? Because nearly a half-century ago, the court walked away from physical trespass as the touchstone of Fourth Amendment protection. In walking away, the court recognized that, as technology progresses, continuing to tie constitutional protection to trespass results in an unacceptably shrinking realm of privacy. The court therefore assured us that, beyond protecting against physical intrusions, the Fourth Amendment guarantees each of us a reasonably expected realm of privacy. As the court then famously stated, the Fourth Amendment “protects people, not places.”

With full knowledge of this history, the Jones decision should give us pause. It is widely believed that the test the court enunciated nearly a half-century ago better protects the privacy interest of citizens in the face of advancing technology. By reverting to the language of trespass, the court this week took a step back when it could have taken a bold step forward. Moreover, by failing to engage the admittedly “thorny” question of whether the monitoring of the GPS device alone violated Mr. Jones’ constitutional rights, the court missed a momentous opportunity to speak clearly in a brave new world.