An Illegal Search, by GPS

In a landmark 1967 case, the Supreme Court ruled that evidence from a wiretap on a phone booth was obtained unconstitutionally. Despite the public nature of a phone booth, the tap violated the defendant’s privacy under the Fourth Amendment. “Wherever a man may be,” the court explained, “he is entitled to know that he will remain free from unreasonable searches and seizures.”

Fast forward to today, when courts are wrestling with the question of whether new technology requires them to think differently about what is a reasonable expectation of privacy.

In August, three judges on the United States Court of Appeals for the District of Columbia (two conservatives, one liberal) ruled unanimously — and correctly — that police violated the Constitution when they hid a GPS device on a person’s car and tracked his every move without a valid warrant. That person, Antoine Jones, was convicted of conspiracy to distribute crack and cocaine based on the tracking of his Jeep for four weeks.

The way to define what was reasonable for Mr. Jones to regard as private, the court said, is by focusing on what was unreasonable for law enforcement to consider public. “The whole of one’s movements over the course of a month is not constructively exposed to the public,” Judge Douglas Ginsburg said, adding that it “reveals an intimate picture of the subject’s life that he expects no one to have — short perhaps of his spouse.”

Last week, the Justice Department asked the whole court to rehear the case. The government relies heavily on one precedent. In 1983, the Supreme Court said it was legal for police to use a beeper without a warrant to track a suspect on public roads. The argument was dubious: The suspect’s movements were visible and anyone could have gleaned what the police did without the beeper’s help, so he had no reasonable expectation of privacy.

The government now contends that replacing the beeper with a GPS makes no difference because surveillance of Mr. Jones was on public roads as well. Two other appeals courts in the past three years have accepted that argument. In one, the opinion was written by Richard Posner, among the most respected federal judges.
He got it wrong. Judge Ginsburg got it right: “The difference is not one of degree but of kind.” He also said that, in the Supreme Court case, the justices “distinguished between the limited information discovered by use of the beeper — movements during a discrete journey — and more comprehensive or sustained monitoring.” The justices left for another day whether 24/7 surveillance should be regulated by another legal principle.

That day is here. Digital technology raises questions about differences between cyberspace and the physical world, which most search-and-seizure laws deal with. In showing why a powerful advance in technology calls for significantly greater protection of privacy, the three-judge panel provided an important example of how the law can respond to new circumstances.