RECENT CASES

CONSTITUTIONAL LAW — FOURTH AMENDMENT — D.C. CIRCUIT DEEMS WARRANTLESS USE OF GPS DEVICE AN UNREASONABLE SEARCH. — *United States v. Maynard*, 615 F.3d 544 (D.C. Cir.), *reh'g en banc denied,* No. 08-3034, 2010 WL 4703743 (D.C. Cir. Nov. 19, 2010), *cert. denied*, No. 10-7102, 2010 WL 4156203 (U.S. Nov. 29, 2010).

The Fourth Amendment has proved a constant source of consternation for courts attempting to reconcile its proscriptions with the rapid advance of technology.[1] In defining the contours of an "unreasonable search[]," [2] courts have found that tracking mechanisms are especially challenging to categorize, as electronic surveillance mimics visual surveillance in some respects but vastly exceeds human abilities in accuracy and efficiency.[3] Recently, in *United States v. Maynard*,[4] the D.C. Circuit held that the government's use of a global positioning system (GPS) device to track a suspect's vehicle over a substantial time period violated the Fourth Amendment's prohibition of "unreasonable searches."[5] In reaching a result in tension with decisions from three other circuits,[6] the D.C. Circuit both misconstrued precedent and replaced a workable framework previously suggested by the Supreme Court with a loosely defined test for constitutionality.

In 2005, Antoine Jones[7] was charged with conspiracy to distribute cocaine, among other drug charges.[8] While investigating the alleged conspiracy, the police utilized various surveillance tactics, including the installation of a GPS device on Jones's vehicle.[9] The GPS device

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[1] *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001) (thermal-imaging device); Dow Chem. Co. v. United States, 476 U.S. 227 (1986) (high precision aerial camera); Katz v. United States, 389 U.S. 347 (1967) (electronic listening device). *See generally* Tracey Maclin, Katz*,* Kyllo*, and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 MISS. L.J. 51, 51–58 (2002).

[2] U.S. CONST. amend. IV.

[3] *See* United States v. Garcia, 474 F.3d 994, 998 (7th Cir. 2007) (observing that "new technologies enable, as the old (because of expense) do not, wholesale surveillance"); Note, *Tying Privacy in* Knotts*: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 VA. L. REV. 297, 317 (1985) (arguing that "electronic tracking is merely the equivalent of conventional tailing" in the individual context, but "its technological nature may generate greater societal anxiety").

[4] 615 F.3d 544 (D.C. Cir.), *reh'g en banc denied*, No. 08-3034, 2010 WL 4703743 (D.C. Cir. Nov. 19, 2010), *cert. denied*, No. 10-7102, 2010 WL 4156203 (U.S. Nov. 29, 2010).

[5] *Id.* at 555–56.

[6] *See* United States v. Marquez, 605 F.3d 604 (8th Cir. 2010); United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010); *Garcia*, 474 F.3d 994.

[7] Jones was tried jointly with alleged co-conspirator Lawrence Maynard, and the two defendants' appeals were also consolidated. *Maynard*, 615 F.3d at 548–49.

[8] United States v. Jones, 451 F. Supp. 2d 71, 73–74 (D.D.C. 2006).

[9] *Id.* at 74.

allowed the police to track the vehicle constantly for twenty-eight days.[10] Although an order authorizing the installation had originally been granted, the device was installed after the authorized time period and outside the appropriate jurisdiction.[11] Consequently, Jones moved to suppress the evidence obtained from the GPS device.[12]

Because the installation occurred outside the parameters of the warrant, the district court analyzed whether "the placement of the GPS device was proper — 'even in the complete absence of a court order.'"[13] Relying on *United States v. Knotts*[14] and *United States v. Karo*,[15] two Supreme Court cases evaluating police surveillance using electronic beepers, the court "distinguished between monitoring in public spaces versus private locations."[16] Simply put, data obtained while a vehicle remains on public streets would be admissible, while data obtained from a tracking device inside a private residence would not.[17] The trial court therefore denied Jones's motion to suppress the data from the GPS device, with the exception that any data obtained while Jones's vehicle was parked in the garage adjoining his home would be inadmissible.[18] Trial commenced, and a jury found Jones guilty in January 2008.[19]

The D.C. Circuit reversed Jones's conviction.[20] Writing for the panel, Judge Ginsburg[21] held that the trial court erred in admitting evidence acquired by the effectively warrantless use of the GPS device because such evidence was "procured in violation of the Fourth Amendment."[22] Judge Ginsburg began his analysis by asking the threshold question of whether use of the GPS device constituted a government search. All parties conceded that the appropriate test, as laid out in *Katz v. United States*,[23] requires a court to consider whether the government violated an individual's "reasonable expectation of privacy."[24] This evaluation of reasonableness "depends in large part upon

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10 *Maynard*, 615 F.3d at 558.

11 *Jones*, 451 F. Supp. 2d at 87–88.

12 *Id.* at 87.

13 *Id.* at 88 (quoting Government's Omnibus Response to Defendant's Legal Motions at 51, *Jones*, 451 F. Supp. 2d 71 (No. 05-CR-386(1)(ESH)), 2006 WL 6219954).

14 460 U.S. 276 (1983).

15 468 U.S. 705 (1984).

16 *Jones*, 451 F. Supp. 2d at 88.

17 *Id.*

18 *Id.* at 90.

19 *Maynard*, 615 F.3d at 549.

20 *Id.*

21 Judge Ginsburg was joined by Judges Tatel and Griffith.

22 *Maynard*, 615 F.3d at 568.

23 389 U.S. 347 (1967).

24 *Maynard*, 615 F.3d at 555 (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring) (internal quotation marks omitted)).

whether . . . information . . . has been 'expose[d] to the public.'"[25] Applying the *Katz* test, the court held that Jones did not expose his behavior to the public; thus, the government violated his reasonable expectation of privacy.[26]

In determining that a search had occurred, the court first distinguished *Knotts* — which held that the government's use of an electronic beeper to track a suspect on public roads did not amount to a Fourth Amendment search[27] — by asserting that the *Knotts* Court "specifically reserved the question" of prolonged surveillance at issue in Jones's case.[28] Judge Ginsburg noted that the *Knotts* Court did not opine on the constitutionality of "a case involving 'twenty-four hour surveillance,' stating [that] 'if such dragnet-type law enforcement practices . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.'"[29] Unlike other circuits that have read the Court's reservation as applying to the blanket surveillance of random citizens,[30] the D.C. Circuit interpreted *Knotts* as "actually reserv[ing] the issue of *prolonged* surveillance."[31] For this reason, the court found that *Knotts* did not control and analyzed the issue as one of first impression.[32]

The court held that Jones's movements during the period of GPS tracking were not exposed to the public for two reasons. First, Jones's movements were "not *actually* exposed to the public because the likelihood anyone will observe all those movements is effectively nil."[33] In other words, though it might be physically possible for the police to follow a suspect on public roads for a month, a reasonable person would not expect law enforcement actually to do so.[34] Second, Jones's movements were not *constructively* exposed through the observable nature of each individual movement "because [the] whole reveals more . . . than does the sum of its parts."[35] Analogizing to the "mosaic

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[25] *Id.* at 558 (alteration in original) (quoting *Katz*, 389 U.S. at 351).

[26] *Id.* at 563.

[27] United States v. Knotts, 460 U.S. 276, 285 (1983). The beeper was placed inside a can of chloroform, which was traced from defendants' point of purchase in Minneapolis, Minnesota, to a secluded residence near Shell Lake, Wisconsin. *Id.* at 277.

[28] *Maynard*, 615 F.3d at 556.

[29] *Id.* (quoting *Knotts*, 460 U.S. at 283–84).

[30] *See* United States v. Marquez, 605 F.3d 604, 610 (8th Cir. 2010) (noting that "'wholesale surveillance' by attaching such devices to thousands of random cars" would raise a different question of constitutionality); United States v. Pineda-Moreno, 591 F.3d 1212, 1216 n.2 (9th Cir. 2010) (reserving the question of whether widespread surveillance of vehicles would violate the Fourth Amendment); United States v. Garcia, 474 F.3d 994, 998 (7th Cir. 2007) (same).

[31] *Maynard*, 615 F.3d at 558 (emphasis added).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 559.

[35] *Id.* at 558.

theory" articulated by the government in several national security cases, Judge Ginsburg asserted that individual pieces of data, when viewed collectively, can reveal information that is different not just in "degree but [in] kind" from the pieces themselves.[36]

Based on its determination that extended observation "reveals an intimate picture of the subject's life that he expects no one to have,"[37] the court concluded that "[s]ociety recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable."[38] The GPS surveillance thus violated a reasonable expectation of privacy and qualified as a search under the *Katz* test.[39] Moreover, because the GPS device was installed without a valid warrant, the search was per se unreasonable and, consequently, violated the Fourth Amendment.[40] Finally, the court noted that the evidence obtained from the GPS device was "essential to the Government's case,"[41] so the error in admitting such data could not be construed as harmless.[42]

The opinion garnered significant coverage in the news media[43] and generated some controversy over the "mosaic theory" the court transplanted from other legal settings to the Fourth Amendment context.[44] Though it provides fodder for interesting academic debate, this innovative application of mosaic theory should never have occurred in *Maynard*. Whatever the mosaic theory's merits as a mode of Fourth Amendment analysis, *Maynard*'s application of the theory was inconsistent with Supreme Court precedent that suggested a simple resolution of the case based on the distinction between public and residential spaces. To establish the breathing room it needed to posit its controversial mosaic theory, the D.C. Circuit largely misconstrued *Knotts* and completely ignored the closely related case of *Karo*, resulting in an analysis untethered from past precedent and unwieldy as future precedent. *Knotts* and *Karo* provided a workable framework within

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[36] *Id.* at 562.

[37] *Id.* at 563.

[38] *Id.*

[39] *Id.* The court made clear, however, that it would not opine on the constitutionality of prolonged visual surveillance, expressing doubt that this question would arise in light of substantial logistical costs. *See id.* at 565–66.

[40] *Id.* at 566–67.

[41] *Id.* at 567.

[42] *Id.* at 568.

[43] *See, e.g.*, Spencer S. Hsu, *Appeals Court Limits Police Use of GPS to Track Suspects*, WASH. POST, Aug. 7, 2010, at A4; Jim McElhatton, *GPS Use Voids Conviction; Court Overturns D.C. Man's Drug Sentence*, WASH. TIMES, Aug. 9, 2010, at A2; Charlie Savage, *Judges Divided over Rising GPS Surveillance*, N.Y. TIMES, Aug. 14, 2010, at A12.

[44] *See, e.g.*, Orin Kerr, *D.C. Circuit Introduces "Mosaic Theory" of Fourth Amendment, Holds GPS Monitoring a Fourth Amendment Search*, THE VOLOKH CONSPIRACY (Aug. 6, 2010, 2:46 PM), http://volokh.com/2010/08/06/d-c-circuit-introduces-mosaic-theory-of-fourth-amendment-holds-gps-monitoring-a-fourth-amendment-search.

which to resolve the case, and the D.C. Circuit's deviation from that framework raised more questions than it answered.

First, the court in *Maynard* mischaracterized the legal question left open by *Knotts*. Judge Ginsburg portrayed *Knotts* as clearly reserving the issue of whether extended surveillance of one individual constitutes a Fourth Amendment search.[45] He cited two portions of *Knotts* for this proposition: first, the Court's observation that the beeper in *Knotts* was put to "limited use"; and second, the Court's emphasis that the police did not rely on the beeper after they tracked one discrete journey.[46] These portions of the *Knotts* opinion, however, were unrelated to the duration of the surveillance; instead, they focused on the distinction between the public and private spheres. The "limited use" assertion related to the *Knotts* Court's assurance that the case did not "involve[] the sanctity of [the defendant's] residence, which is accorded the greatest protection available under the Fourth Amendment."[47] Similarly, the Court's emphasis on the beeper's single journey to the defendant's premises indicated only that the government did not use the beeper "in any way to reveal information as to the movement of the drum [containing the beeper] *within the cabin*."[48] The D.C. Circuit's failure to recognize the context of these statements unduly focused its attention on the quantity of the surveillance rather than the location, resulting in the conclusion that relevant precedent was inapplicable.

The *Maynard* court also relied heavily on a single, ambiguous passage in *Knotts*, in which the Court responded to the dire predictions of governmental abuse of surveillance technology in the defendant's brief.[49] The *Knotts* Court expressly reserved the question of whether "twenty-four hour surveillance of any citizen of this country"[50] and "dragnet-type law enforcement practices"[51] would be permissible under the Fourth Amendment. Judge Ginsburg argued that the "twenty-four hour" language definitively foreclosed *Knotts* from having any bearing on Jones's case.[52] The *Knotts* Court, however, could have intended its reservations to apply to either the mass surveillance of ordinary citizens ("dragnet-type")[53] or the prolonged surveillance of targeted sus-

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[45] *See Maynard*, 615 F.3d at 556.

[46] *Id.* (quoting United States v. Knotts, 460 U.S. 276, 284 (1983)).

[47] *Knotts*, 460 U.S. at 284 (quoting Brief of Respondent at 26, *Knotts*, 460 U.S. 276 (No. 81-1802) (internal quotation mark omitted)).

[48] *Id.* at 285 (emphasis added).

[49] *See* Brief of Respondent, *supra* note 47, at 9–10.

[50] *Knotts*, 460 U.S. at 283 (quoting Brief of Respondent, *supra* note 47, at 9) (internal quotation mark omitted).

[51] *Id.* at 284.

[52] *See Maynard*, 615 F.3d at 556–58.

[53] *See* Bennett L. Gershman, *Privacy Revisited: GPS Tracking as Search and Seizure*, 30 PACE L. REV. 927, 958–59 (2010) ("This kind of 'dragnet' intrusion into privacy conjures up Or-

pects ("twenty-four hour"),[54] or both. This ambiguity is demonstrated by other circuits' differing interpretation of the *Knotts* reservation.[55]

Assuming *Knotts* left open the central question in *Maynard*, the D.C. Circuit overreacted by completely scrapping *Knotts* as relevant authority. The rejection of *Knotts* as inapposite, based entirely on differences in the length of surveillance, is particularly surprising given the *Maynard* opinion's later exposition of cases arising in a variety of unrelated contexts and its reliance on these cases to support its cumulative approach to defining searches.[56] Even if *Knotts* did not bind the court, it was surely more applicable than, for example, a Freedom of Information Act case,[57] as it provides insight into the Supreme Court's major analytical concerns in the Fourth Amendment context.

Indeed, *Knotts* becomes particularly salient when considered jointly with *Karo*. In *Karo*, as in *Knotts*, the police installed a beeper in a can of chemicals and tracked its location after purchase by the suspect.[58] Unlike the beeper in *Knotts*, the beeper in *Karo* traveled through multiple residences and storage facilities, and the police maintained surveillance for almost five months.[59] Also unlike *Knotts*, the Court held that beeper monitoring in private locations violated the Fourth Amendment.[60] Yet *Karo* remains conspicuously absent from *Maynard*.[61] If the D.C. Circuit were correct in its assertion that *Knotts* left open the quantitative question, the Supreme Court could have resolved *Karo* based on the discrepancy in either duration or location. It elected to focus primarily on the latter, emphasizing the qualitative difference between public streets and private residences: "The case is thus not like *Knotts*, for there the beeper told the authorities nothing about the interior of Knotts' cabin. . . . [H]ere, . . . the monitoring indicated that the beeper was inside the house, a fact that

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wellian images of 'mass surveillance' of motorists picked at random by the government, and using digital search techniques to identify suspicious patterns of behavior.").

[54] *See* Renée McDonald Hutchins, *Tied Up in* Knotts*? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 440 (2007) ("The Court's cautionary words in . . . *Knotts* underline the notion that while sense-augmenting surveillance does not typically trigger Fourth Amendment concerns, where such devices reveal information that is noteworthy for its potential volume or detail, constitutional protections may be required.").

[55] *See* cases cited *supra* note 30.

[56] *See, e.g.*, *Maynard*, 615 F.3d at 561 (citing a Freedom of Information Act case describing compiled records on individuals as different from discrete events in each record); *id.* at 562 (analogizing to the "mosaic theory" often argued in national security cases).

[57] *See id.* at 561.

[58] United States v. Karo, 468 U.S. 705, 708 (1984).

[59] *Id.* at 708–10.

[60] *Id.* at 714.

[61] Its absence appears to result from a conscious choice to disregard its relevance, given that *Karo* was relied upon in both the trial court's opinion, *see* United States v. Jones, 451 F. Supp. 2d 71, 88 (D.D.C. 2006), and the government's brief, *see* Brief and Record Material for Appellee at 53–54, *Jones*, 451 F. Supp. 2d 71 (Nos. 08-3030, 08-3034), 2009 WL 3126569.

could not have been visually verified."[62] If, conversely, the Court had considered the duration of surveillance to be a dispositive factor in the constitutional inquiry, it would have been well positioned to say so in *Karo*. Further, while the *Karo* Court held that beeper surveillance inside a private residence constituted a Fourth Amendment search, it permitted the use of the beeper evidence obtained during different portions of the prolonged tracking period, based in part on the public nature of the information.[63] By allowing the use of "untainted information"[64] — that is, information not obtained while the beeper remained in a defendant's residence — the Court implicitly sanctioned a duration of public tracking that exceeded the single trip in *Knotts*.[65] The Supreme Court's *Knotts-Karo* framework thus reveals a focus in surveillance cases on qualitative differences over quantitative ones,[66] but the D.C. Circuit failed to glean insight from these opinions.

Because the *Maynard* opinion worked outside the framework illustrated in *Knotts* and *Karo*, the D.C. Circuit had little authority on which to ground its Fourth Amendment formulation. Not surprisingly, then, the court set forth a loosely defined test to determine whether certain quantities of electronic surveillance[67] rise to the level of unconstitutional searches. The court suggested that unlimited observation of movements would constitute a search,[68] as would constant sur-

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[62] *Karo*, 468 U.S. at 715; *see also* THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 240 (2009) ("The beeper in *Karo* was used to gain information about private locations, . . . whereas in *Knotts* it had been used to gain information about public locations."); David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1087 & n.258 (2004) (highlighting the Supreme Court's emphasis on privacy in residences by contrasting *Karo* and *Knotts*).

[63] *See Karo*, 468 U.S. at 719–21.

[64] *Id.* at 721.

[65] The Court's acceptance of prolonged tracking in *Karo* does not mean, of course, that tracking via beeper and tracking via GPS device are strictly identical for Fourth Amendment purposes. *See* Hutchins, *supra* note 54, at 418–21 (discussing the vast potential of GPS technology and its expanding functions in law enforcement). Similarly, *Karo*'s surveillance of a container of chemicals could be distinguished as tracking a *thing*, whereas *Maynard*'s surveillance focused on tracking an *individual*. *See* Edward L. Barrett, Jr., *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 46 (noting that "the security of the 'person' . . . is far more significant today than is the protection of property interests"). The *Maynard* court, however, did not grapple with the more nuanced distinctions in the nature of the technology and of the interest affected because it failed to confront *Karo*.

[66] Scholars, conversely, continue to debate the relevant framework to be applied. *Compare* Gershman, *supra* note 53, at 955 ("One of the central themes of the Supreme Court's Fourth Amendment jurisprudence is, in fact, the existence of different degrees of intrusions . . . ."), *with* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1010 (2010) ("The distinction between government surveillance outside and government surveillance inside is probably the foundational distinction in Fourth Amendment law.").

[67] The same concerns arguably apply to visual surveillance, though the court took care to avoid opining on more traditional investigatory tactics. *See supra* note 39.

[68] *See Maynard*, 615 F.3d at 557.

veillance "week in and week out."[69] Beyond the hyperbole, there is no indication of what length of surveillance triggers an unconstitutional search. Presumably, tracking a "single journey" comports with the Constitution,[70] but any further government action enters a suspect gray area. This uncertainty reduces the confidence of police in tracking suspects and challenges investigators to make a judgment call as to how much surveillance is too much.[71] The Supreme Court, in contrast, has emphasized the Fourth Amendment's function of regulating police activity and the consequent need for doctrinal clarity.[72]

Advanced tracking technology is a difficult issue that merits a thorough evaluation of — and, if the Supreme Court[73] sees fit, departure from — precedent that hails from a different technological era.[74] Lower courts have consistently struggled with police methods that some judges view as "creepy and un-American."[75] Nevertheless, the D.C. Circuit's hasty disregard for precedent in *Maynard* was not the proper method to grapple with changing technologies. Instead, the dismissal of *Knotts* as relevant precedent untethered the court from Supreme Court guidance in the murky realm of Fourth Amendment analysis, and the consequent substitution of a poorly defined test left law enforcement with vague directives.

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[69] *Id.* at 560.

[70] *See id.* at 558, 560, 562, 565.

[71] The district court, by comparison, applied a workable test, based on the *Knotts-Karo* framework, that could be replicated easily and consistently in future cases. Noting the distinction "between monitoring in public spaces versus private locations," the district court suppressed any evidence obtained while Jones's vehicle was parked in the garage attached to his residence, while admitting all evidence obtained while Jones traveled on public roads. United States v. Jones, 451 F. Supp. 2d 71, 88 (D.D.C. 2006).

[72] *See* New York v. Belton, 453 U.S. 454, 458 (1981) (noting that Fourth Amendment restrictions "ought to be expressed in terms that are readily applicable by the police" instead of terms that "requir[e] the drawing of subtle nuances and hairline distinctions" (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141)). While some scholars contest the desirability of applying bright-line rules in Fourth Amendment jurisprudence, *see, e.g.*, Hutchins, *supra* note 54, at 438, others argue for an even stricter divide than the public-residential framework, *see, e.g.*, Steinberg, *supra* note 62, at 1084 (arguing that "the Fourth Amendment prohibits improper *physical* searches of residences, and that is all") (emphasis added).

[73] The judiciary is not the only mechanism for confining the government's use of technology; on the contrary, legislatures remain free to limit police practices as they choose, and they are increasingly voting to do so. *See Maynard*, 615 F.3d at 564 (listing laws limiting the use of electronic tracking devices in California, Florida, Hawaii, Minnesota, Oklahoma, Pennsylvania, South Carolina, and Utah); *see also* David E. Steinberg, *Sense-Enhanced Searches and the Irrelevance of the Fourth Amendment*, 16 WM. & MARY BILL RTS. J. 465, 471–73 (2007).

[74] For a compelling discussion of existing legal standards' overemphasis on the physical world and the resulting need for the judiciary to impose constitutional limits on technological restraints, see Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1394–1400 (2008).

[75] *See* United States v. Pineda-Moreno, No. 08-30385, 2010 WL 3169573, at *7 (9th Cir. Aug. 12, 2010) (Kozinski, C.J., dissenting from the denial of rehearing en banc).