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DRAGNET LAW ENFORCEMENT: PROLONGED SURVEILLANCE & THE FOURTH AMENDMENT

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DRAGNET LAW ENFORCEMENT: PROLONGED SURVEILLANCE & THE FOURTH AMENDMENT
WHERE CHANGING THE NAMES WILL NOT PROTECT THE INNOCENT
By Anna-Karina Parker¹

Introduction

Technology has advanced significantly from 1983 to today. In the past, law enforcement had access to RF tracking allowing them to locate a vehicle on public highways, when needed, by activating a radio transmitter; but it did not allow law enforcement to track the movement of a vehicle continuously without activation, as with a Global Positioning System [hereinafter GPS].²

The use of a tracking device on a vehicle has been allowed without a warrant since the Court’s decision in United States v. Knotts,³ assuming that law enforcement placed the tracker on the vehicle legally. With the rapid development and progression from RF tracking to GPS surveillance, law enforcement is now able to track a person’s movement by use of GPS without a warrant for a prolonged period of time. Two cases have provided different perspectives regarding prolonged GPS surveillance. One allowed for the use of a GPS device without a warrant, making the clear distinction that it was being used merely as a tracking device. The other stated that when the GPS is used for a prolonged period of time revealing intimate details of a person’s life, a warrant should be required. This paper argues with the latter position. A person has a reasonable expectation of privacy when the whole of a person’s activities are being monitored through GPS; thus making it tantamount to dragnet law enforcement referred to in Knotts.

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United States v. Pineda-Moreno\(^4\) recognized the need for warrantless tracking of vehicles, but United States v. Maynard\(^5\) correctly recognized the advancement of technology; the abuses that happen with technology; and most importantly the privacy of an individual in a social world. The D.C. Circuit took into account the significance of the privacy of an individual that is revealed when a GPS monitors for the sole purpose of putting together the daily movements and activities of an individual. This is an example of the dragnet type law enforcement that the Court in Knotts did not address when limiting its decision to the facts of the case before it.

**Case Overview: Maynard & Pineda-Moreno**

**U.S. v. Maynard: A Closer Look**

The D.C. Circuit reversed upon appeal Antoine Jones’ conviction of conspiracy and intent to distribute on the grounds that prolonged surveillance of the GPS was warrantless.\(^6\) Mr. Jones was tracked continuously for twenty-eight days with a GPS, not to merely locate his vehicle, but to piece together his movements in their entirety.\(^7\) The GPS was placed on Mr. Jones’ car after the warrant expired, but the court looked to see if the use of the GPS was a search, and if so, whether it was a reasonable search.\(^8\)

The D.C. Circuit determined that it was a search, as Knotts does not govern with respect to the GPS being used for prolonged surveillance.\(^9\) First, the court pointed to the limited holding in Knotts. The D.C. Circuit stated that the limited use of a beeper in one journey to merely find the final destination of a container still reserved the question for the court of “whether a warrant

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\(^4\) U.S. v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010).
\(^6\) Maynard, 615 F.3d at 549.
\(^7\) Id. at 549.
\(^8\) Id. at 555.
\(^9\) Id. at 555-56.
would be required in a case involving “twenty-four hour surveillance.”

The Court in *Knotts* held that there is “no reasonable expectation of privacy in his movements from one place to another. . . [but not] world without end.”

The D.C. Circuit further reasoned that Mr. Jones’ situation would be applicable to the “world without end” scenario. With Mr. Jones, “the police used the GPS device not to track [Mr.] Jones’ ‘movements from one place to another,’ *Knotts*, 460 U.S. at 281, but rather to track [Mr.] Jones’ movements twenty four hours a day for twenty-eight days as he moved among scores of places, thereby discovering the totality and pattern of his movements from place to place.”

The court recognized that Mr. Jones’ locations were not exposed to the public for two reasons. First, unlike a single journey that may be exposed to the public, the movements of a person over the course of a month are not actually exposed. Secondly, the whole of one’s movements are not exposed constructively to the public. The government, on the other hand, argued that Mr. Jones’ movements were actually exposed, as law enforcement could have *lawfully* followed Mr. Jones over the course of a month. The court, in response, stated that it is not a question of what one may lawfully do, but it is “what a reasonable person expects another might *actually* do.” (Emphasis added). With this understanding, the court held that the movement of a person over a month is not actually exposed, as “the likelihood a stranger would observe all those movements. . . is essentially nil.”

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10 *Id.* at 556.
11 *Id.* at 557
12 *Maynard*, 615 F.3d at 558.
13 *Id.* at 558
14 *Id.* at 559.
15 *Id.* at 560.
16 *Id.* at 559.
17 *Id.* at 560.
Moreover, it is not constructively exposed as case precedent\textsuperscript{18} has distinguished between the whole versus the parts with respect to the Freedom of Information Act cases, and implicitly with the Fourth Amendment cases as seen in \textit{Smith v. Maryland}\textsuperscript{19}(discussing whether one has a reasonable expectation of privacy with a list of numbers versus one or a few).\textsuperscript{20} The whole would reveal intimate details of a person’s life “such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person. . .” as opposed to “. . . an individual trip viewed in isolation.”\textsuperscript{21} Thus, a reasonable person does not expect that one would “monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there.”\textsuperscript{22} So Mr. Jones did not constructively expose his movements over the twenty-eight days to society.

The second question the court asks is, if the search was reasonable? In other words, was Mr. Jones’ expectation of privacy reasonable?\textsuperscript{23} The court affirmatively answers by defining reasonable as “understandings that are recognized or permitted by society.”\textsuperscript{24} The government though focused on the search being reasonable as it was the tracking of a vehicle on a public road rather than in the home.\textsuperscript{25} The court, looking at other state laws, disagreed with the

\textsuperscript{19} Smith v. Maryland, 442 U.S. 735 (1979).
\textsuperscript{21} \textit{Maynard}, 615 F.3d at 562.
\textsuperscript{22} \textit{Id.} at 563.
\textsuperscript{23} \textit{Id.} at 563.
\textsuperscript{25} \textit{Id.} at 563.
government’s argument. Several states require a warrant for prolonged GPS monitoring. Thus
the D.C. Circuit held that this type of prolonged surveillance “reveals an intimate picture of the
subject’s life that he expects no one to have… The intrusion such monitoring makes into the
subject’s private affairs stands in stark contrast to the relatively brief intrusion at issue in Knotts.
.”27 Therefore Mr. Jones did have a reasonable expectation of privacy with the intimate details
revealed through the prolonged use of the GPS.

The government in turn, argued that this decision would also prohibit prolonged visual
surveillance, yet, the government, when asked, could not point to a single example of practiced
visual surveillance that would be affected by the holding.28 This is important because visual
surveillance incurs an expense much greater than GPS. Thus, “the advent of GPS technology
has occasioned a heretofore unknown type of intrusion into an ordinarily and hitherto private
enclave.”29 The court further reasoned when looking at Fourth Amendment issues “means do
matter;”30 and the facts of each case must be reviewed in each Fourth Amendment analysis.31

The D.C. Circuit concluded that intimate details were revealed in the prolonged
surveillance since it was not monitoring a location merely from one point to another, but rather
that the GPS was essential to the case by putting together the life of Antoine Jones’ for twenty-
eight days.32 Thus the conviction was reversed.

Pineda – Moreno: A Closer Look

26 States recognized in the case requiring warrants are Oklahoma, California, Utah, South Carolina, Florida, Hawaii, Pennsylvania, and Minnesota.
27 Maynard, 615 F.3d at 563.
28 Id. at 565.
29 Id. at 565.
30 Id. at 566.
31 Id. at 566 (citing Dow Chemical Co. v. United States 476 U.S. 227, 238 n.5 (1986).
32 Id. at 567.
The Ninth Circuit in *Pineda-Moreno* looked at whether one’s Fourth Amendment rights were violated when law enforcement entered the curtilage of one’s home and attached a mobile tracking device to Juan Pineda-Moreno’s jeep. In this instance, the DEA used a tracking device over a period of four months, not continuously, but on and off to see when Mr. Pineda-Moreno’s jeep would be at a suspected marijuana grow sight. The use of the tracking device was further aided with visual surveillance and other evidence. In September 2007, the agents were alerted that the vehicle was leaving the suspected marijuana grow sight and pulled Mr. Pineda-Moreno over. He consented to a search of his car and trailer, and two large garbage bags were found of marijuana. Mr. Pineda-Moreno appealed on a motion to suppress evidence obtained from the tracking device. The Ninth Circuit held that it was not a violation of the Fourth Amendment as the GPS was used to track his jeep on public highways and the information obtained by agents was only a log of locations.

The Ninth Circuit in *Pineda-Moreno* primarily focused on whether the tracking device used was generally used by the public, pointing to *Kyllo v. United States*, rather than *Knotts*. In *Kyllo*, the thermal imaging was a substitute for a search within the Fourth Amendment; while in *Knotts*, the following of a car on public highways is not a search within the Fourth Amendment. Further, the only evidence obtained was a log of locations where Mr. Pineda-Moreno’s jeep had traveled; the GPS tracking device was not used to collect information to reveal intimate details of Mr. Pineda-Moreno’s life. Instead the focus was the jeep. Thus, the

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33 *Pineda-Moreno*, 591 F.3d at 1213.
34 *Id.* at 1214.
35 *Id.* at 1214.
36 *Id.* at 1214.
37 *Id.* at 1216-17.
38 *Id.* at 1216.
40 *Pineda-Moreno*, 591 F.3d at 1216.
41 *Id.* at 1216.
Ninth Circuit held that Mr. Pineda-Moreno was not unreasonably searched under the Fourth Amendment;\textsuperscript{42} looking at the technology used rather than if intimate details were exposed where a reasonable expectation of privacy was held.

\textit{Existing Legal Background}

\textit{Knotts: Public Highways & Tracking Devices}

The primary authority that the D.C. Circuit in \textit{Maynard} looked at was \textit{Knotts}, but \textit{Karo} and \textit{Kyllo} did have a supportive role. The Court in \textit{Knotts} held that the use of a beeper to track on public roads was ok, but it also limited the holding to the specifics of the case, and did not look at dragnet law enforcement. In \textit{Knotts}, law enforcement planted a beeper in a container and monitored its movements with not only the beeper, but visual surveillance along public highways to a “secluded cabin.”\textsuperscript{43} The lack of privacy expectation in public was specifically related to the movement of a vehicle from point A to point B.\textsuperscript{44} The \textit{Knotts} Court followed the \textit{Katz} test; asking if one has exhibited an “actual (subjective) expectation of privacy” and whether “society is prepared to recognize [that expectation] as reasonable.”\textsuperscript{45} In this particular instance, law enforcement located the ether in the container not only through the tracking device but also in their visual observations of witnessing the ether being loaded in the truck.

The Court specifically limited this holding based on the general view that “twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or

\textsuperscript{42} Id. at 1217.
\textsuperscript{43} Knotts, 460 U.S. at 277.
\textsuperscript{44} Id. at 281.
\textsuperscript{45} Id. at 280-81 (citing \textit{Katz v. U.S.}, 389 U.S. 347, 361 (1976)).
supervision.” The Court continued to state that “if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.” The Court held in Knotts that tracking a vehicle on public highways is not a search; recognizing the limited use of the beeper in this particular case.

Karo & Kyllo: A Potential for Abuse in Technology

While the Court in Knotts focused on one’s movement in public from point A to B; the Court in Karo focused on the residence as well as the potential abuse of technology. In Karo, DEA agents placed a beeper in a can of ether with consent of the owner. With visual surveillance and the beeper, agents were able to track the can inside the home. Thus they obtained a search warrant using both the information from the tracking device and the agents’ groundwork. The Court held that the placement of the tracking device was not in violation of the Fourth Amendment, and while the search of the can in the home by way of the beeper was unconstitutional, there was other evidence to provide probable cause for the issuance of the warrant. The Court expressed that it was not necessarily the device that was at issue, but the exploitation of the device which can be protected under the Fourth Amendment. The Court’s holding focused on the locations of the beeper in the residence and held that the monitoring of it in a home is not allowed. The evidence would not be suppressed though, as there was sufficient evidence from other surveillance and tracking that allowed for probable cause.

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46 Id. at 283 (citing Brief for Respondent 9).
47 Id. at 284.
48 Id. at 277.
49 Knotts, 460 U.S. at 284.
50 Karo, 468 U.S. at 708.
51 Id. at 708-10.
52 Id. at 712.
53 Id. at 712.
54 Id. at 721.
Moreover, the Court in *Kyllo* focused on the home and technology by asking “what limits there are upon this power of technology to shrink the realm of guaranteed privacy.”\(^{55}\) This question, although pertaining to the residence, brings us to today where technology has moved far beyond our comprehension; allowing law enforcement to know our personal lives as well as or better than we do through the use of GPS, satellites, and now even the smart phone.

**Maynard: The Advent of Dragnet Law Enforcement through GPS**

The D.C. Circuit recognized the pervasiveness of technology today in that the GPS allows for twenty-four hour surveillance. This dragnet type of law enforcement does reveal intimate details of a person’s life that should have judicial supervision through the warrant process since there is a reasonable expectation of privacy both by the individual and society.

*Knotts to be Continued: Dragnet Law Enforcement*

The D.C. Circuit in *Maynard* correctly picked up on the distinction of twenty-four hour surveillance by GPS versus tracking to aid in an investigation as in *Knotts* and *Karo*. Additionally, the use of the tracking device in *Knotts* and *Karo* was used merely to locate a barrel. The use of the tracker in *Knotts* involved more than one instance, but the purpose was to track a particular item *and* was only a part of the investigative process;\(^{56}\) it was not used to put together intimate details of a person’s life. While in *Maynard*, law enforcement used the GPS to establish a pattern and picture of Mr. Jones’ movements, revealing intimate details. This pattern established by “GPS data was central to its presentation of the case. . .”\(^{57}\) This distinction is important since there was no neutral and detached magistrate ensuring an unbiased review on the government intrusion, as the GPS is more advanced and intrusive than a RF tracking device.

Dragnet type of law enforcement applies whether one is involved in criminal activity or not. The

\(^{55}\) *Kyllo*, 533 U.S. at 34.

\(^{56}\) See *Knotts*, 460 U.S. at 276-78.

\(^{57}\) *Maynard*, 615 F.3d at 562.
Fourth Amendment makes no such distinction between a criminal or a non-criminal person.

“Requiring a warrant will have the salutary effect of ensuring that use of beepers is not abused. . .”

**Intimate Details is where a Reasonable Expectation of Privacy Exists**

Furthermore, as previously mentioned, intimate details are revealed by the prolonged use of the GPS as stated in *Maynard*, not just the mere location of an item.\(^5^9\) Law enforcement used the GPS to put together intimate details of Mr. Jones’ life. His trips and movements in isolation do not tell a story, just as one visit to church does not say one is a saint. Yet if followed over a course of a month, one may “deduce whether he is a weekly churchgoer, a heavy drinker… [or] an unfaithful husband.”\(^6^0\) The D.C. Circuit emphasized that intimate details were revealed by the prolonged GPS use as the GPS was the essential piece of the case.\(^6^1\) It was not used to locate a vehicle or person, but it was used to put together a diary of Mr. Jones’ life for twenty-eight days.\(^6^2\) Constructively and actually Mr. Jones’ never revealed this entire picture to society as his movements over a course of a month were not exposed to the same passerby.\(^6^3\) The *Katz* test of privacy is not about what one may *lawfully* do, but what a reasonable person *actually* expects another to do. The Eastern District of New York also recognized the progress of technology and the need to recognize this progress in order to protect the individual with respect to the Fourth Amendment.

\[T\]echnology has progressed to the point where a person who wishes to partake in the social, cultural, and political affairs of our society has no

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58 *Karo*, 468 U.S. at 717-718.
59 *See Knotts and Karo*.
60 *Maynard*, 615 F.3d at 562.
61 The GPS was not just “one more piece of information to add” to the other evidence. Foltz v. Virginia, 2011 WL 1233562 at 5 (Va. Ct. App. 2011).
62 As discussed earlier the D.C. Circuit in *Maynard* is the first to really look at the constitutionality of the information that the GPS is providing rather than just the mere use of a GPS to aid an investigation.
63 This refers back to the discussion in the D.C. Circuit’s decision regarding actual and constructive exposure of the whole of one’s movements versus seeing only a part of one’s movements.
realistic choice but to expose to others, if not the public as a whole, a broad range of conduct and communications that would previously have been deemed unquestionably private.\textsuperscript{64}

To make a distinction simply between public and residential spaces is not feasible in a world that grows more dependent on each other and where technology has vastly surpassed beyond what the Fourth Amendment could have accounted for.\textsuperscript{65} Instead, the focus ought to be on the use of the technology and whether intimate details of a person’s life are being revealed with similar tactics, as in \textit{Maynard}.

\textit{Automobiles: Privacy still Exists}

Additionally, the fact that one is in a car does not mean all expectations of privacy are gone. It may have a lesser expectation of privacy,\textsuperscript{66} but it is not eliminated. As recognized by the New York State Court of Appeals:

Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one’s home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.\textsuperscript{67}

The court further stated that one’s Fourth Amendment rights are not completely taken away when one steps from their home onto public sidewalks. We are more and more creatures that must interact with society on a daily basis for our basic needs.\textsuperscript{68} With this dependency on

\textsuperscript{64} In re United States Order Authorizing the Release of Historical Cell-Site Info., 736 F.Supp.2d 578, 582 (E.D.N.Y. 2010).

\textsuperscript{65} See Constitutional Law – Fourth Amendment –D.C. Circuit deems Warrantless Use of GPS Device an Unreasonable Search, 124 Harv. L. Rev. 827 (2011) (where a discussion of why \textit{Maynard} was incorrectly decided as the author argues that it disregarded precedent).

\textsuperscript{66} \textit{Knotts}, 460 U.S. at 281.

\textsuperscript{67} People v. Weaver, 2009 NY Slip Op 3762, 6-7 (N.Y. 2009).

\textsuperscript{68} Id. at 7.
technology and others, this does not mean that we have to accept a reduction in our privacy or our right to protection under the Fourth Amendment.

_Pineda-Moreno Distinguished_

In _Pineda-Moreno_, the GPS was not being used to put together intimate details of a person’s life over a prolonged period of time. Instead the GPS was used to locate a vehicle that left a suspected drug area.\(^69\) The police used other investigative techniques and received consent for a search. Alternatively in _Maynard_, the essential piece of evidence was the utilization of the GPS surveillance to paint a picture of the life and profile of Mr. Jones in order to determine whether it fit the life and profile of a drug trafficker.\(^70\) Thus, _Pineda-Moreno_ and _Maynard_ are distinguished, as the former used the GPS to initiate visual surveillance, while _Maynard_ used the GPS for prolonged surveillance to put together the life of a person.

_Vagueness or Merely Case by Case_

An argument over the feasibility of the D.C. Circuit’s decision has been made due to the potential vagueness of the rule.\(^71\) In other words, how long would be prolonged or dragnet type law enforcement? In response, the D.C. Circuit in _Maynard_ has answered by recognizing that Fourth Amendment cases require a fact by fact determination. Moreover, GPS surveillance to monitor the movement of a vehicle from point A to point B is still allowed. Instead, what has been deemed unconstitutional by the D.C. Circuit is the use of GPS monitoring as an avenue to put together the pieces of a person’s daily live revealing intimate details. It is not unconstitutional to use the GPS intermittently or in conjunction with other investigative

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\(^{69}\) *Pineda-Moreno*, 591 F.3d at 1213.


\(^{71}\) *Id.* at 8.
techniques. \(^72\) Finally, visual surveillance has not been deemed unconstitutional by the D.C. Circuit’s decision in *Maynard*. GPS surveillance is fundamentally different than visual surveillance. With visual surveillance an individual has the opportunity to hide their movements, but with a GPS there is no escape; whether in the darkness of night or the congestion of traffic. \(^73\)

**Conclusion**

The Fourth Amendment was enacted to protect one’s person and not just a place. \(^74\) With respect to the decision in *Maynard*, the D.C. Circuit looked at how the technology was being used and determined that its prolonged use revealed intimate details. The Court’s decision in *Knotts* does not control in this instance, as the *Knotts* Court focused on a tracking device used for a limited purpose to locate an object. Alternatively in *Maynard*, Mr. Jones’ movements were tracked, not to find a mere location, but to put together a pattern of activity, creating a biography. The Fourth Amendment is to protect all citizens, and as technology advances along with our social dependency, intimate details of our lives do become vulnerable and need to be safeguarded. Therefore, the D.C. Circuit correctly held that intimate details may be revealed by prolonged surveillance and must be protected by the Fourth Amendment through the requirement of a warrant.

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\(^{72}\) This is clear in *Knotts, Maynard* as well as post-Maynard cases that focus on GPS surveillance that is used intermittently with other law enforcement investigative techniques. See generally *U.S. v. Walker*, 2011 US Dist. Lexis 13717 (W.D. Mich. 2011).

\(^{73}\) *U.S. v. Ugochukwu*, 2010 WL 5641650 (N.D. Ohio 2010), *Memorandum in Support of Defendant Sapp’s Motion to Suppress Evidence*.

\(^{74}\) “The right of the people to be secure in their persons... against unreasonable searches and seizures, shall not be violated...” U.S. Const. amend. IV.