UNITED STATES V. JONES AND THE DEBATE OVER WARRANTLESS GPS SURVEILLANCE ON VEHICLES

I. INTRODUCTION

While many sections of the Constitution have served as focal points for an endless stream of evolving debate and jurisprudence over the past two centuries, few areas have led courts to such broad and inconsistent interpretations as the Fourth Amendment. This is especially true of the last decade, where the dichotomy between sentiments of privacy and the desire for national security has become more and more prevalent in the minds of the American public. While 2010 and 2011 have seen some enlightening judicial authority come down around the country in the area of privacy with regard to searches and seizures,[1] it is still evident that significant progress must be made to clarify the complex legal strictures under which those responsible for ensuring our security operate.[2] At a time

1. *E.g.*, United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010); United States. v. Maynard, 615 F.3d 544 (D.C. Cir. 2010). These cases are discussed in depth in Part II of this Note.

2. *See* Paul B. Kantor & Michael E. Lesk, *The Challenges of Seeking Security While Respecting Privacy*, in 5661 LECTURE NOTES IN COMPUTER SCIENCE 2 (Cecilia S. Gal et al. eds., Springer-Yeriag Berlin Heidelberg 2009) ("[In] May 2008, it was clear from a cursory glance at the media, that

when technology in the area of surveillance is becoming increasingly sophisticated, the legal standards of the past no longer provide a viable scheme for determining what actions are constitutionally permissible by officers of the law in the areas of search and seizure. Officers today have the technological ability and legal authority to do much more in the area of surveillance than they ever could, particularly because of the disconnect between technological advancement and the evolution of Fourth Amendment case law. Recent socio-political events and legal changes in police surveillance and search powers have created an environment that is conducive to invasive applications of emerging technologies.[3]

Among those emerging technologies implemented by officers today, Global Positioning Systems (GPS) have been a continuous source of debate and have given rise to many constitutional challenges. GPS is a space-based positioning system consisting of 25 satellites, which "permit simultaneous determination of both precise three-dimensional position and precise time."[4] GPS tracking devices receive signals from satellites in the GPS network and use the information to calculate precise location, speed, and direction.[5] Prior to the implementation of GPS devices, locational tracking was achieved through (now obsolete) "beeper" tracking technology, which differs in several significant ways from GPS. Unlike GPS, beeper tracking devices transmit intermittent radio signals that must be monitored in real time from a relatively close distance. GPS devices, on the other hand, in addition to being much more accurate, can be monitored from a remote location and can track movements for an extended period of time, creating a detailed collage of a subject's activities for days, weeks, months, and so on.[6] Those who advocate against the warrantless use of GPS devices argue that this type of remote day-to-day recordkeeping is a "completely different type of intrusion" from the traditional surveillance of people traveling on public streets.[7] However, several federal courts of appeals have sanctioned the warrantless use of GPS devices, and while national statistics regarding the frequency of use do not exist, there is evidence that GPS has become a widely accepted means of preventive sur-

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in the United States there was a strong and growing concern regarding the tensions between programs aimed at protecting the security of citizens, and programs or policies aimed at protecting the privacy of those same citizens.").

3. William Bloss, *Escalating U.S. Police Surveillance after 9/11: An Examination of Causes and Effects*, 4 SURVEILLANCE & SOC'Y (SPECIAL ISSUE) 208 (2007), *available at* http:// surveillance-and-society.org/ criminaljustice.htm.

4. The Future of the Global Position System, Rep't Dep't of Def., Def. Sci. Bd. 4 (2005) *available at* http:// *www.acq.osd.mil/ dsb/ reports/ ADA443573.pdf.*

5. Ben Hubbard, *Police Turn to Secret Weapon: GPS Device*, WASH. POST, Aug. 13, 2008, at A1.

6. *Cf.* United States v. Maynard, 615 F.3d 544, 558 (D.C. Cir. 2010) ("[T]he whole of one's movements is not exposed *constructively* even though each individual movement is exposed, because that whole reveals more—sometimes a great deal more—than does the sum of its parts.").

7. Hubbard, *supra* note 5 (quoting Washington D.C. attorney Chris Leibig).

veillance.[8] For example, according to year-end reports from Fairfax County, Virginia, the Fairfax police department utilized GPS technology in investigations from 2005 to 2007 sixty-one times, fifty-two times, and forty-six times, respectively.[9] However, the accuracy of these figures may be dubious, as underlying every reported instance of GPS use, there may be countless unreported cases as well.[10] By and large, the public only hears about the use of GPS after it has effectively aided in the capture or conviction of a criminal who then tries to challenge the constitutionality of its use. As a result, public perception of the warrantless use of GPS by police remains positive, most likely because it appears to be solely correlated with the capture of murderers, drug dealers, and other hardened criminals.[11] But, what about cases in which GPS devices are used to track the movements of innocent people with little or no evidence of wrongdoing? How often are innocent people subjected to this kind of intrusion, and would public opinion change if we were suddenly enlightened to a high frequency of use targeted at law-abiding citizens?

This Note will explore the evolution of case law on the issue of warrantless GPS use from 2007 to 2011, leading up to the recent United States Supreme Court case of *United States v. Jones*.[12] Part I will give a brief overview of the Fourth Amendment and its interpretation and then will examine how the Supreme Court has reconciled the use of tracking technology with a modern interpretation of the Fourth Amendment. Part II will review the most recent federal case law concerning the constitutionality of warrantless GPS attachment and monitoring. Part III will introduce a recent instance in California where GPS technology was implemented by law enforcement in an unjust, yet lawful way,[13] and then will examine the

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8. Audio: NPR's Morning Edition story entitled "GPS Devices Do the Work of Law Enforcement Agents" (Oct. 27, 2010) *available at* http:// www.npr.org/ templates/ story/ story.php?storyId=130851849&ps=rs (quoting justice correspondent Carrie Johnson) ("There are no clear statistics about [how common it is for officers to use GPS devices]. But in a recent Federal Court brief, prosecutors say the Justice Department is using this GPS tracking technique with increasing frequency. They say it's a very important investigative technique for them."). *See also* Kim Zetter, *Busted! Two New Fed GPS Trackers Found on SUV*, WIRED, Nov. 8, 2011 *available at* http:// www.wired.com/ threatlevel/ 2011/ 11/ gps-tracker-times-two ("The Justice Department has said that law enforcement agents employ GPS as a crime-fighting tool with 'great frequency,' and GPS retailers have told Wired that they've sold thousands of the devices to the feds.").

9. Hubbard, *supra* note 5.

10. *See id.* ("Most police departments in the Washington region resist disclosing whether they use GPS to track suspects. . . . Police departments in Arlington, Fairfax and Montgomery counties and Alexandria declined to discuss the issue.").

11. *See id.* ("Such cases have revealed how police in Washington state arrested a man for killing his 9-year-old daughter: the GPS device attached to his truck led them to where he had buried her. Cases have shown how detectives in New York caught a drug-runner after monitoring his car as he bought and sold methamphetamine. In Wisconsin, police tracked two suspected burglars by attaching a GPS device to their car and apprehending them after burglarizing a house.")

12. United States v. Jones, 131 S.Ct. 3064 (2011).

13. Kevin Dolak, *Student Says He Found FBI Tracking Device On Car*, ABC News, Oct. 9, 2010, *available at* http:// abcnews.go.com/ US/ california-student-finds-fbi-tracking-device-car/ sto-

current state of public opinion on the issue. Finally, Part IV will summarize the most predominant arguments asserted by each side in the recent Supreme Court case and explain why the Court may have trouble reconciling the disparate analyses of the lower courts that have addressed the issues. As Barry Steinhardt, former Director of the ACLU's Technology and Liberty Program, put it, "Given the capabilities of today's technology, the only thing protecting us from a full-fledged surveillance society are the legal and political institutions we have inherited as Americans."[14]

II. THE FOURTH AMENDMENT

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[15]

Under the Fourth Amendment to the United States Constitution, the threshold inquiry is whether police activities constitute a search or seizure, since this answer determines whether the action falls under the scope of the Amendment's protections.[16] If it is determined that a search has occurred, the search will only be deemed constitutional if it was reasonable under the circumstances. Because the Amendment is separated into two clauses, the question arises whether a search is only reasonable pursuant to a warrant supported by probable cause or whether the clauses should be read separately, meaning that some warrantless searches may still be deemed reasonable.[17] The Supreme Court has frequently asserted that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[18] With regard to the attachment and monitoring of GPS devices on automobiles, some courts have cited a specific exception as a way to get around the requirement of a warrant.[19] However, most courts have

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ry?id=11841644.

14. *Is the U.S. Turning Into a Surveillance Society?*, Jan. 15, 2003, *available at* http:// www.aclu.org/ technology-and-liberty/ us-turning-surveillance-society.

15. U.S. CONST. amend. IV.

16. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 31 (2001); Katz v. United States, 389 U.S. 347, 352-53 (1967).

17. Johnny Kilman & George Costello, *The Constitution of the United States of America: Analysis and Interpretation* (2002 ed.) *available at* http:// www.gpoaccess.gov/ constitution/ pdf2002/ 022.pdf.

18. *Katz*, 389 U.S. at 357 (emphasis added).

19. *See, e.g.*, U.S. v. Shovea, 580 F.2d 1382 (10th Cir. 1978) (recognizing that utilization of an

simply deemed the activity constitutionally permissible, notwithstanding prior judicial approval, based on the determination that the act does not constitute a search.

A. What is a "Search"?

Until the 1960s, the Supreme Court repeatedly defined a Fourth Amendment "search" in terms of physical trespass boundaries.[20] In other words, where there was no physical trespass, delineated in property law, there could be no Fourth Amendment violation.[21] The Court later rejected this approach in the landmark case of *Katz v. United States*.[22] Under the Court's analysis in *Katz*, interpreted in conjunction with the seminal concurring opinion of Justice John M. Harlan, the Fourth Amendment is only applicable where a person exhibits a subjective expectation of privacy, and society would be prepared to recognize that expectation as objectively reasonable.[23] In *Katz*, the Court held that the government's conduct in recording the defendant's conversations in a phone booth violated his justifiable expectation of privacy, even absent physical intrusion, because society would consider a person's expectation of privacy in a phone booth to be objectively reasonable.[24] While this new test provided a much more obscure demarcation than the traditional approach, the context of the case necessitated a new standard and demonstrated the Court's recognition of the need for constitutional interpretation to evolve alongside technology.[25]

In *Kyllo v. United States*,[26] more than thirty years later, new technologies in surveillance forced the Supreme Court to revisit Fourth Amendment privacy issues. The Court held that the warrantless use of a thermal imaging device on a private home to monitor movement within the home violated the Fourth Amendment.[27] The Court stated that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search—at least

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electronic tracking device, without prior court approval, may be justified by probable cause and exigent circumstances).

20. *See, e.g.*, Goldman v. United States, 316 U.S. 129 (1942), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

21. *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1928) (One of the two premises underlying the holding that wiretapping was not covered by the Fourth Amendment was that there had been no actual physical invasion of the defendant's premises.).

22. *Katz*, 389 U.S. 347.

23. *Id.* at 351-53, 361 (Harlan, J., concurring).

24. *Id.* at 352-53.

25. *Id.* at 353 (The warrantless use of a listening device placed on the outside of a telephone booth violates the Fourth Amendment.).

26. *Kyllo*, 533 U.S. 27.

27. *Id.* at 40.

where (as here) the technology in question is not in general public use."[28] The rationale in *Kyllo* is important as a representation of the fact that officers cannot use surveillance technologies to retrieve information that would otherwise be impossible to obtain without crossing a constitutionally protected boundary.

B. Tracking Devices and the Fourth Amendment

The use of a tracking device by police on a suspect's vehicle requires two distinct steps, each of which is vulnerable to a constitutional challenge. First, police must install the device on the vehicle and second, they must monitor it.[29] While the Supreme Court has only recently taken up the issue of whether the warrantless use of GPS devices violates the Fourth Amendment, the Court has previously ruled on the use of beeper tracking devices,[30] and the rationales in those cases could provide some indication of how the Court might view the use of GPS devices.

In *United States v. Knotts*, police installed a beeper in a drum of chloroform, which was then placed into the respondents' car.[31] Subsequently, the police combined visual surveillance with monitoring the beeper to follow the respondents to a cabin where they were manufacturing illegal drugs.[32] The Court stated, "A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[33] The use of the tracking device in this instance was not deemed to be a Fourth Amendment violation because it only allowed the officers to observe more effectively what was already public.[34] Interestingly, while the Court opened the door to this kind of warrantless surveillance, they also noted that the decision in *Knotts* did not necessarily validate the use of technology by police to affect twenty-four hour surveillance of any citizen, without prior judicial knowledge or supervision.[35] The inclusion of this qualifying statement will probably be a

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28. *Id.* at 34 (citation omitted).

29. April A. Otterberg, *GPS Tracking Technology: The Case For Revisiting* Knotts *and Shifting the Supreme Court's Theory of the Public Space Under the Fourth Amendment*, 46 B.C. L. REV. 661, 665-70 (2005).

30. *See* United States v. Karo, 468 U.S. 705 (1984); United States v. Knotts, 460 U.S. 276 (1983).

31. *Knotts*, 460 U.S. at 278.

32. *Id.* at 278-79.

33. *Id.* at 281.

34. *Id.* at 282 ("The fact that the officers in this case relied not only on visual surveillance, but also on the use of the beeper to signal the presence of [the respondents'] automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.")

35. *Id.* at 284 ("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.").

significant consideration for the Court when they rule on the warrantless use of GPS tracking devices in the coming months.

III. TREATMENT OF WARRANTLESS GPS USE IN FEDERAL COURTS OF APPEALS[36]

Although the Supreme Court has yet to render an opinion on the warrantless use of GPS devices, the issue has made its way up to several federal courts of appeals, all of which have done distinct analyses of the constitutionality of attaching and/or monitoring GPS devices. The trend among circuits addressing the issue of monitoring GPS devices has been to follow the beeper analysis set forth in *Knotts*, which primarily relies on the argument that a person has no reasonable expectation of privacy in his or her movements on public streets.[37] However, in August 2010, the Court of Appeals for the D.C. Circuit became the first and only federal court of appeals to analyze the monitoring of GPS devices using a different approach[38] and held that the warrantless use of a GPS device on a vehicle violates the Fourth Amendment.[39] While the D.C. Circuit currently stands on the minority side of the circuit split on this issue, it is the only court to evaluate its holding against the arguments of the three circuits' decisions preceding it and the only court to explain why variances in the contentions set forth by the appellants in those cases may have substantially influenced the approach each circuit took in coming to its conclusion.[40]

A. Using Knotts *to Validate Warrantless GPS Use*

The most prominent court of appeals case to come out recently in favor of warrantless GPS use was the Ninth Circuit case of *United States v. Pineda-Moreno*.[41] In that case, Drug Enforcement Agency (DEA) officers planted GPS devices on the underside of the appellant's Jeep on seven different occasions while it was parked in the driveway outside his home

36. For purposes of this Note, the focus will remain on federal court of appeals cases and the current circuit split. However, it is important to note that several of the highest state courts have addressed GPS issues with regard to comparable state constitutional provisions. *See, e.g.*, State v. Jackson, 76 P.3d 217 (Wash. 2003) (The Supreme Court of Washington held that that the monitoring of a GPS tracking device constitutes a search requiring a warrant under the Washington State Constitution.).

37. *Knotts*, 460 U.S. at 281.

38. *See Maynard*, 615 F.3d at 557 ("*Knotts* held only that '[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another,' not that such a person has no reasonable expectation of privacy in his movements whatsoever, world without end . . . .") (citation omitted).

39. *Id.* at 555-56.

40. *See id.* at 557 (Referring to cases from the Ninth and Seventh Circuits, the Court stated that "in neither case did the appellant argue that *Knotts* by its terms does not control whether prolonged surveillance is a search, as [the appellant] argues here.").

41. *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010).

and on a public street.[42] The officers monitored the appellant's movements in his car over the span of four months and used a compilation of that data to pinpoint the location of a marijuana grow operation.[43] Surprisingly, the appellant only challenged the monitoring of his vehicle based on the argument that, as established in *Kyllo*, there is a "search" anytime officers use sense-enhancing technology not generally available to the public.[44] The court struck down this argument and then concluded "that the police did not conduct an impermissible search of Pineda-Moreno's car by monitoring its location with mobile tracking devices."[45] However, the part of the case that has raised the most concern from privacy advocates is the court's constitutional treatment of the officers' attachment of the GPS device to the appellant's car while it was parked in his driveway. The court held that "because Pineda-Moreno did not take steps to exclude passersby from his driveway, he cannot claim a reasonable expectation of privacy in it, regardless of whether a portion of it was located within the curtilage of his home."[46] As one privacy advocate put it, the decision "upsets years of legal precedent establishing 'curtilage' . . . as protected under the Fourth Amendment, and represents an officiously narrow interpretation of the 'open fields doctrine' test established in *United States v. Dunn* in 1987."[47]

Prior to the decisions of the Ninth Circuit and D.C. Circuit in August 2010, only two other circuits had directly addressed the warrantless use of GPS devices, and their analyses were relatively unavailing. The Eighth Circuit addressed the issue briefly in a 2010 case, where the court held that the attachment and monitoring of a GPS device on a truck used in a drug trafficking operation was not a search.[48] However, the Eighth Circuit was careful in its analysis not to leave the door open for uninhibited surveillance. The court concluded, "[W]hen police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable period of time."[49] Qualifiers like "non-invasive" and "for a reasonable period of time" made it clear that the Eighth Circuit intended to leave room for future constitu-

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42. *Id.* at 1213.
43. *Id.* at 1214.
44. *Id.* at 1216.
45. *Id.* at 1217.
46. *Id.* at 1215. It is important to note that no other court that has validated the installation and monitoring of GPS devices has addressed the issue of whether attachment while a vehicle is parked in a person's driveway is permissible. In this way, the Ninth Circuit represents the most extreme position taken to-date supporting the warrantless use of GPS.
47. Jim Garrettson, *Ninth Circuit Court: Secret GPS Tracking is Legal*, (Aug. 31, 2010) http://www.executivegov.com/ 2010/ 08/ ninth-circuit-court-secret-gps-tracking-is-legal.
48. United States v. Marquez, 605 F.3d 604, 610 (8th Cir. 2010).
49. *Id.*

tional challenges to GPS use. Additionally, unlike other circuits that have decided the issue, the Eighth Circuit declined to create a blanket authorization of GPS surveillance, instead opting to apply a "reasonable suspicion" standard.

In 2007, the Seventh Circuit addressed the use of GPS devices in *United States v. Garcia*.[50] In *Garcia*, because the appellant did not contend that he had a reasonable expectation of privacy in the movements of his vehicle, the court merely glossed over the monitoring issue and used *Knotts* to validate all tracking of vehicles on public streets.[51] As for the attachment of the GPS device, the court used something resembling a spectrum analysis, saying that GPS devices are more analogous to hypothetical practices it suggested are not searches than to practices the Supreme Court has held are searches, concluding that attachment of the GPS device was not a search.[52] While the analysis in *Garcia* is not particularly convincing, it is notable that in both *Garcia* and *Marquez*, the courts ended their analyses by considering the dangers of allowing the use of surveillance technology to advance in the future unrestricted.[53]

B. United States v. Maynard

In *Maynard*, the D.C. Circuit concluded that because the whole of one's movements in a vehicle over the course of a month is not "actually exposed" or "constructively exposed" to the public, the monitoring of those movements using a GPS device over a prolonged period violates a person's reasonable expectation of privacy.[54] Although the court went into a much more detailed analysis than any other court of appeals addressing the same issues, the most important part of its decision is its unique and convincing treatment of *Knotts*. The D.C. Circuit explained that, by reserving the "dragnet" question in *Knotts*, the Supreme Court was actually avoiding the hypothetical concern posed by the appellant about whether

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50. United States v. Garcia, 474 F.3d 994 (7th Cir. 2007).

51. *Id.* at 996.

52. *Id.* at 997 ("If a listening device is attached to a person's phone, or to the phone line outside the premises on which the phone is located, and phone conversations are recorded, there is a search. . . . But if police follow a car around, or observe its route by means of cameras mounted on lampposts or of satellite imaging as in Google Earth, there is no search. . . . GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking.")

53. *See, e.g.*, *Marquez*, 605 F.3d at 610 ("It is imaginable that a police unit could undertake 'wholesale surveillance' by attaching such devices to thousands of random cars . . . . Such an effort, if it ever occurred, would raise different concerns than the ones present here."); *see also Garcia*, 474 F.3d at 998 ("Technological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive. Whether and what kind of restrictions should, in the name of the Constitution, be placed on such surveillance when used in routine criminal enforcement are momentous issues that fortunately we need not try to resolve in this case.").

54. *Maynard*, 615 F.3d at 558, 563.

prolonged "twenty-four hour surveillance" would constitute a search.[55] The D.C. Circuit then explained why monitoring the totality of one's movements over a prolonged span of time differs substantially from monitoring individual movements.[56] Taken as a whole, the arguments established in *Maynard* are compelling, and although the D.C. Circuit currently stands on the minority side of the circuit split regarding the GPS issue, its rationale may prove to be influential to the Supreme Court's decision in *United States v. Jones*.

C. *Post*-Maynard *Treatment*

Since the D.C. Circuit's holding in *Maynard* in August 2010, leading up to oral arguments heard by the Supreme Court in November 2011, two other federal court of appeals cases have addressed the issue of warrantless GPS use. While these two cases do not substantially affect the GPS landscape, they do provide some insight into the likelihood the Supreme Court will recognize a distinction between long-term and short-term surveillance, as both courts chose to emphasize the importance of this distinction. In doing so, neither court truly embraced the extreme positions of either side of the circuit split, instead factually distinguishing *Maynard* and opting to reside somewhere in the middle of the debate.

One such case, *United States v. Cuevas-Perez*,[57] was the second major case involving the issue of warrantless GPS use to come out of the Seventh Circuit. In *Cuevas-Perez*, the appellant challenged the monitoring of a GPS device attached to his car over a 60-hour period.[58] Federal Immigration and Customs Enforcement agents used the device to track the appellant's movements on a three-day trip from Arizona to Illinois to pick up a large quantity of heroine, thereafter instructing the Illinois state police to "find a reason to pull over the defendant's vehicle if possible."[59] The Seventh Circuit followed its previous holding in *Garcia* four years earlier, relying on the rationale in *Knotts* to validate the use of GPS devices.[60] However, the appellant also called upon the Court to address whether the D.C. Circuit's recent opinion in *Maynard* had any implications on the Seventh Circuit's treatment of GPS cases.[61] The Court held that, unlike the 28-day surveillance in *Maynard*, "the surveillance here was not leng-

55. *Id.* at 556-57 (quoting *Knotts*, 460 U.S. at 283).
56. *See id.* at 562 ("[N]o single journey reveals the habits and patterns that mark the distinction between a day in the life and a way of life, nor the departure from a routine . . . .").
57. United States v. Cuevas-Perez, 640 F.3d 272 (7th Cir. 2011).
58. *Id.* at 272-73.
59. *Id.*
60. *Id.* at 273-74.
61. *Id.* at 274.

thy and did not expose, or risk exposing, the twists and turns of Cuevas-Perez's life, including possible criminal activities, for a long period."[62]

What is most significant about the Seventh Circuit's opinion in *Cuevas-Perez* is that the Court, in light of the contradictory opinion in *Maynard*, found it necessary to expand upon its previous validation of GPS use. Even though it had no legal obligation to do so, the Court took up the appellant's contentions and distinguished the case from the facts in *Maynard*. As a result, the Seventh Circuit did not fully embrace the position of the Ninth Circuit, instead choosing only to permit warrantless GPS monitoring during a "single trip" and declining to "codify the limits of allowable GPS use."[63]

The only other circuit that has addressed the issue of warrantless GPS use since the decision in *Maynard* is the Fifth Circuit in *United States v. Hernandez*.[64] The facts in *Hernandez* were similar to those in *Cuevas-Perez*—the appellant challenged the use of a GPS device by police to monitor his movements during a single trip from Texas to California to pick up and transport a large quantity of methamphetamine.[65] Also like in *Cuevas-Perez*, the Fifth Circuit distinguished *Maynard* by pointing out that the surveillance challenged in this case involved only a "single cross-country trip" and was achieved through a GPS device that only provided police with intermittent signals.[66] Following the lead of the Seventh Circuit, the Fifth Circuit used *Knotts* to validate warrantless GPS monitoring but declined to address whether prolonged, continuous surveillance would be constitutionally permissible.[67] The Court also declined to address whether attachment of the device violated the defendant's Fourth Amendment rights because the defendant lacked standing to challenge that issue.[68]

IV. WARRANTLESS GPS IMPLEMENTATION AND PUBLIC RESPONSE

Most of the circuits that have ruled on the issue of warrantless GPS surveillance have either explicitly declined to address whether long-term surveillance is permissible or have included in their discussion some kind of warning about the uninhibited "wholesale" or dragnet use of GPS tech-

62. *Cuevas-Perez*, 640 F.3d. at 274-75.
63. *Id.* at 275-276.
64. United States v. Hernandez, 647 F.3d 216 (5th Cir. 2011).
65. *Id.* at 218.
66. *Id.* at 221 ("[T]he GPS device transmitted a 'ping' at regular intervals ranging from 15 minutes to two hours. The DEA Dallas Communication Center was not monitoring Hernandez at all times.").
67. *Id.*
68. *Id.* at 219 ("Hernandez lacks standing to challenge the placement of the GPS device on his brother's truck. The truck was registered to Angel. Angel was the primary driver, but Hernandez was not a regular driver. When the GPS was attached, the truck was parked on the street at Angel's house, and nothing in the record suggests that Hernandez had any possessory interest in that house.").

nology by law enforcement.[69] However, even if law enforcement's use of GPS devices does not become wholly pervasive, what about routine use by officers, with no reasonable suspicion of wrongdoing, to track the movements of presumably innocent people? Moreover, aside from the sheer quantity envisioned, do similar scenarios really differ from a wholesale or dragnet use of GPS? Professor Jed Rubenfeld recently examined the contradictory nature of modern Fourth Amendment jurisprudence as it stands against the principles the Fourth Amendment is meant to represent:

> Imagine a society in which undercover police officers are ubiquitous. Nearly every workplace has at least one, as does nearly every public park, every store and restaurant, every train and plane, every university classroom, and so on. . . . Existing Fourth Amendment law would find nothing wrong with this picture. . . . Yet the ubiquitous deployment of secret police spies would seem to represent an almost totalitarian form of surveillance deeply antithetical to the freedom from state scrutiny of our personal lives for which the Fourth Amendment stands.[70]

As previously discussed decisions suggest, the Supreme Court will probably never allow the warrantless use of GPS devices or undercover police officers to become ubiquitous, as hypothesized by Rubenfeld. However, Rubenfeld's scenario raises interesting concerns about the care with which the Supreme Court must address the growing struggle between security and privacy.

A. The Case of Yasir Afifi

In early October 2010, a California college student named Yasir Afifi found a GPS tracking device attached under his car during a routine oil change.[71] Two days after his discovery, FBI agents approached Afifi outside his home.[72] They asked several questions, insinuating his involvement in terrorist activities, and demanded to have the tracking device back.[73] Apparently, the FBI had been monitoring Afifi for three to six

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69. *Maynard*, 615 F.3d at 563 ("The intrusion such monitoring makes into the subject's private affairs stands in stark contrast to the relatively brief intrusion at issue in *Knotts*."); *Pineda-Moreno*, 591 F.3d at 1217 n.2 ("[S]hould [the] government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search." (quoting *Garcia*, 474 F.3d at 998)).

70. Jed Rubenfeld, *The End of Privacy*, 61 STAN L. REV. 101, 104 (2008).

71. Kevin Dolak, *Student Says He Found FBI Tracking Device On Car*, ABC NEWS, Oct. 9, 2010 *available at* http:// abcnews.go.com/ US/ california-student-finds-fbi-tracking-device-car/ story?id=11841644.

72. Bob Egelko, *Man Sues FBI over GPS Surveillance*, SAN FRANCISCO CHRON., Mar. 3, 2011, at C3.

73. *Id.*; Mina Kim, *Morning Edition: FBI's GPS Tracker Raises Privacy Concerns* (NPR Radio

months after receiving an anonymous tip that he might be a threat to national security.[74] Afifi, a 20-year-old American-born citizen of Muslim decent, is a part-time sales manager for a laptop retailer as well as a full-time student at Mission College in Santa Clara, California.[75] He had never been in trouble with the law, nor had he ever been affiliated with any questionable organizations.[76]

Understandably confused by his discovery, Afifi had a friend upload photos of the tracking device online, which prompted wide speculation about whether the device was real and why FBI agents would be investigating Afifi, who allegedly had done nothing to warrant the attention. According to speculation, Afifi may have been a prime target because his father, who recently passed away, was a prominent Muslim community leader, and Afifi frequently visits family in Egypt and travels to the Middle East for work.[77] Still, the FBI discovered nothing from their surveillance, and conversely, they may have prompted a string of litigation challenging the constitutionality of this kind of intrusion.[78] In principle, because of the recent Ninth Circuit decision in *Pineda-Moreno*, the FBI's actions in this case were well within their legal bounds. However, the case is controversial because of the extent to which they monitored Afifi and the fact that their surveillance was ultimately unavailing.

B. Public Opinion: Cause and Effect

The case of Yasir Afifi is only one of several instances of GPS surveillance targeted at law-abiding citizens to have surfaced over the last year or so.[79] These stories present some interesting questions regarding the current state of public opinion and its potential effect on the Supreme Court's decision. As previously mentioned, public sentiment toward the use of GPS and beeper tracking devices by police has historically been positive. However, the recent expansion of case law on the subject, in conjunction with the proliferation of electronic news and social media outlets, has led to increasing polarization on the subject.

Broadcast Oct. 27, 2010).

74. *Student Finds FBI Tracking Device Under Car, FBI Demands it Back*, LIVE LEAK (Oct. 8, 2010) http:// www.liveleak.com/ view?i=553_1286585366.

75. Egelko, *supra* note 72; Kim, *supra* note 73.

76. Linda Goldston, *Santa Clara Resident Says Doesn't Know Why FBI Planted Tracking Device on His Car*, SAN JOSE MERCURY NEWS, OCT. 9, 2010, AT B1.

77. *See* Dolak, *supra* note 71 ("He fits the profile, as a young Arab American male who travels frequently . . . . His father was very well-known in the community, he passed away several years ago in Egypt and was a President of his Mosque." (quoting Afifi's attorney Zahra Billoo)).

78. *See Student Finds FBI Tracking Device Under Car*, *supra* note 74 ("Brian Alseth from the American Civil Liberties Union in Washington state contacted Afifi after seeing pictures of the tracking device posted online and told him the ACLU had been waiting for a case like this to challenge the [recent Ninth Circuit] ruling.").

79. *See, e.g.*, Zetter, *supra* note 8.

While there is no clear-cut way to gauge public opinion, there are some indications that the public generally disagrees with the government's assertion that warrantless GPS surveillance is constitutional. One such indication is that, of the thirteen amicus curiae briefs filed by third parties since the Supreme Court decided to address the issue in *United States v. Jones*, twelve have been filed in support of the Respondent. Among those formally endorsing the position of the Respondent is the principal inventor of GPS, Roger L. Easton, who joined several public interest organizations and respected academics in filing an amicus curiae brief on October 3, 2011.[80] Another indication that public perception is shifting away from the government's position is the fact that references to George Orwell's dystopian novel *1984* have become increasingly prevalent.[81] This suggests that, at least ostensibly, people are becoming more wary of the exponential growth of technology and its potential for abuse. As Chief Justice Roberts suggested during oral arguments for the *Jones* case:

> 30 years ago if you asked people does it violate your privacy to be followed by a beeper, . . . you might get one answer, while today if you ask people does it violate your right to know that the police can have a record of every movement you made in the past month, they might see that differently.[82]

Although the post-9/11 era has led the public to embrace heightened national security measures, there still seems to be an underlying notion that the right to privacy, though never explicitly guaranteed in the Constitution, is a sacred right. What remains uncertain is whether that notion will infiltrate the decision-making process of the Supreme Court in any significant way. Although the Supreme Court is charged with objectively interpreting the Constitution, many scholars maintain that, historically, the Supreme Court has functioned as much like a conduit for the will of the people as it has like an objective interpretive authority.[83] Barry Friedman, Vice Dean at New York University School of Law, published a book in 2009 entitled *The Will of the People: How Public Opinion Has Influenced*

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80. *See* David Kravets, *GPS Inventor Urges Supreme Court to Reject Warrantless Tracking*, WIRED, Oct. 4, 2011 *available at* http:// www.wired.com/ threatlevel/ 2011/ 10/ gps-inventor-surveillance/.

81. *See, e.g.*, Greg Stohr, *Police Use of GPS Devices Questioned by U.S. Supreme Court*, BLOOMBERG BUSINESSWEEK, Nov. 11, 2011 *available at* http:// www.businessweek.com/ news/ 2011-11-11/ police-use-of-gps-devices-questioned-by-u-s-supreme-court.html; Adam Liptak, *Court Casts a Wary Eye on Tracking by GPS*, N.Y.TIMES, Nov. 8, 2011, at A18.

82. Transcript of Oral Argument at 21-22, *Jones*, 131 S. Ct. 3064 (No. 10-1259).

83. *See, e.g.*, Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 263 (Dec. 2010) ("When the 'mood of the public' is liberal (conservative), the Court is significantly more likely to issue liberal (conservative) decisions.").

the Supreme Court and Shaped the Meaning of the Consitution, in which he wrote that "the relationship between the popular will and the Supreme Court as it unfolded over two hundred-plus years of American history . . . reveals how the Supreme Court went from being an institution intended to check the popular will to one that frequently confirms it."[84] There is probably a lot of truth to this statement, but given the polarizing effect of surveillance issues over the last few years, it is difficult to say with any certainty how public opinion will affect the rationale of the Supreme Court in this case.

V. *UNITED STATES V. JONES*

In *United States v. Maynard*, the appellants, Lawrence Maynard and Antoine Jones, appealed prior convictions for conspiracy to distribute, and to possess with intent to distribute, a large quantity of cocaine.[85] The appellants made several joint arguments, all of which were rejected.[86] However, Jones also successfully argued against the warrantless use of GPS on his vehicle, leading the D.C. Circuit to reverse his conviction.[87] Subsequently, after the D.C. Circuit denied the government's petition for a rehearing en banc,[88] the government filed a petition with the United States Supreme Court for a writ of certiorari, which the Court granted.[89]

A. Key Arguments Asserted by the Government (Petitioner)

In the government's brief on writ of certiorari, it reiterated the positions of the Fifth, Seventh, Eighth, and Ninth Circuits that, in *Knotts*, the Supreme Court made clear "that technological enhancements in the ability to observe matters 'knowingly expose[d] to the public' do not render those observations a search."[90] The government then countered the D.C. Circuit's rationale that one's movements over the span of a month are not actually exposed to the public because of the extreme improbability that those movements would be observed absent tracking technology.[91] The government argued that the Supreme Court has never applied a test regarding Fourth Amendment searches that has turned on the probability, or improbability, of something being exposed to the public.[92] They used sim-

84. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSITUTION 4 (1st ed. 2009).
85. *Maynard*, 615 F.3d at 548.
86. *Id.* at 568.
87. *Id.*
88. United States v. Jones, 625 F.3d 766 (D.C. Cir, 2010).
89. *Jones*, 131 S. Ct. at 3064.
90. Brief for the United States at 12, *Jones*, 625 F.3d 766 (No. 10-1259).
91. *Id.*
92. *Id.* at 12-13.

ilar grounds to dismiss the D.C. Circuit's argument that the entirety of one's long-term movements should be constitutionally protected because of the "mosaic" of patterns and habits those movements reveal.[93] Finally, the government suggested that "[n]o evidence exists of widespread, suspicionless GPS monitoring" and that, if preventative measures are deemed appropriate, they should be implemented by the legislature, not the judiciary.[94]

With regard to the attachment of GPS devices, the government dismissed the idea that attachment creates a search within the meaning of the Fourth Amendment because the attachment itself "reveals no information at all, and certainly no private information."[95] It also argued that attachment does not amount to a seizure because a seizure requires "meaningful interference with an individual's possessory interest in the property."[96] As a last resort, the government also maintained that, even if GPS tracking amounts to a Fourth Amendment search or seizure, it is still reasonable because governmental interests supporting the investigative technique outweigh the nature and degree of the intrusion.[97]

B. Key Arguments Asserted by Antoine Jones (Respondent)

In response to the government's arguments, attorneys for Jones primarily focused on the nature of GPS surveillance, its potential for abuse, and the distinction between long-term and short-term surveillance.[98] First, the Respondent, citing *Silverman v. United States*,[99] suggested that the attachment of the GPS device was a violation of property rights, necessarily entailing a violation of a reasonable expectation of privacy.[100] Second, the Respondent emphasized the potential for abuse, suggesting that GPS surveillance is a "grave and novel threat to personal privacy" and that it "empowers the government to engage in indiscriminate and perpetual monitoring of any individual's movements."[101] The Respondent then refuted the government's argument that only technological intrusions into private places can infringe on a legitimate expectation of privacy by demonstrating that privacy can sometimes flourish in public places.[102] They

93. *Id.* at 13 ("[T]his Court's cases do not support a 'mosaic' approach. The governing principle is that the observation of matters knowingly exposed to the public is not a search, and that principle applies to *any* travel on public roadways.") (emphasis added).
94. *Id.* at 14-15.
95. *Id.* at 15.
96. Brief for the United States at 15, *Jones*, 625 F.3d 766 (No. 10-1259).
97. *Id.* at 16.
98. Brief for Respondent, *Jones*, 625 F.3d 766 (No. 10-1259).
99. Silverman v. United States, 365 U.S. 505 (1961).
100. Brief for Respondent, *supra* note 98, at 10.
101. *Id.* at 10-11.
102. *Id.* at 12.

supported this notion by citing the Court's opinion in *Kyllo*, which stated that the "fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment."[103] The Respondent countered the oft-used *Knotts* argument by distinguishing the features of beeper technology from specific features of GPS, which they suggested make the use of the latter technology a search. Lastly, the Respondent argued that prolonged use of GPS technology "enables the government to generate and store patterns of movement and location that could not feasibly be obtained through visual surveillance."[104] With regard to this issue of attachment, the Respondent claimed that attaching a GPS device to a vehicle interferes with the owner's right to exclude others "from using [the] vehicle for their own ends" and that it amounts to a seizure of intangible data regarding the owner's movements, particularly because the data becomes permanently stored on government computers.[105]

C. The Supreme Court's Dilemma

The emerging circuit split on the issue of warrantless GPS attachment and monitoring has prompted the United States Supreme Court to provide a uniform ruling. Considering that the issue involves actions of the FBI, a federal body of law enforcement, it seems necessary to make the guidelines under which officers operate homogeneous for every corner of the nation. However, the Supreme Court may struggle to come to a resolution because of the complexity of the legal issues and the concern that a loosely constructed opinion might create additional problems in the future.

When the Supreme Court examines the way different circuits have treated GPS attachment and monitoring, the first problem will be trying to gain perspective on the controversy in the face of court opinions that have each taken unique and inconsistent approaches to analyzing the issues. In the most recent Ninth Circuit opinion, *Pineda-Moreno*, the court primarily focused on the appellant's challenge to attaching a GPS device to his car while it was parked in his driveway, holding that the appellant only had a reasonable expectation of privacy in his driveway if he took steps to "exclude passerby" from the area.[106] Furthermore, the court only addressed the issue of surveillance in the context of the appellant's challenge that the issue should be examined under the analysis in *Kyllo v. United States*.[107]

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103. *Id.* at 12 (quoting *Kyllo*, 533 U.S. at 35 n.2)
104. *Id.*
105. *Id.* at 13.
106. *Pineda-Moreno*, 591 F.3d at 1215.
107. *See id.* at 1216 ("From this holding [in *Kyllo*, the appellant] contends that law enforcement officers conduct a 'search' whenever they use sense-enhancing technology not available to the general public to obtain information.").

The court never fully expounded upon their determination that prolonged surveillance was not a search. In recent opinions from the Fifth and Seventh Circuits, the courts ruled in favor of warrantless GPS monitoring but explicitly declined to address whether prolonged surveillance would be permissible, instead only discussing the issue in terms of monitoring a single cross-country trip.[108] Previously, in *Garcia*, the Seventh Circuit did not even address the issue of GPS monitoring and used a makeshift spectrum analysis in concluding that installation of a GPS device on a vehicle is not a search.[109] To add to the confusion, the Eighth Circuit, in *Marquez*, became the only federal court of appeals to apply a reasonable suspicion standard to the attachment and monitoring of a GPS device and held that warrantless GPS monitoring could only proceed "for a reasonable period of time."[110]

The only circuit to analyze the constitutionality of GPS installation and surveillance in depth, without glossing over key arguments and considerations, was the D.C. Circuit in *Maynard*, which coincidentally was the only circuit to hold that long-term GPS surveillance does constitute a search within the meaning of the Fourth Amendment.[111] Most importantly, the D.C. Circuit distinguished other circuits' brief analyses of *United States v. Knotts*, explaining that the Supreme Court "specifically reserved the question whether a warrant would be required in a case involving 'twenty-four hour surveillance.'"[112] While the D.C. Circuit's decision is probably the most comprehensive and thoughtful, it nonetheless remains the minority, making it unlikely the Supreme Court will affirm the D.C. Circuit's analysis. However, given the notable disparities between the conclusions of each circuit, it is difficult to say with any degree of certainty what the analysis in *Jones* will entail. The Supreme Court's dilemma will be trying to reconcile the disparate analyses of the lower courts while also taking into consideration any novel arguments laid out by the Petitioner, Respondent, or the thirteen amicus curiae briefs submitted to the Court in *United States v. Jones*.

VI. CONCLUSION

In addition to balancing the aforementioned considerations, the Supreme Court must also be wary of the future direction of surveillance technology and the current state of popular sentiment toward police surveillance and the right to privacy. In the post-9/11 era, political factors

108. *Hernandez*, 647 F.3d at 220-21; *Cuevas-Perez*, 640 F.3d at 274-75.
109. *Garcia*, 474 F.3d at 997.
110. *Marquez*, 605 F.3d at 610.
111. *Maynard*, 615 F.3d at 555.
112. *Id.* at 556 (quoting *Knotts*, 460 U.S. at 283-84).

have combined with advances in technology to create an environment of relaxed standards toward police surveillance. When dealing with constitutional challenges to police surveillance and search activities, courts have typically adopted a "balancing of competing interests" measure, which allows them to "interpret constitutional principles and statutes to decide whether police surveillance and search methods violate citizen privacy."[113] As the government suggested in its arguments to the Court, even if GPS surveillance is deemed a search within the meaning of the Fourth Amendment, the question would still remain whether governmental interests supporting the search outweigh the nature and degree of its intrusion. Implicit within this question is the notion that public opinion will also be an important consideration for the Court. While public opinion appears to be trending against broad police surveillance authority, it is difficult to say with certainty what the current state of public opinion actually is or what impact it will have on the Supreme Court's decision in *Jones*. However, public concerns notwithstanding, the Supreme Court must carefully construct its opinion to ensure that the balance between government authority and civil liberties does not erode. As surveillance technology continues to advance, legal constraints on its use must ensure that longstanding democratic ideals are not compromised.

Seth Capper

113. Bloss, *supra* note 3, at 212-13.