IT'S LIKE TAILING YOUR VEHICLE FOR A MONTH: AN ANALYSIS OF THE WARRANTLESS USE OF A GLOBAL POSITIONING SYSTEM IN *UNITED STATES V. MAYNARD*, 615 F.3D 544 (D.C. CIR. 2010)

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I. INTRODUCTION

In modern society, a conflict resounds between providing security and protecting the liberties found in the Constitution of the United States. Over the course of our country's existence, courts have applied our governing document and its progeny to new fact patterns dealing with a vast array of technological innovations. During the drafting of the Constitution, the Framers could never have envisioned the high-tech world in which we live; nonetheless, the document they drafted provides the basis for the regulatory limits imposed upon our society. While the Framers could not have imagined the ability to pinpoint the exact location of a moving object on earth from space using a Global Positioning System (GPS), the judicial system of the United States is currently applying the Constitution and its progeny to determine the exact constitutional limits of such a system.

The issue of warrantless GPS tracking goes to the heart of Fourth Amendment rights. Courts must ask whether the use of GPS tracking constitutes a search and whether long-term GPS tracking violates an individual's right to privacy. Appellate courts are narrowing these issues to define the exact limits of GPS tracking. Since 9/11 and the subsequent War on Terror, both the Bush and Obama Administrations have sought broad federal powers in regards to searches and more specifically, warrantless tracking. Governmental support for warrantless tracking, along with favorable appellate court decisions, makes *United States v. Maynard*[1] a key case as the judicial system seeks to identify the limits of GPS tracking.

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1. United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010).

In its decision, the Court of Appeals for the District of Columbia went against the majority of appellate courts by finding that *United States v. Knotts*[2] did not control the issue of whether a warrant is required before conducting prolonged surveillance of a vehicle's movements on public thoroughfares using a GPS tracking device.[3] The *Maynard* Court specifically examined whether the defendant's locations were exposed to the public and whether the defendant had a reasonable expectation of privacy over the course of a month.[4] After analyzing these issues, the D.C. Circuit Court found that prolonged surveillance constituted an unreasonable search and, furthermore, that the defendant's right to privacy was violated because the aggregate of his movements was not exposed to the public.[5]

This Note reasons that in deciding *Maynard*, the Court of Appeals for the District of Columbia incorrectly interpreted precedent in holding that *Knotts* does not apply. The appellate court's opinion does, however, highlight important questions regarding prolonged GPS surveillance and whether an individual's public movements, in their entirety, constitute an invasion of privacy rights.[6] Overall, this Note will describe the *Maynard* holding and explore the differences and rationales between *Maynard* and other GPS tracking cases. More specifically, Section II examines existing law and the current legal background; Section III provides an exposition of *Maynard*; and Section IV analyzes the issues of why *Knotts* is controlling, why the appellant's locations were exposed to the public, and why the appellant did not have a reasonable expectation of privacy. As a final thought, this Note will discuss relevant points raised in *Maynard* and why the Supreme Court may want to provide a more adequate roadmap to deal with innovative technologies, their uses, and the effects they have on constitutional liberties.

II. EXISTING LAW AND LEGAL BACKGROUND

The crux of *Maynard* concerns the Fourth Amendment which states:

> [T]he 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

2. United States v. Knotts, 460 U.S. 276 (1986).
3. *Maynard*, 615 F.3d at 557.
4. *Id*. at 558, 563.
5. *Id*. at 558-63.
6. *Id*. at 563-64.

> or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[7]

In examining the Fourth Amendment, cases such as *Katz v. United States*,[8] *Smith v. Maryland*,[9] and *United States v. Knotts* have analyzed key issues involving the limits of searches and the boundaries of an individual's basic expectation of privacy.[10] Justice Harlan's weighty concurrence in *Katz*, which the foregoing cases apply, provides a twofold requirement for an individual's basic expectation of privacy: "first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[11]

In 1979, *Smith* expounded upon the principle in *Katz* that "what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection"[12] by stating that "the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action."[13]

A watershed moment for mobile device tracking cases came in *Knotts* where the court held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[14] *Knotts* dealt with police planting a tracking beeper in a container of chemicals before the purchase of the container by one of Knotts's co-conspirators.[15] The police then tracked the vehicle using the beeper as it made a one hundred mile trip from Minneapolis, Minnesota to a secluded cabin in Wisconsin.[16]

In *Knotts*, the Supreme Court held that an individual who travels on public roads voluntarily conveys his or her route to anyone who wishes to look.[17] The Court reasoned that because visual surveillance would have revealed the route taken, the use of the tracking beeper did not change the result.[18] Justice Rehnquist followed this line of reasoning by declaring "[n]othing in the Fourth Amendment prohibit[s] . . . police from augmenting the sensory faculties bestowed upon them at birth with such

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7. U.S. CONST. amend. IV.
8. Katz v. United States, 389 U.S. 347 (1967).
9. Smith v. Maryland, 442 U.S. 735 (1979).
10. *Katz*, 389 U.S. at 351; *Smith*, 442 U.S. at 740; *Knotts*, 460 U.S. 276 at 281.
11. *Katz*, 389 U.S. at 361.
12. *Id*. at 351.
13. *Smith*, 442 U.S. at 740.
14. *Knotts*, 460 U.S. at 281.
15. *Id*. at 278.
16. *Id*. at 277-78.
17. *Id*. at 281.
18. *Id*. at 282.

enhancement as science and technology afforded them in this case."[19] Justice Rehnquist bluntly augmented this point by stating "no constitutional foundation" existed for respondent's complaint which "appear[ed] to be simply that scientific devices such as the beeper enabled the police to be more effective" and also that "we have never equated police efficiency with unconstitutionality."[20]

In answering Knotts's claim that "twenty-four hour surveillance of any citizen of this country will be possible without judicial knowledge or supervision," Rehnquist found that the "reality hardly suggests abuse," and stated "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."[21] The contention by Knotts referring to "surveillance of *any* citizen" and Rehnquist's use of the term "dragnet" seems to connote the use of widespread surveillance as opposed to prolonged surveillance.[22] Employing this reasoning, Rehnquist asked whether tracking the beeper signals invaded any reasonable expectation of privacy; the Court found that it did not.[23]

Lower courts, such as the Seventh and Ninth Circuits, have applied the foundational reasoning supplied in *Knotts* to support holdings that the use of a GPS tracking device does not constitute either a search or seizure or a violation of an individual's expectation of privacy. For example, both *United States v. Garcia*[24] and *United States v. Pineda-Moreno*[25] found that the use of a GPS tracking device is merely a substitute for an activity, most notably the trailing of a car on a public street, which is not a search within the meaning of the Fourth Amendment.[26]

In *Garcia*, the Seventh Circuit looked to the admissibility of evidence obtained by a warrantless GPS search.[27] After suspicious activity (the purchase of large quantities of ingredients used in the manufacture of methamphetamine), the police placed a GPS "memory tracking unit" underneath Garcia's vehicle.[28] Here, the Seventh Circuit stated "there is nothing in the [Fourth] [A]mendment's text to suggest that a warrant is required to make a search or seizure reasonable . . . [t]he Supreme Court,

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19. *Id*.
20. *Id*. at 284.
21. *Id*. at 283-84 (citing Zurcher v. Stanford Daily, 436 U.S. 547, 566 (1978)).
22. *Knotts*, 460 U.S. at 284 (emphasis added).
23. *Id*. at 285.
24. United States v. Garcia, 474 F.3d 994 (7th Cir. 2007).
25. United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010).
26. *Garcia*, 474 F.3d at 997; *Pineda-Moreno*, 591 F.3d at 1216.
27. *Garcia*, 474 F.3d at 995-96.
28. *Id*. at 995.

however, has created a presumption that a warrant is required, unless infeasible, for a search to be reasonable."[29]

In deciding *Garcia*, the Seventh Circuit first employed the reasoning in *Knotts* that tracking a vehicle on public thoroughfares does not amount to a search.[30] The court went on to state that "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."[31] The court did, however, highlight the difference at hand, namely, the use of old technology versus new technology.[32] Here, the court reasoned that GPS tracking is more similar to the use of surveillance cameras and satellite imaging, and "if what they do is not searching in Fourth Amendment terms, neither is GPS tracking."[33]

Further expounding upon the technological means argument, the Seventh Circuit differentiated the case at hand from *Kyllo* v. *United States*,[34] an instrumental case which helped frame a balance between technological innovations, searches, and an individual's privacy.[35] The court discussed that in *Kyllo* law enforcement used technology to gather information that without the use of such technology, would have unequivocally been a search under the Fourth Amendment.[36] To differentiate *Garcia* from *Kyllo*, the court stated, "[t]he substitute here is for an activity, namely following a car on a public street, that is unequivocally *not* a search within the meaning of the amendment."[37]

In the Ninth Circuit case of *Pineda-Moreno*, DEA agents tracked Pineda-Moreno's Jeep over the course of four months by affixing various types of tracking devices on seven different occasions.[38] In deciding this case, the Ninth Circuit used the reasoning from *Knotts* and *Garcia* to reach the conclusion that use of a tracking device did not constitute a proscribed search. More specifically, the Ninth Circuit highlighted the variance between an indisputable search and a substitute for an act that is not a search, namely tailing an automobile, and the permissible use of innovative technology.[39]

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29. *Id*. at 996.
30. *Id*.
31. *Id*. at 997.
32. *Id*.
33. *Id*.
34. Kyllo v. United States, 533 U.S. 27 (2001). This case dealt with the use of thermal imaging technology to view into a house to see if heat lamps were being used to grow marijuana. The Supreme Court found this a search in violation of the Fourth Amendment.
35. *Id*.
36. *Garcia*, 474 F.3d at 997.
37. *Id*.
38. *Pineda-Moreno*, 591 F.3d 1212 at 1213.
39. *Id*. at 1216.

The forerunners of *Maynard* helped frame the legal issues and environment leading up to that case. With a majority of appellate courts adhering to and applying *Knotts*, the Court of Appeals for the District of Columbia is taking a major break from that approach. This departure was so great that the Obama Administration and the Department of Justice urged the D.C. Circuit Court to rehear *United States v. Maynard*; nonetheless, the D.C. Circuit Court refused a rehearing *en banc*.[40] *Maynard* and its issue of warrantless, prolonged GPS tracking, however, would not end in the D.C. Circuit Court of Appeals. After initially denying the writ of certiorari, the Supreme Court granted certiorari in June 2011.[41] Thus, this issue may soon gain some clarity.

While federal case law currently leans toward the allowance of warrantless GPS tracking, a bastion of greater protection seems to be forming in some of the several states. In examining their own constitutions, courts in New York, Washington, and Oregon found more protective provisions in their state constitutions than those under the Fourth Amendment.[42] These courts held that the police must obtain a warrant before using a mobile tracking device.[43] Furthermore, legislatures in several states have responded to prolonged GPS monitoring with protective statutes.[44] To name a few, Hawaii, Minnesota, and Pennsylvania have all passed legislation against warrantless searches.[45]

The several states, however, are not uniform on this issue. For example, a court in Nevada held that the warrantless use of a tracking device did not infringe upon any protected rights and also that this use did not violate any reasonable expectation of privacy.[46] Additionally, an appellate case in Virginia, *Foltz v. Commonwealth of Virginia*,[47] decided after *Maynard*, found that the warrantless use of a GPS tracking device did not constitute an unreasonable search.[48]

III. EXPOSITION OF THE CASE

Maynard began with the FBI investigating Antoine Jones, Lawrence Maynard, and others for alleged narcotic violations.[49] Jones and Maynard,

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40. United States v. Jones, 625 F.3d 766 (D.C. Cir. 2010).
41. United States v. Jones, 131 S. Ct. 3064 (2011) (No. 10-1259).
42. People v. Weaver, 909 N.E.2d 1195 (N.Y. 2009); State v. Jackson, 76 P.3d 217 (Wash. 2003); State v. Campbell, 759 P.2d 1040 (Or. 1988).
43. *Weaver*, 909 N.E.2d at 1203; *Jackson*, 76 P.3d at 224; *Campbell*, 759 P.2d at 1041.
44. By no means is the list of states mentioned exhaustive; rather, it merely serves as an indicator.
45. Haw. Rev. Stat. § 803-42 (2010); Minn. Stat. § 626A.37 (2010); 18 Pa. Cons. Stat. § 5761 (2007).
46. Osburn v. State, 44 P.3d 523, 526 (Nev. 2002).
47. Foltz v. Commonwealth, 698 S.E.2d 281 (Va. Ct. App. 2010).
48. *Id*. at 292.
49. *Maynard*, 615 F.3d 544 at 548.

respectively, owned and managed the "Levels" nightclub in Washington, D.C. [50] From 2003 through October 24, 2004, Jones, Maynard and others "acquired, repackaged, stored, processed, sold, and redistributed large quantities of cocaine and cocaine base" in Washington, D.C., Maryland, Texas, Mexico, and elsewhere.[51] In investigating this conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base, law enforcement agents used a number of investigative techniques including attaching a GPS tracking device to Jones's Jeep without a warrant.[52] Jones's vehicle was under surveillance twenty four hours a day for four weeks.[53] The investigation ended on October 24, 2005, with warrants authorizing searches and subsequent arrests.[54] In the searches, law enforcement agents seized ninety seven kilograms of cocaine, three kilograms of crack cocaine, drug paraphernalia, firearms, and over $800,000 in cash.[55]

In March 2007, the government filed a superseding indictment charging Jones and Maynard with a single count of conspiracy to distribute and to possess with intent to distribute five or more kilograms of cocaine and fifty or more grams of cocaine base.[56] In January 2008, a joint trial found Jones and Maynard guilty; Jones and Maynard appealed this decision.[57] Before the D.C. Circuit Court, Jones and Maynard jointly argued that the D.C. District Court erred in five respects.[58] The Court concluded that none of the joint arguments required reversal; however, the Court addressed Jones's individual argument that the lower court "erred in admitting evidence acquired by the warrantless use of a Global Positioning System (GPS) device to track his movements continuously for a month."[59] The Court reversed Jones's conviction due to evidence obtained by the GPS tracking device because it violated the Fourth Amendment.[60]

In examining the use of the GPS tracking device, the Court addressed two main questions: 1) was the use of the GPS a search; and 2) was the search reasonable nonetheless?[61] To answer whether the use of a GPS tracking device constituted a search, the Court first addressed whether

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50. *Id*. at 549.
51. United States v. Jones, 451 F. Supp. 2d 71, 73-74 (D.D.C. 2006)
52. *Id*.
53. *Maynard*, 615 F.3d at 555.
54. *Jones*, 451 F. Supp. 2d at 74.
55. *Id*.
56. *Maynard*, 615 F.3d at 549.
57. *Id*.
58. *Id*.
59. *Id*.
60. *Id*. at 568.
61. *Id*. at 555, 566.

Knotts controlled the issue.[62] The D.C. Circuit Court found *Knotts* reserved the issue of prolonged surveillance via mobile tracking devices.[63] By making a temporal distinction between the two cases, the *Maynard* Court did not feel constrained to follow *Knotts*.[64]

As a result, the *Maynard* Court distinguished *Knotts* on several grounds. First, they found "the [Supreme] Court explicitly distinguished between the limited information discovered by use of the beeper-movements during a discrete journey and [a] more comprehensive or sustained monitoring."[65] The D.C. Circuit Court discerned this "explicit" differentiation from Rehnquist noting the "limited use which the government made of the signals" from the tracking beeper and the apparent reservation of the "dragnet" provision.[66] Regarding the "dragnet" question, the D.C. Circuit Court hypothecated that the Supreme Court did not just intend for the "dragnet" provision to cover mass surveillance, but rather that the Court purposefully avoided and reserved the question of prolonged surveillance.[67] Second, the *Maynard* Court once again closely scrutinized the specific language from *Knotts* by reasoning that the Supreme Court 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."[68]

After determining *Knotts* did not control the issue at stake, the D.C. Circuit Court turned to the question of whether Jones's locations were exposed to the public.[69] The D.C. Circuit Court examined the information conveyed to the public and determined that Jones's movements during the four-week tracking period were not exposed to the public.[70] They reached this conclusion for two reasons.

First, unlike one's movements during a single journey, the whole of one's movements over the course of a month is not *actually* exposed to the public because the likelihood anyone will observe all those movements is effectively nil. Second, the whole of one's movements is not exposed *constructively* even though each individual movement is exposed because

62. *Id*. at 556.
63. *Id*. at 558.
64. *Id*.
65. *Id*. at 556.
66. *Id*.
67. *Id*.
68. *Id*. at 557 (citing United States v. Knotts, 460 U.S. 276, 281 (1983)) (internal citation omitted).
69. *Maynard*, 615 F.3d at 558-63.
70. *Id*. at 558.

that whole reveals more, sometimes a great deal more, than does the sum of its parts.[71]

In determining actual exposure, the D.C. Circuit Court asked "not what another person can physically and lawfully do but rather what a reasonable person expects another might actually do."[72] They then reasoned that Jones's actions were not actually exposed because the chance that a stranger would observe all of these movements is practically zero.[73] In answering this question, the appellate judges turned to precedent. Here, they made a comparison with *Bond v. United States*.[74] In *Bond*, the Supreme Court found that the action of a Texas Border Patrol agent squeezing a bag in order to determine whether the bag contained contraband violated the Fourth Amendment.[75] The Supreme Court stated that because Bond did not have a reasonable expectation that his bags would be handled "in an exploratory manner," his Fourth Amendment rights were violated.[76] Utilizing a reasonableness standard, the D.C. Circuit Court identified the difference between a passerby observing an individual one day and the entirely different scenario for that same passerby to follow that same individual week after week.[77]

The D.C. Circuit Court next addressed whether Jones's movements were constructively exposed. The D.C. Circuit Court offered the rationale that the "whole reveals far more than the individual movements it comprises."[78] In making this distinction, the appellate justices expounded that no single journey reveals the facets of an individual's life; however, if one were to track an individual's movements over the course of a month, this "may reveal an intimate picture of [one's] life."[79] Furthermore, the *Maynard* Court analogized to precedent where the Supreme Court found the entire disclosure of an individual's rap sheet "could reasonably be expected to constitute an unwarranted invasion of personal privacy" even though the individual events were matters available via public record.[80] The D.C. Circuit Court applied this reasoning to tracking the entirety of an individual's movements and stated that a person who knows the whole of one's movements can deduce an extraordinary amount of information that

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71. *Id*.
72. *Id*. at 559.
73. *Id*. at 560.
74. *Bond v. United States*, 529 U.S. 334 (2000).
75. *Id*. at 338-39.
76. *Id*. at 339.
77. *Maynard*, 615 F.3d at 560.
78. *Id*. at 561- 62.
79. *Id*. at 562.
80. *Id*. at 561 (quoting U.S. Dept. of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 764 (1989).

tracking a single movement would fail to reveal.[81] The *Maynard C*ourt further discussed this point by drawing attention to the amount of information potentially divulged. For example, a person who knows all of another's movements can figure out whether "he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, [or] an outpatient receiving medical treatment . . . ."[82] Once again, underpinning this lack of constructive exposure is the argument that the "whole reveals far more than the individual movements it comprises."[83]

The D.C. Circuit Court next turned to an individual's reasonable expectations of privacy. Here, it applied the test formulated by Justice Harlan in *Katz*.[84] As noted above, this test states a twofold requirement for an individual to have a reasonable expectation of privacy, "first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[85] The D.C. Circuit Court further qualified Justice Harlan's test by stating, "[w]hether an expectation of privacy is reasonable depends in large part upon whether that expectation relates to information that has been 'expose[d] to the public.'"[86]

The D.C. Circuit Court then addressed whether Jones's expectation of privacy was reasonable. Using implied reasoning, the appellate court found that application of the *Katz* test and its progeny can lead to one conclusion: "[s]ociety recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation."[87]

In the end, the crux of *Maynard* comes down to the issue of prolonged surveillance. The D.C. Circuit Court of Appeals advocates that a warrant is needed for prolonged GPS tracking because, according to its interpretation and application of *Knotts*, people have a reasonable expectation of privacy in the aggregate of their movements via automobile.[88] Consequently, the court found that warrantless use of prolonged GPS tracking violated the Fourth Amendment as an unreasonable search.[89]

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81. *Id*. at 562.
82. *Id*.
83. *Id*.
84. Katz v. United States, 389 U.S. 347, 361 (1967).
85. *Id.*
86. *Maynard*, 615 F.3d at 558 (citing *Katz*, 389 U.S. at 351).
87. *Id*. at 563.
88. *Id*.
89. *Id*. at 568.

IV. ANALYSIS

Given the precedential value of *Knotts*, the D.C. Circuit Court erred in deciding *United States v. Maynard*. Nonetheless, the Court's reasoned opinion highlights important privacy concerns, and *Maynard* could pave a path towards future developments in the realm of Fourth Amendment searches and mobile tracking devices.

Uncertainty currently surrounds mobile tracking devices and how their use fits within the Fourth Amendment. Looking at the aggregate, federal courts disagree with other federal courts, state courts disagree with other state courts, state legislatures disagree with other state legislatures, and the Obama Administration and the Department of Justice have interposed their opinion as well. With such a lack of uniformity, the Supreme Court's future decision will help provide much-needed guidance on the matter.

While uncertainty permeates this issue across our system of federalism, a majority of federal courts have allowed the warrantless use of mobile tracking devices. Through *Maynard*, the D.C Circuit Court seeks to redefine the existing jurisprudence by carving out a niche in existing law. The circuit court tried to achieve this goal by differentiating the precedent established in *Knotts* and appealing to uncertain societal expectations of privacy. The overarching reasoning applied by the D.C. Circuit Court primarily found that *Knotts* does not govern because the Supreme Court reserved the question of prolonged tracking. As a result of prolonged tracking, the Court opined that Jones's reasonable expectation of privacy was defeated.[90] The reasoning below will seek to demonstrate that *Knotts* does in fact govern *Maynard* and also that the defendant did not have a reasonable expectation privacy in light of the holding in *Knotts* and other societal concerns.

A. The Precedential Value of *Knotts*

Given the holding in *Knotts*, the problem with *Maynard* is its refusal to apply *stare decisis*. The precedential value of *Knotts* asserts itself through three main components: (1) Justice Rehnquist's finding that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another;"[91] (2) the similarities between the use of a beeper as a mobile tracking device and the use of a GPS, coupled with the Supreme Court's stance on advancements in technology; and (3) the plain language utilized

90. *Id*. at 555-56.
91. *Knotts*, 460 U.S. at 281.

in *Knotts* regarding the "dragnet" provision. This is not to say that the D.C. Circuit Court does not present valid arguments or potential problems in the current law, but the D.C. Circuit Court promulgated an opinion against the weight of precedential authority and in light of what it calls societal support.

First, the plain language of *Knotts* unequivocally demonstrates the lack of necessity for a warrant. Given the near absence of an expectation of privacy on the open roads, the infringement of individual liberties does not occur and hence a law enforcement agency should have no need to procure a warrant. As further developed throughout the rest of this article, the D.C. Circuit Court tried to find a reasonable expectation of privacy in the aggregate of one's movements by stating that the Supreme Court only found that an individual did not have a "'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 movement whatsoever, world without end."[92] The *Maynard* Court essentially found that law enforcement agencies have a right to track one's movements up to a certain extent; however, once law enforcement personnel cross this "prolonged" threshold, an individual's reasonable expectation of privacy is violated.[93] The D.C. Circuit Court's interpretation of the controlling precedent reaches this conclusion by broadening the language in *Knotts*. This should not have been done. First, the Supreme Court continuously discussed the public nature of the tracking, not the extent of it. Second, the appellate court's argument that the language "from one place to another" reserves the question of prolonged searches can be read with the exact opposite effect; namely, that since the entirety of one's public movements are composed of individual public movements, the government has a right to track each and every one of these movements. While the *Maynard* Court does address an important issue, the precedential weight of the plain language in *Knotts* seems to lend itself to other interpretations.

Second, both the use of tracking beepers in the past and the use of GPS devices today raise the same implications – the ability to follow an individual's movements via automobile without being physically present. As long as law enforcement agencies use these devices in a way which would reveal the same information that visual surveillance would also reveal, then precedence guides the answer and ultimately allows their use. Going back to *Knotts*, Justice Rehnquist stated "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and

92. *Maynard*, 615 F.3d at 557 (citing *Knotts*, 460 U.S. at 281).
93. *Id*. at 556-58.

technology afforded them in this case."[94] In reference to the use of beepers, the Supreme Court stated "scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise."[95] Given these statements, a conclusive outcome from *Knotts* is that as long as visual surveillance could reveal the information, then the methodology of its procurement is of little relevance. To qualify further, as long as technology does not infringe upon identified constitutional limitations, such as "[t]he right of people to be secure in their person, houses," etc., law enforcement agencies can utilize advancements in technology.[96]

Finally, the appellate court in *Maynard* stated that the Supreme Court specifically reserved the question of prolonged surveillance through its discussion of a "dragnet" provision, and the D.C. Circuit Court went to lengths to rationalize this viewpoint.[97] The Supreme Court's language in *Knotts*, however, states nothing about reserving prolonged searches. The verbatim language in *Knotts*, which the D.C. Circuit Court sought to mold states:

> [Respondent] expresses the generalized view that the result of the holding sought by the government would be that "twenty-four hour surveillance of any citizen of this country will be possible without judicial knowledge or supervision." But the fact is that "reality hardly suggests abuse," 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.[98]

The D.C. Circuit Court tried its luck with a verbal sleight of hand, disembodying the language in *Knotts* to fit its own need. The court correctly stated that the "dragnet" language was in response to the defendant's argument in *Knotts* that "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge of supervision."[99] However, the D.C. Circuit Court repeatedly inserted and assumed the qualifying language of *prolonged* twenty-four hour surveillance throughout its opinion.[100] By inserting the word "prolonged" into its statements, the D.C. Circuit Court merely assumed the inclusion of lengthy searches to fall within the dragnet reservation. Furthermore, the order of the language in *Knotts* does not demand the reading forced upon it

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94. *Knotts*, 460 U.S. at 282.
95. *Id*. at 285.
96. U.S. CONST. amend. IV.
97. *Maynard*, 615 F.3d at 556.
98. *Knotts*, 460 U.S. at 284-85 (citations omitted).
99. *Maynard*, 615 F.3d at 556 (citing *Knotts*, 460 U.S. at 283).
100. *Id* .at 556-58.

by the *Maynard* Court. The defendant in *Knotts* made an argument about the possibility of twenty-four hour surveillance of any citizen, and the Supreme Court stated that the "reality hardly suggests abuse," reserving such dragnet enforcement practices should they occur.[101] By reading the language in order, giving effect to all of the words, and not inserting "helpful" language, one can arrive at an entirely different result from that of the D.C. Circuit.

First, given that it was a hypothetical posed by the defendant in *Knotts* and not the actual facts of the case, the D.C. Circuit Court's reading that the language be limited to the specific fact of *Knotts* is misleading. Second, the actual language used by the Supreme Court does not insist that its holding be limited to the facts in *Knotts*, like the D.C. Circuit Court advocates. The Court's statement that the "reality hardly suggests abuse," in response to the hypothetical of "twenty-four hour surveillance of *any* citizen," simply refers to the reality of surveillance on any citizen for any reason. The Supreme Court further qualified this statement with the addition of the "dragnet" language that once again refers not to lengthier tracking, but to tracking on a broad scale. Given the Supreme Court's statements that the "reality hardly suggests abuse" qualified by the "dragnet" language, the plain and simple language of the case does not reserve the issue of prolonged surveillance; it unequivocally excludes it.

B. The Existence of a Reasonable Expectation of Privacy?

In justifying its holding, the D.C. Circuit Court next turned to an individual's reasonable expectations of privacy and found that Jones had such an expectation of privacy. As noted above, the Court applied the test formulated by Justice Harlan in *Katz*, which stated that for an individual to have a reasonable expectation of privacy, they must first have "exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[102] The D.C. Circuit Court further qualified this by stating: "[w]hether an expectation of privacy is reasonable depends in large part upon whether that expectation relates to information that has been 'expose[d] to the public.'"[103] Here, the

101. *Knotts*, 460 U.S. at 283-84.

102. Katz v. United States, 389 U.S. 347, 361 (1967).

103. *Maynard*, 615 F.3d at 558 (citing *Katz*, 389 U.S. at 351). Before analyzing the *Katz* test to the facts of *Maynard*, one must view the public exposure statement in the context of the original case. In *Katz*, the court stated, "[f]or the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. (Citation omitted). But what he seeks to preserve as private, even in an area accessible to the public, *may* be constitutionally protected." *Katz*, 389 U.S. at 351 (emphasis added).

D.C. Circuit Court analyzed "expos[ure] to the public" by the standard of what a reasonable person would expect another to do rather than what an individual could physically or lawfully do.[104] Condensed, the *Maynard* Court held that because a reasonable person would not view a person's movements via automobile over the course of a month, the individual's movements are not actually exposed to the public.[105] This reasoning falls back on the peculiarity of prolonged searches. The appellate court's standard of reasonableness, however, does not readily transfer to other fact patterns where the Supreme Court has stated a warrant is not needed. For example, the tracking of an automobile as it traveled over one hundred miles to a secluded cabin. Using the reasoning applied in *Maynard*, the D.C. Circuit Court would probably find it unreasonable because the likelihood that any one person would observe the entire one hundred mile trip to the secluded cabin "is effectively nil."[106] This is exactly what occurred in *Knotts,* however, where the Supreme Court found that the use of a beeper did not violate the Fourth Amendment.[107] The Supreme Court decided *Knotts* not based on a standard of reasonableness but based on whether the movements occurred in public. Consequently, the reasoning in *Knotts* lends itself to the belief that it does not matter if anyone actually observes all of those movements; rather, it depends if those movements could have been viewed. Given that roads are public thoroughfares, anyone can view an individual's movements. Therefore, the mere likelihood that someone could have viewed an individual's public movements results in exposure.

Delving deeper into the question of privacy, a line of court opinions demonstrates the spectrum of privacy more clearly than the laden language the D.C. Circuit Court used. The most protected part of this scale safeguards individuals in their persons and in their homes. Outside of this defined area, one should look at past cases to obtain the best idea of how people are protected from unreasonable searches. For example, the Supreme Court in *Kyllo v. United States* held that the use of a thermal imaging device to explore the inner details of a private home was an unreasonable search without a warrant.[108] In *United States v. Karo*,[109] the Court held that the monitoring of a beeper inside a private home violated the Fourth Amendment.[110] Furthermore, the Court in *Katz* held that the government's auditory intrusion into a telephone booth violated the

104. *Id.* at 559.
105. *Id.* at 559-63.
106. *Id*. at 558.
107. *Knotts*, 460 U.S. at 285.
108. *Kyllo*, 533 U.S. at 40.
109. United States v. Karo, 468 U.S. 705 (1984).
110. *Id*. at 718.

defendant's privacy right where the defendant had shut the door.[111] Finally, the crucial holding in *Knotts* found monitoring a beeper transported via an automobile did not constitute an unreasonable search.[112] These cases illustrate the principle stated in *Katz* that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[113] Looking at *Karo* and *Kyllo*, one sees the protection a private residence is accorded. *Katz* demonstrates the central difference of being in public but maintaining privacy in one's person and spoken words. Applying these cases, one can see how the principle in *Knotts* that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another" was reached.[114] The key element here is exposure to the public. The line of reasoning advocated by the Supreme Court stated that where exposure to the public has occurred, the existence of a privacy right does not occur.

Analyzing the specific reasoning of the *Maynard* Court further, one notices the shading of circumstances between individuals having a right to privacy in their persons and effects and not having a right to privacy in a public place. The Court cited *Bond v. United States* where the Supreme Court found a Texas border agent's act of squeezing a bag to determine whether it contained illegal drugs unreasonable and therefore a violation of the Fourth Amendment.[115] Besides the question of reasonableness, the *Maynard* Court sought to shade another aspect - actual exposure. In *Bond*, the contents of the bag were never actually exposed to the public. In *Maynard*, the Jeep was constantly exposed to the public, a fact that could be "voluntarily conveyed to anyone who wanted to look."[116] Before *Maynard* went to the appellate court, the lower court recognized that variance in *United States v. Jones*.[117] In *Jones*, the D.C. District Court recognized the public versus private distinction and found that evidence obtained from the GPS, while the Jeep was parked inside an adjoining garage, was inadmissible.[118] The lower court found all other data collected from the GPS was admissible.[119] The lower court's reasoning echoed *Knotts* where Justice Rehnquist established that as long as the device was not used in a

111. *Katz*, 389 U.S. at 358-59.
112. *Knotts*, 460 U.S. at 285.
113. *Katz*, 389 U.S. at 351.
114. *Knotts*, 460 U.S. at 281.
115. United States v. Maynard, 615 F.3d 544, 559-60 (D.C. Cir. 2010) (citing Bond v. United States, 529 U.S. 334, 338-39 (2000)).
116. *Knotts*, 460 U.S. at 281.
117. United States v. Jones, 451 F.Supp.2d 71, 88 (D.D.C. 2006).
118. *Id.*
119. *Id.*

way to reveal information not visible to the naked eye, then the only issues raised would be the same ones visual surveillance would also raise.[120] With the weight of Supreme Court precedence, the idea of voluntary conveyance, and the distinction between public and private, the scales are tipped in favor of finding that Jones's actions were exposed to the public and that no reasonable expectation of privacy existed.

Opinions in academia lend credence to this point of view as well. For example, Orin Kerr, a George Washington University law professor has opined this same viewpoint. Professor Kerr stated, "the historic line is that public surveillance is not covered by the 4th Amendment."[121] Predicting the outcome should the issue reach the Supreme Court, Professor Kerr stated as long as GPS devises are affixed to automobiles on public roads, the Court will probably decide no warrant is needed in light of previous Fourth Amendment decisions allowing warrantless searches on public property.[122]

C. Societal Acknowledgement of a Privacy Right

After citing in its opinion Justice O'Connor's statement that "[w]e have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable,"[123] the *Maynard* Court stated that application of *Katz* and its progeny can only reach the conclusion that "society recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation."[124] The D.C. Circuit Court reached this conclusion because of the extent of the monitoring involved. Nevertheless, this conclusion merely assumes the existence of a societal acknowledgement of a privacy interest. The court fails to produce anything resembling a Brandeis Brief detailing society's feelings on the issue, and the judges presuppose that because another court has never differentiated the issue of prolonged surveillance, society must have recognized this privacy right. So, the court implicitly reaches the conclusion that society does not recognize a privacy interest in one's movements via his or her automobile, but the aggregate of those movements over the course of a month is a recognized privacy interest.

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120. *Knotts*, 460 U.S. at 285.
121. *Discovery of GPS tracker becomes privacy issue*, USA TODAY (Oct. 16, 2010, 10:47 PM), http://www.usatoday.com/news/nation/2010-10-16-gps-tracking-warrants_N.htm.
122. *Id*.
123. O'Connor v. Ortega, 80 U.S. 709, 715 (1987).
124. *Maynard*, 615 F.3d 544 at 563.

The circuit court's broad statements merely assume societal recognition of a privacy right, and this assumption fails to adequately consider the forces at play. In a post-9/11 world, society seems to be willing to sacrifice some liberty in order to attain better security. While this Note is no place for a detailed examination of what society acknowledges as a privacy right and what it does not,[125] the enactment and subsequent reauthorizations of the PATRIOT ACT[126] lends credit to at least segments of society willing to give up some liberty. More importantly, the widespread use of commercial GPS devices, such as OnStar and Garmin, support the idea of public acceptance of GPS devices. As the popularity of these products grows, and as more and more vehicles come pre-equipped with GPS capabilities, arguments in opposition of societal acceptance of GPS devices wane. While the D.C. Circuit Court of Appeals would likely differentiate acceptance of GPS devices from acceptance of prolonged tracking, the Court's current Fourth Amendment jurisprudence as applied to vehicles would go against the appellate court's reasoning.

V. CONCLUSION

For the D.C. Circuit Court, everything hinges on differentiating the idea of prolonged searches from *Knotts*. While the D.C. Circuit Court raised valid and important issues, the current application of precedent coupled with the difference between public exposure and an individual's privacy right results in the conclusion that the D.C. Circuit Court wrongly decided *Maynard*. The question of prolonged searches does eventually need to be answered, but this question needs to be answered by the Supreme Court. The *Maynard* opinion only convolutes the law. It provides no test or guidelines for when mobile device tracking crosses over into the territory of a prolonged search. While competing interest in society do exist, a balance has not yet been found. The Supreme Court will soon hear and opine on the struggle between warrantless GPS searches and an individual's right to privacy; however, until such a hearing, courts should follow and apply the existing precedent.

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125. While it may be conceded that most people would not outright approve of the government following their vehicular movements for a month, the Supreme Court's jurisprudence provides minimal privacy rights when it comes to vehicles on the road. Furthermore, an individual's privacy must be analyzed in the contextual whole, and the issue of privacy rights and advancements in technology will undoubtedly provide a constant ebb and flow to this discussion.

126. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).