Along for the Ride: GPS and the Fourth Amendment

ABSTRACT

With the advent of new technologies, the line as to where the Fourth Amendment forbids certain police behavior and when it does not has become increasingly blurred. Recently, the issue of whether police may use Global Positioning System (GPS) tracking devices to track individuals for prolonged periods of time without first securing a search warrant has crept its way into the limelight. The various circuits have arrived at different conclusions, and the question has now found its way onto the US Supreme Court’s docket.

After analyzing and weighing both Supreme Court caselaw and public policy considerations, this Note concludes that the D.C. Circuit’s “Mosaic Theory”—that the collection of discreet trips in a vehicle tells more than any individual movement, and therefore is protected by the Fourth Amendment—is misguided and strays from the Supreme Court’s analysis in United States v. Knotts. Rather, existing caselaw and policy considerations better support the Ninth and Seventh Circuits’ rulings that GPS tracking does not fall within Fourth Amendment protection. The question remains as to how the Supreme Court will rule on the issue and where the Court will draw the line between privacy concerns and police needs with regards to the increasing role of surveillance technology.

TABLE OF CONTENTS

I. FOURTH AMENDMENT JURISPRUDENCE AND THE RISE OF A “REASONABLE EXPECTATION” ............................................. 164
   A. The Exclusionary Rule and a “Reasonable Expectation of Privacy” ......................................................... 164
   B. The Open Fields Doctrine ........................................ 165
   C. Technological Developments ........................................ 167
   D. GPS Technology .................................................... 170
II. ANALYSIS: NAVIGATING THROUGH THE CIRCUIT SPLIT ...... 171
   A. Seventh and Ninth Circuits’ Approach ......................... 172
   B. D.C. Circuit Approach ........................................... 175
   C. The Seventh Circuit Response to Maynard ................. 176
III. RESOLUTION: OVERRULING MAYNARD

A. A Brief Comment on Installation

B. Distinguishing Kyllo

C. The Expectation of Privacy and Totality of One’s Movements

D. Analogy to Video Technology Surveillance

E. Bright-Line Benefits

IV. CONCLUSION

Imagine driving your car along the Pacific Coast Highway on a warm Sunday afternoon. The view is so striking that you decide to pull onto an overlook to take some pictures of the sun setting over the ocean. As you make your way to the barrier separating the road from the steep cliffs, you feel exhilarated by the cool sea breeze and the magnificent scene before you. After capturing the brilliant sunset with your camera, you whirl around to take one last picture of your beloved red ’68 Mustang. That is when you notice an unusual shadow. A quick examination reveals a small black box affixed to the underside of the bumper. Alarmed but curious, you hop back into the car and throw it into gear. The once gleaming scenery dissolves in the periphery of your vision as your eyes focus steadily on the road in front of you. Your thoughts are consumed with the mysterious black box—what is it and who put it there? Once at home, you grab some tools and immediately try to remove the object. Hesitant to cause any damage when it does not easily disengage, you decide instead to conduct an Internet search. After an hour of perusing various websites, you finally have an answer—the little black box is a Global Positioning System (GPS) tracking device. But who would want to spy on you? You are not an intelligence agent or a convicted criminal, and you cannot imagine your ex-fiancé taking such measures to get back at you. Could it be the government? Surely, this type of action would require a warrant. However, depending on where you are in the United States, law enforcement may not need a warrant before secretly placing a GPS device on your car and tracking your every move.¹

While the Fourth Amendment establishes protection for individuals against unreasonable searches and seizures,² the US

¹ Compare United States v. Maynard, 615 F.3d 544, 568 (D.C. Cir. 2010) (holding that law enforcement violated the Fourth Amendment when it secretly placed a GPS device on defendant’s car to monitor his actions), with United States v. Pineda-Moreno, 591 F.3d 1212, 1217 (9th Cir. 2010) (holding that law enforcement did not violate the Fourth Amendment when it secretly placed mobile tracking devices on defendant’s car to monitor his actions).

² U.S. CONST. amend. IV.
Courts of Appeals have diverging opinions on whether prolonged surveillance by electronic means is a violation of that prohibition. The debate among the circuits centers on whether police should be required to obtain a warrant before installing these devices. The Seventh and Ninth Circuits maintain that because the road system is a public domain, individuals do not have a “reasonable expectation of privacy” to the location of their cars; thus, GPS tracking without a warrant does not violate Fourth Amendment rights. Alternatively, the D.C. Circuit has held that this type of snooping challenges everything the Fourth Amendment stands to protect. Generating considerable debate as technological advances allow law enforcement to engage in such activities, this question is likely to repeat itself in local, state, and federal courts, making it ripe for review. The Supreme Court of the United States (“Supreme Court”) recently granted certiorari on the issue, and will provide guidance as to whether such surveillance oversteps constitutional boundaries.

This Note argues that the Fourth Amendment allows law enforcement to use GPS technology to perform prolonged remote surveillance without a warrant. To support this contention, Part I provides a brief overview of the Fourth Amendment and the corresponding exclusionary rule. It also examines how the Supreme Court, as well as lower federal courts, has viewed electronic surveillance under various situations. Part II reviews the circuit split and analyzes the Seventh, Ninth, and D.C. Circuits’ divergent reasoning. Part III explains the public policy and legal rationales that support GPS tracking of suspects’ vehicles, irrespective of duration, without a warrant. In this portion, the Note draws analogies between GPS surveillance, in-person surveillance, and surveillance through video technology to support the conclusion that police are not restricted by the Fourth Amendment when tracking a car through electronic means.

3. See supra note 1.
4. See supra note 1.
5. Pineda-Moreno, 591 F.3d at 1214-15; United States v. Garcia, 474 F.3d 994, 997 (7th Cir. 2007).
6. See generally United States v. Maynard, 615 F.3d 544, 568 (D.C. Cir. 2010) (holding that law enforcement violated the Fourth Amendment when it secretly placed a GPS device on defendant’s car to monitor his actions).
7. See Greg Nojeim, Court Rules that Warrant is Required for Stored Cell Site Location Information, CENTER FOR DEMOCRACY & TECHNOLOGY (Sept. 12, 2011), http://www.cdt.org/blogs/greg-nojeim/129court-rules-warrant-required-stored-cell-site-location-information (stating that the Supreme Court will review the Maynard decision during the October 2011 term).
8. See discussion infra Part III.
I. FOURTH AMENDMENT JURISPRUDENCE AND THE RISE OF A “REASONABLE EXPECTATION”

The United States Constitution affords its citizens the right to privacy—government officials are not permitted to conduct searches without probable cause.9 For the purpose of this Note, it is important to delve into the judicial history of the Fourth Amendment, and how the Court has treated technological advances within its Fourth Amendment framework.

A. The Exclusionary Rule and a “Reasonable Expectation of Privacy”

The Fourth Amendment states that citizens have the right to be secure in their own “persons, houses, papers, and effects, against unreasonable searches and seizures.”10 Courts use the “reasonable expectation of privacy” standard to determine whether an action is an infringement of Fourth Amendment rights.11 If an individual can demonstrate that he reasonably expected that his activity would not be accessible to the public, then that activity is within the realm of privacy protected by the Fourth Amendment.12 Accordingly, the Federal Rules of Evidence bar any evidence collected in violation of a defendant’s Fourth Amendment rights from admission at trial—this principle is known as the exclusionary rule.13

As a result, courts must determine if law enforcement obtained the evidence in violation of the Fourth Amendment.14 Weeks v. United States first outlined this type of analysis when it established the exclusionary rule.15 In Weeks, police entered and searched the defendant’s room with neither a warrant nor the defendant’s permission.16 The police seized letters and other articles and subsequently submitted them as evidence in a criminal case involving mail fraud charges.17 The Supreme Court held that the officers

9. U.S. CONST. amend. IV.
10. Id.
11. See, e.g., Maynard, 615 F.3d at 557 (finding that the defendant’s Fourth Amendment rights had been violated because he had a reasonable expectation of privacy in his movements).
12. E.g., id. at 558.
15. Id.
16. Id. at 386.
17. Id.
searched the defendant’s room improperly and seized the items unlawfully, so the prosecution could not use that evidence in the criminal trial against the defendant.\textsuperscript{18} Allowing improperly seized items to be admitted into evidence would render the Fourth Amendment meaningless and would deny the accused his constitutional rights.\textsuperscript{19}

Building on Weeks, the Supreme Court ruled in \textit{Katz v. United States} that government officials could not introduce evidence gathered by tapping a public phone.\textsuperscript{20} The defendant in \textit{Katz} used a public telephone booth to call in illegal gambling bets.\textsuperscript{21} According to the Court, these surveillance techniques invaded the defendant’s privacy and violated his Fourth Amendment rights.\textsuperscript{22} Despite being in a public area, the defendant made concerted efforts to conceal his speech, including shutting the door to the booth so that no one could listen in on his conversation.\textsuperscript{23} In his concurring opinion, Justice Harlan rationalized “that an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy.”\textsuperscript{24} The ruling in \textit{Katz} overturned \textit{Olmstead v. United States}, wherein the Supreme Court had held that wiretapping was not a “search and seizure” within the meaning of the Fourth Amendment and was thus admissible as evidence in a criminal trial.\textsuperscript{25} \textit{Katz} provided courts a standard to determine whether various environments should be afforded Fourth Amendment protections—whether or not a person has a “reasonable expectation of privacy.”\textsuperscript{26}

\textbf{B. The Open Fields Doctrine}

The open fields doctrine theorizes that an individual does not have a reasonable expectation of privacy in an open field (or any open space), as a “field” is not a part of the constitutionally protected “persons, houses, paper, and effects.”\textsuperscript{27} First espoused in \textit{Hester v. United States}, 265 U.S. 57, 59 (1924).
United States,²⁸ the open fields doctrine applied because the defendant was accused of exchanging “illicitly distilled” moonshine whiskey in an open field adjacent to his house.²⁹ Because the exchange had taken place in an open field, in wide view of the public, the warrantless “search” that occurred was not within the bounds of the Fourth Amendment’s protection.³⁰ By applying a strict interpretation, the Court found that because the field was not part of the defendant’s “persons, houses, paper, [nor] effects” the officer’s actions did not amount to a “search” prohibited by the Fourth Amendment.³¹

Limiting the broad determination that the Fourth Amendment never protects activity in open fields, Katz instead created the circumstance-intensive standard requiring review of whether an individual had a reasonable expectation of privacy.³² Therefore, if a defendant was able to prove that a reasonable expectation of privacy existed for activities conducted in an open field, he may have evidence of those activities excluded from trial if officers collected the evidence without permission or a warrant.³³

The Katz holding, however, did not completely do away with the open fields doctrine.³⁴ In Oliver v. United States, the Supreme Court once again held that a search in an open field did not violate the Fourth Amendment.³⁵ The police discovered that a defendant had grown marijuana in an open field.³⁶ Despite Katz, Oliver stands to show that society does not recognize an individual’s expectation of privacy³⁷ in open fields as reasonable, even if privately owned, fenced, and marked with ‘No Trespassing’ signs, because there is no barrier to public view of the field.³⁸ Further,

an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. . . . The [Fourth] Amendment reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference. For example, the [Supreme] Court since the enactment of the Fourth Amendment has stressed “the overriding respect for the

²⁸.    Id.
²⁹.    Id. at 58.
³⁰.    Id.
³¹.    Id. at 59.
³³.    See id. at 360-62 (establishing the reasonable expectation of privacy standard).
³⁴.    See Oliver v. United States, 466 U.S. 170, 184 (1984) (“We conclude that the open fields doctrine, as enunciated in Hester, is consistent with the plain language of the Fourth Amendment and its historical purposes.”).
³⁵.    Id.
³⁶.    Id. at 173.
³⁷.    Id. at 178.
³⁸.    Id. at 179.
The open fields doctrine is directly applicable to the issue presented in this Note because, like open fields, roads are publicly accessible and everyone can view an individual’s actions on public roads. Everyone has direct access to roads, and as a result, no person has a reasonable expectation of privacy regarding his location if he is using publicly accessible thoroughfares. As the Court in Oliver articulated, the framers envisioned the Fourth Amendment to provide privacy in certain settings including homes and other enclaves. However, privacy protections do not extend to all locations or all circumstances because there are certain places where society does not recognize privacy expectations as reasonable.

C. Technological Developments

The Supreme Court created a framework to guide law enforcement officials’ efforts to use new technology as a warrantless means of secret surveillance without violating the Fourth Amendment. For example, placing a radio tracker (a “beeper”) in a defendant’s car does not run afoul of the Fourth Amendment because the information obtained through that device could have been gained through unaided visual surveillance. In United States v. Knotts, the police suspected that the defendant purchased chloroform to manufacture illegal drugs. Police planted a beeper in a container of chloroform and arranged for a supplier to sell it to the defendant. Law enforcement officials then used the beeper to track the location of the chloroform, which ultimately led them to the defendant’s secluded cabin. The defendant argued that the beeper and tracking activities

39. Id. at 178 (citations omitted) (quoting Payton v. New York, 445 U.S. 573, 601 (1980)).
40. See United States v. Knotts, 460 U.S. 276, 281 (1983) ("A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.").
41. See U.S. CONST. amend. IV ("The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated . . . ."); see also Oliver v. United States, 466 U.S. 170, 179 (1984).
42. Olvier, 466 U.S. at 179 (finding that a field was not a place where society recognized a reasonable expectation of privacy).
44. Knotts, 460 U.S. at 285.
45. Id. at 278.
46. Id.
47. Id.
violated his Fourth Amendment rights. The Supreme Court found that a person driving on public roads does not have a reasonable expectation of privacy in his movements. The court rationalized that when a driver travels on public roads, that driver conveys to anyone who wishes to observe what direction he is going, what his destination is, and what stops he made. Justice Rehnquist went on to state: “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.” He also noted: “A police car following [the defendant] at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin owned by respondent, with the drum of chloroform still in the car.” The defendant had no expectation of privacy on the roadway; thus, police did not violate his Fourth Amendment rights.

However, in a subsequent case, United States v. Karo, the Court held that unrestricted use of beeper technology for “[i]ndiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.” Thus, the Supreme Court prohibits the use of technology to glean information that could not have been otherwise obtained. In Karo, drug enforcement agents planted a beeping device (similar to the one in Knotts) in a can of ether that the defendant purchased. The agents tracked the device for four months, ultimately arresting the defendant after determining that the canister of ether had come to rest in the defendant’s home. The police’s use of the beeper violated the defendant’s Fourth Amendment rights because, unlike the information gleaned during the Knotts investigation, this beeper provided information that could not have been ascertained by the naked eye: the fact that the ether was inside

48. Id. at 279.
49. Id. at 281.
50. Id. at 281-82.
51. Id. at 282.
52. Id. at 285.
53. Id.
55. See id.
56. Id. at 708.
57. Id. at 710.
58. Id. at 714.
the defendant’s house.\textsuperscript{59} The Court stated that while the use of the beeper device to determine that the ether was located in the defendant’s home was not as extensive as a full-blown search, it still revealed information that police could not have discovered without otherwise obtaining a warrant.\textsuperscript{60} The Supreme Court voiced its concerns regarding free use of the beeper technology, stating in the \textit{Karo} opinion that the use of technology to monitor property that has been removed from public view would be a serious threat to privacy interests.\textsuperscript{61} Because police used technology to collect information that they could not have obtained without it, the Court found this to be an intrusion of privacy.\textsuperscript{62}

The Fourth Amendment also prohibits using other devices that reveal information about homes, even without physically entering the premises.\textsuperscript{63} In \textit{Kyllo v. United States}, for example, the Supreme Court excluded evidence that the police collected based on information obtained through a heat-detecting device.\textsuperscript{64} A judge had granted a warrant to search for a marijuana-growing operation after the device (which police used in a publicly accessible area) showed that the roof and walls of the defendant’s garage were emitting an unusually large amount of heat energy.\textsuperscript{65} During an initial evidentiary hearing, the district court considered the technology a non-intrusive device which emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the house; it “did not show any people or activity within the walls of the structure”; “the device used cannot penetrate walls or windows to reveal conversations or human activities”; and “no intimate details of the home were observed.”\textsuperscript{66} Nevertheless, on appeal, the Supreme Court found that the use of the device infringed upon Kyllo’s Fourth Amendment rights and constituted an improper search of his home.\textsuperscript{67} The Court held that using “sense-enhancing technology” to gather information pertaining to the interior of the home that could not have been obtained other than through physical entrance constitutes an unconstitutional search.

\begin{itemize}
\item \textsuperscript{59} \textit{Id.} ("This case thus presents the question whether the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment . . . ").
\item \textsuperscript{60} \textit{Id.} at 715.
\item \textsuperscript{61} \textit{Id.} at 716.
\item \textsuperscript{62} \textit{Id.} at 715-16. The Court ultimately upheld the defendant’s conviction on other grounds. \textit{Id.} at 706.
\item \textsuperscript{63} \textit{Kyllo v. United States}, 533 U.S. 27, 27 (2001).
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.} at 30.
\item \textsuperscript{66} \textit{Id.} (citation omitted).
\item \textsuperscript{67} \textit{Id.} at 40.
\end{itemize}
of the home, particularly when the technology is not part of everyday use. The government argued that the heat emitted from the house was heat from the exterior of the home and therefore detection did not intrude into the home.68 The Supreme Court rejected this argument, stating that this was an overly “mechanical” interpretation of the Fourth Amendment.69 The Court found support for its stance in Katz, where the sounds that police recorded from outside a phone booth constituted an improper search.70 The Court emphasized the long-standing notion that people have a reasonable expectation of privacy in their homes.71

The holdings in Karo and Kyllo echo the Court’s reservations regarding privacy and technological advancements in law enforcement.72 Thus, when the Court examines whether police should be allowed to install and monitor GPS tracking devices on cars without a warrant, it will likely consider the issue with this skepticism in mind. The Framers conceived of the Fourth Amendment when the only types of searches and seizures were those that occurred in person.73 As a result, courts today face the difficult task of interpreting privacy rights with respect to evolving technology.

D. GPS Technology

For the purposes of this Note, it is important to consider the uses of a GPS tracker, how it works, and how it differs from the beeper technology in Knotts and Karo. GPS uses satellites to monitor and track the locations of various receivers (the tracking devices) on Earth.74 Using signals from these satellites, authorities are able to track the exact longitude, latitude, and altitude of the devices.75 By attaching a GPS tracking device to the undercarriage or bumper of a car, police can pinpoint the location of a vehicle at any time as long as

68. Id. at 35.
69. Id.
70. Id.
71. Id. at 40 (“We have said that the Fourth Amendment draws ‘a firm line at the entrance to the house.’” (quoting Payton v. New York, 445 U.S. 573, 590 (1980))).
72. See id. (finding the police’s use of technology violated the defendant’s Fourth Amendment rights); United States v. Karo, 468 U.S. 705, 708 (1984) (holding that the police may not use beeper technology to glean information from inside a person’s home).
75. Id.
the tracking device is still affixed to the automobile. Unlike the beeper technology at issue in Knotts and Karo, GPS does not require that the receiving device be within close proximity to track its location. Instead, GPS allows police to locate a vehicle remotely at any time. In effect, police are able to monitor a vehicle’s location without any in-person tracking.

II. ANALYSIS: NAVIGATING THROUGH THE CIRCUIT SPLIT

At the heart of the circuit split is whether police may use GPS devices to monitor a vehicle’s movement without first receiving a warrant to attach or track the device. The basis for the dilemma is rooted in the Fourth Amendment, which protects individuals from unreasonable searches and seizures. Courts agree that installing and monitoring these devices are not seizures, which the Court defines as a “meaningful interference with an individual’s possessory interests in [his] property.” A GPS device does not “affect the car’s driving qualities, [does] not draw power from the car’s engine or battery, [does] not take up room that might otherwise have been occupied by passengers or packages ... and in short [does] not ‘seize’ the car in any intelligible sense of the word.” Despite this, courts disagree about whether using a GPS tracker constitutes an improper search.

As stated in Katz, the test for whether police may search without a warrant is whether a person has a reasonable expectation of privacy in the thing or location searched. The Seventh and Ninth Circuits take the approach that GPS tracking does not infringe upon this right, and that GPS devices placed on vehicles monitor activities for which people have no reasonable expectation of privacy. The D.C. Circuit reached the opposite conclusion, finding that such use of

---

76. See id. (“The user segment consists of the GPS receiver equipment, which receives the signals from the GPS satellites and uses the transmitted information to calculate the user’s three-dimensional position and time.”).
78. See id.
79. See id.
80. See supra note 1.
81. U.S. CONST. amend. IV.
83. United States v. Garcia, 474 F.3d 994, 996 (7th Cir. 2007).
84. See supra note 1.
86. United States v. Pineda-Moreno, 591 F.3d 1212, 1215-16 (9th Cir. 2010); Garcia, 474 F.3d at 998.
GPS technology invades a person’s right to privacy, arguing that a person’s accumulated trips tell more about that person’s behavior than any single journey. The question raises concerns pertaining to both security and privacy in the modern age of electronic surveillance.

A. Seventh and Ninth Circuits’ Approach

The Seventh and Ninth Circuits recently ruled that the use of GPS tracking devices does not interfere with a person’s expectation of privacy, and therefore police do not need a warrant to install and monitor a device on a person’s car. The use of a car is generally confined to publicly accessible roadways; therefore, GPS surveillance of a vehicle does not infringe on a person’s Fourth Amendment rights, according to these courts.

In the Seventh Circuit case *United States v. Garcia*, the court found the defendant guilty of manufacturing methamphetamine. Shortly after Garcia left prison, a third party reported to police that Garcia had delivered methamphetamine to him and announced that Garcia intended to begin manufacturing the drug again. Police began to monitor Garcia’s activities and discovered that he was purchasing common ingredients of methamphetamine. After learning that Garcia was driving a borrowed Ford Tempo, police attached a GPS “memory-tracking” device to record all of the car’s movements. When police later retrieved the device, they used it to determine all of the car’s locations and paths since its installation. They searched a large tract of land the car had repeatedly visited and discovered equipment and materials used in the manufacture of methamphetamine; they later used this information to prosecute Garcia.

The Seventh Circuit ruled that the installation and use of the “memory tracking device” was not an unconstitutional search and

---

87. United States v. Maynard, 615 F.3d 544, 568 (D.C. Cir. 2010).
88. Pineda-Moreno, 591 F.3d at 1215-16; Garcia, 474 F.3d at 998.
89. See, e.g., Garcia, 474 F.3d at 996 (referencing United States v. Knotts, 460 U.S. 276 (1983), for the proposition that there is no expectation of privacy on public roads).
90. Id. at 995.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id.
97. Id.
98. Id. at 996.
According to the court, the GPS tracking was more similar to surveillance cameras and satellite imaging and dissimilar to the heat monitors in *Kyllo*. Unlike the device in *Kyllo*, this GPS tracking device did not help police perceive something they could not have observed through the naked eye. Here, police could have used twenty-four-hour, in-person surveillance to obtain the same information. GPS tracking devices are simply substitutes for legal “in-person surveillance,” according to the Seventh Circuit, and are therefore permissible under the Fourth Amendment.

Judge Posner was quick to point out in *Garcia* that the court’s holding in no way endorsed or made a decision with regard to mass surveillance. The court recognized a difference between mass surveillance of the general public using GPS systems and the use of GPS tracking devices to observe one suspect for a prolonged period. The court stated that it would be premature to rule that mass surveillance raised no questions under the Fourth Amendment, and that the hiring of “another 10 million police officers” is not necessarily an efficient substitute for GPS tracking. Posner further asserted, “[t]echnological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive.” As a result, the holding in *Garcia* only applies to the occasional surveillance of a single subject, and not to any widespread government surveillance program.

In the Ninth Circuit case *United States v. Pineda-Moreno*, a drug enforcement officer noticed a group of men purchasing fertilizer commonly used to cultivate marijuana plants. The agent followed the men’s vehicle and later determined that the defendant, Pineda-Moreno, owned it. Police affixed GPS mobile tracking devices to the defendant’s car seven different times, sometimes entering onto

99. *Id.* at 997.
100. *Id.*
101. *Id.*
102. *Id.* (“The 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.”).
103. *Id.*
104. *Id.* at 998.
105. *Id.*
106. *Id.*
107. *Id.*
108. See *id.* (“Should 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.”).
110. *Id.*
Pineda-Moreno’s driveway to do so. Using the GPS devices, police tracked the defendant leaving a suspected marijuana grow site. Eventually, officers pulled the vehicle over, smelled marijuana, and arrested the defendant.

The Ninth Circuit found that neither the installation of the GPS device nor the tracking of Pineda-Moreno’s vehicle violated the Fourth Amendment. Additionally, the court determined that the police’s action of entering onto the defendant’s driveway to install the device also did not violate the Fourth Amendment. While the driveway was “within the curtilage of [Pineda-Moreno’s] home,” it was not subject to a reasonable expectation of privacy since Pineda-Moreno had not taken any steps to shield the driveway from the public. There was no fence or barrier obstructing the driveway from public view or access, nor was there a sign stating “[n]o [t]respassing.” Therefore, Pineda-Moreno had no expectation that people would not enter onto his driveway freely.

The prolonged, round-the-clock surveillance of Pineda-Moreno was not deemed an improper search under Fourth Amendment standards. While the defense asserted that the Supreme Court’s holding in *Kyllo* directly applied to the case at hand, stating that “law enforcement officers conduct a ‘search’ whenever they use sense-enhancing technology not available to the general public to obtain information,” the court rejected this contention. In *Kyllo*, the technology was used to peer into the defendant’s house—an area that the Fourth Amendment explicitly protects. In the present case, the GPS monitored the defendant only in areas that were open to the public; thus, the defendant had no reasonable expectation of privacy in these locations. As a result, the Ninth Circuit found that placing a GPS tracking device on a vehicle without first procuring a warrant does not constitute a “search” for Fourth Amendment purposes.

111. *Id.*
112. *Id.* at 1214.
113. *Id.*
114. *Id.* at 1217.
115. *Id.* at 1215.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 1217.
120. *Id.* at 1216.
121. *Id.*
122. *Id.*
123. *Id.* at 1217.
B. D.C. Circuit Approach

While the Seventh and Ninth Circuits both hold that installing and tracking GPS devices on vehicles does not violate Fourth Amendment protections,\(^\text{124}\) the D.C. Circuit takes the opposing position.\(^\text{125}\)

In *United States v. Maynard*, police began investigating a nightclub owner, Jones, for narcotics offenses; they monitored his activities for four weeks after installing a GPS tracking device on his Jeep.\(^\text{126}\) Using the tracking results, the government pieced together a case against Jones and successfully prosecuted him.\(^\text{127}\) Jones appealed his conviction on the grounds that the GPS surveillance of his car was unconstitutional under the Fourth Amendment.\(^\text{128}\)

Finding for the defendant, the D.C. Circuit stated that *Knotts* did not control the present case because it had dealt with different circumstances.\(^\text{129}\) The Circuit Court noted that in *Knotts*, the Supreme Court had never answered the question as to whether prolonged, twenty-four-hour surveillance using technological devices is an improper search under the Fourth Amendment.\(^\text{130}\) The *Knotts* officers followed the defendant for only a short period of time and ceased tracking activities as soon as they learned that the car had come to rest at a certain location.\(^\text{131}\) In *Maynard*, however, the police used GPS tracking to survey Jones’ movements for almost a month.\(^\text{132}\) While Jones did not necessarily have an expectation of privacy for individual trips on public roads, the totality of his movement was subject to a reasonable expectation of privacy, as “the likelihood anyone will observe all those movements is effectively nil.”\(^\text{133}\) Along these lines, the court found that the totality of one’s movements

\(^{124}\) See *United States v. Pineda-Moreno*, 591 F.3d 1212, 1217 (9th Cir. 2010); *United States v. Garcia*, 474 F.3d 994, 996 (7th Cir. 2007).

\(^{125}\) *United States v. Maynard*, 615 F.3d 544, 555 (D.C. Cir. 2010).

\(^{126}\) *Id.* at 548-55.

\(^{127}\) *Id.* at 549.

\(^{128}\) *Id.* at 555.

\(^{129}\) *Id.* at 556-58.

\(^{130}\) *Id.* at 556-57.

\(^{131}\) *Id.*

\(^{132}\) *Id.* at 558.

\(^{133}\) *Id.*
reveals more than any individual movement; therefore, *prolonged* surveillance using GPS monitoring violates the Fourth Amendment.\(^{134}\)

Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one’s not visiting any of these places over the course of a month.\(^{135}\)

The Supreme Court granted certiorari to review this case during the October 2011 term and will determine whether prolonged surveillance is constitutional.\(^{136}\)

**C. The Seventh Circuit Response to Maynard**

After the D.C. Circuit handed down its *Maynard* ruling, the Seventh Circuit had a chance to reconsider its position on the use of GPS and its Fourth Amendment implications in *United States v. Cuevas-Perez*.\(^{137}\) In *Cuevas-Perez*, the Phoenix police used a GPS tracking device to monitor the defendant’s vehicle for more than sixty hours and through five states.\(^{138}\) Earlier, Immigration and Customs Enforcement (ICE) agents had observed, through use of a pole camera, Cuevas-Perez manipulating the hatch and rear door panels of his Jeep Laredo outside of his home.\(^{139}\) The ICE agents told Phoenix police they suspected Cuevas-Perez might be involved in drug distribution, so the police attached the GPS to the defendant’s vehicle while it was parked in a public area.\(^{140}\) Upholding *Garcia*, the court found that, in this instance, the use of the GPS tracking device did not violate the defendant’s Fourth Amendment rights.\(^{141}\) The court distinguished the case at bar from *Maynard*, explaining that the sixty-hour surveillance period in *Cuevas-Perez* was not a prolonged search and therefore did not raise the same implications as the surveillance in *Maynard*.\(^{142}\) The court, however, did not dismiss the possibility that prolonged monitoring may implicate Fourth Amendment concerns.\(^{143}\)

---

134. *Id.* at 561-62.
135. *Id.* at 562.
136. *See* Nojeim, *supra* note 7 (stating that the Supreme Court will review the *Maynard* decision during the October 2011 term).
138. *Id.* at 272-73.
139. *Id.*
140. *Id.*
141. *Id.* at 275-76.
142. *Id.* at 274-75.
143. *Id.* at 275.
In his concurring opinion, Judge Flaum went a step further and addressed whether a prolonged search would have violated the defendant’s Fourth Amendment rights.\textsuperscript{144} His response was a resounding no.\textsuperscript{145} According to Judge Flaum, the \textit{Maynard} ruling was incorrect in finding that \textit{Knotts} did not control the issue of GPS surveillance.\textsuperscript{146} Judge Flaum asserted that the Supreme Court consistently recognizes that people do not have a legitimate expectation of privacy when they reveal their actions to others.\textsuperscript{147} He went on to attack the D.C. Circuit’s “mosaic theory,” stating that “the fact that law enforcement are able to take information that is revealed publicly and piece together an intimate picture of someone’s life does not raise constitutional concerns under current doctrine.”\textsuperscript{148} Essentially, a reasonable expectation of privacy hinges on whether the information was “willingly conveyed, not that someone has aggregated it.”\textsuperscript{149}

III. RESOLUTION: OVERRULING \textit{MAYNARD}

When presented with the question of whether GPS tracking infringes upon a defendant’s Fourth Amendment rights, courts must decide whether a person has a “reasonable expectation of privacy” as to the movements of his car.\textsuperscript{150} While it may seem that \textit{Knotts} directly controls the issue at hand, distinctions between beeper technology and GPS technology exist with regard to Fourth Amendment analysis.\textsuperscript{151} The Seventh, Ninth, and D.C. Circuits agree that the use of GPS tracking devices by police is permissible if used for short-term tracking.\textsuperscript{152} The courts are split on whether police may use GPS for

\begin{itemize}
\item \textsuperscript{144} \textit{Id.} at 276.
\item \textsuperscript{145} \textit{Id.} at 278.
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} \textit{Id.} at 276.
\item \textsuperscript{148} \textit{Id.} at 283.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{See United States v. Maynard, 615 F.3d 544, 555 (D.C. Cir. 2010) (stating that the central issue is whether the defendant had a reasonable expectation of privacy in his movements).}
\item \textsuperscript{151} \textit{See, e.g., id. at 557; United States v. Pineda-Moreno, 591 F.3d 1212, 1216-17 (9th Cir. 2010); United States v. Garcia, 474 F.3d 994, 998 (7th Cir. 2007) (all three courts were able to draw distinctions between GPS technology and the beeper technology at issue in \textit{Knotts}). During oral arguments for \textit{Jones}, Chief Justice Roberts noted that being able to push a button and track anyone from anywhere (using GPS) is very different from monitoring someone from a helicopter using beeper technology. Transcript of Oral Argument at 4, United States v. \textit{Jones}, No. 10-1259 (Nov. 8, 2011).}
\item \textsuperscript{152} \textit{See Maynard, 615 F.3d at 557; Pineda-Moreno, 591 F.3d at 1217; Garcia, 474 F.3d at 998.}
\end{itemize}
prolonged searches, ones that can extend for weeks and even months.\textsuperscript{153} The beeper technology employed in \textit{Knotts} could only be used to track a vehicle for a short period of time; it could not be used to track movements for prolonged durations, and the technology required that police always remain within close proximity of the vehicle in order to receive the signal.\textsuperscript{154} With GPS technology, however, police can install a tracking device and effortlessly collect massive amounts of data regarding a vehicle’s movement.\textsuperscript{155} In the Seventh and Ninth Circuits, prolonged monitoring of a vehicle’s movement falls outside of Fourth Amendment protection; but in the D.C. Circuit, people have a reasonable expectation of privacy for the totality of their long-term activities and movements.\textsuperscript{156}

This Note argues that, while GPS surveillance is not commonplace,\textsuperscript{157} most people know that it is possible for someone to monitor their movements over an extended period of time. As long as one is in a publicly accessible area, a reasonable person should expect that he may be followed and that his accumulated trips can be the subject of surveillance. Therefore, prolonged surveillance on publicly accessible roadways is not subject to a reasonable expectation of privacy and should not receive Fourth Amendment protection.\textsuperscript{158}

\textbf{A. A Brief Comment on Installation}

This Note addresses only the issue of whether the use of GPS tracking devices is permissible under the Fourth Amendment and takes no stance as to whether police officers may enter onto private property in order to install GPS devices. Courts are unanimous that GPS devices may be installed on vehicles located in public areas such as parking lots, where there is no reasonable expectation of privacy. However, judges do not agree as to whether police may install them on

\textsuperscript{153} \textit{Compare Maynard}, 615 F.3d at 557 (stating that prolonged monitoring of a vehicle’s movement falls within the protection of the Fourth Amendment), with \textit{Pineda-Moreno}, 591 F.3d at 1217 (stating that prolonged monitoring of a vehicle’s movement falls outside of the protection of the Fourth Amendment), and \textit{Garcia}, 474 F.3d at 998 (stating that prolonged monitoring of a vehicle’s movement falls outside of the protection of the Fourth Amendment).

\textsuperscript{154} \textit{See United States v. Knotts}, 460 U.S. 276, 278 (1983) (noting that police were only able to track the defendant while in close proximity to the beeper).

\textsuperscript{155} \textit{See GPS Overview, supra note 74} (describing generally what GPS technology does and how it works).

\textsuperscript{156} \textit{See cases cited supra note 153.}

\textsuperscript{157} \textit{But see Declan McCullagh, Senator Pushes for Mobile Privacy Reform, CNET NEWS} (Mar. 22, 2011, 4:00 AM), http://news.cnet.com/8301-31921_3-20045723-281 (stating GPS tracking has become commonplace).

\textsuperscript{158} \textit{See discussion infra Part III.C.}
a vehicle while it is on private property, in particular the curtilage surrounding a person’s home. In *Pineda-Moreno*, the court employed a fact-intensive approach to determine whether the defendant had a reasonable expectation of privacy in his driveway. In finding for the government, the court held that the defendant had not taken any steps to protect his driveway from the public and thus did not have a reasonable expectation of privacy in it.

In a dissent to an order denying a rehearing of *Pineda-Moreno*, Judge Koziński criticized the majority’s holding, arguing that the curtilage around one’s home has always received special constitutional protection and police had no right to install a GPS device on the defendant’s car while it was located in his driveway. He further criticized the court’s analysis, arguing that it protected the wealthy while leaving average citizens at a disadvantage. For ordinary individuals, placing a gate in their driveway is impractical and economically infeasible; therefore, the ruling essentially granted additional constitutional protection to individuals who have the means to take extra precautions to block off their curtilage from the world. Kozinski found this inequitable and instead argued that the Constitution should bar police from installing GPS trackers when a car is located in the defendant’s curtilage.

The issue of whether the Fourth Amendment protects curtilage is separate from whether police may use GPS technology to monitor a vehicle’s movements on public thoroughfares. While public roads are always open to plain view and thus not constitutionally protected (there is no reasonable expectation of privacy), curtilage is different and subject to a stricter analysis. Therefore, this Note does not take a stance on the constitutionality of GPS installation on private property.

---

159. Compare United States v. Pineda-Moreno, 617 F.3d 1120, 1121 (9th Cir. 2010) (Kozinski, C.J., dissenting) (police may not install a GPS device on a vehicle that is in the curtilage of one’s home), with United States v. Pineda-Moreno, 591 F.3d 1212, 1217 (9th Cir. 2010) (police may install a GPS device on a vehicle that is in the curtilage of one’s home).

160. *Pineda-Moreno*, 591 F.3d at 1215.

161. Id.

162. *Pineda-Moreno*, 617 F.3d at 1121 (Kozinski, C.J., dissenting).

163. Id. at 1123.

164. Id.

165. Id. at 1126.

166. See Oliver v. United States, 466 U.S. 170, 180 (1984) (“[C]ourts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private.”).
B. Distinguishing Kyllo

It is important to mark the dissimilarities in the evidence collected in *Kyllo* as compared to that obtained with the aid of GPS surveillance in *Garcia, Pineda-Moreno*, and *Maynard*. Police in *Kyllo* used a heat-detecting device to determine that the defendant’s garage roof was emitting a large amount of heat.\(^{167}\) They were able to surmise that unusual activities were occurring within the garage and that the excess heat might be the product of a marijuana-growing operation.\(^{168}\) This was an intrusion into the sanctity of the home, which the Supreme Court has repeatedly found to be an area of special constitutional protection.\(^{169}\) Additionally, the technology used in *Kyllo* did not supply police with information that could have been collected through observations of the naked eye.\(^{170}\) It provided information through the use of thermal imaging, evidence police could not have collected without the help of the technology.\(^{171}\)

In contrast, the GPS surveillance technology employed by police in *Garcia, Pineda-Moreno*, and *Maynard* neither (1) gives any information as to the contents of or activities within one’s home; nor (2) provides police with information that could not be collected through naked-eye observations.\(^{172}\) While not necessarily practical, police can physically trail a vehicle’s movements for weeks at a time, even monitoring its movement into and out of the curtilage of the home.\(^{173}\) Though GPS technology allows for easier and less expensive tracking of an individual’s vehicle along public thoroughfares, it does not supply police with any information that they could not obtain but for the new technology.\(^{174}\) Increasing the efficiency of police work is not cause for an automatic bar based on Fourth Amendment

---

168. *Id.* at 30.
169. *Id.* at 40.
170. *See id.* at 30 (describing the use of thermal imaging devices to detect radiation not visible to the naked eye).
171. *Id.*
172. United States v. Maynard, 615 F.3d 544, 555 (D.C. Cir. 2010); United States v. Pineda-Moreno, 591 F.3d 1212, 1213 (9th Cir. 2010); United States v. Garcia, 474 F.3d 994, 995 (7th Cir. 2007).
173. *E.g.*, United States v. Garcia, 474 F.3d 994, 998 (7th Cir. 2007).
174. *Id.*
Therefore, GPS surveillance does not raise the same constitutional concerns as the heat-detecting device used in *Kyllo.*

C. The Expectation of Privacy and Totality of One’s Movements

The major distinction between the circuits is whether the totality of a person’s movements is open to public surveillance, or rather, subject to a person’s reasonable expectation of privacy. "Whether 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." The D.C. Circuit notes that individual trips are not subject to a reasonable expectation of privacy because roadways are open to the observations of everyone. However, the court held that the totality of a person’s movements reveals a different story than any one individual trip, and that people have a reasonable expectation of privacy in the entirety of their movements.

While police may glean more information by observing a person’s movements over a period of time, there should not be a reasonable expectation of privacy in the totality of movement. When people enter into public space, they knowingly expose themselves and their movements. The test to determine whether a reasonable expectation of privacy exists is not whether a person expects that a situation will actually happen, but rather an expectation that something could occur, a distinction that the D.C. Circuit fails to fully analyze in its opinion. Ultimately, people have no expectation of privacy in public places for any duration of time—police may legally track a person’s every public movement without technology for as long

---

175. *See, e.g.,* United States v. Knotts, 460 U.S. 276, 282 (1983) (“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.”).

176. *See discussion supra* Part III.B.

177. *Compare* Maynard, 615 F.3d at 557 (finding that people have a reasonable expectation of privacy for the totality of their long term activities and movements), *with* Pineda-Moreno, 591 F.3d at 1217 (finding that people do not have a reasonable expectation of privacy for the totality of their long term activities and movements), *and* Garcia, 474 F.3d at 998 (finding that people do not have a reasonable expectation of privacy for the totality of their long term activities and movements).

178. *Maynard,* 615 F.3d at 558 (citation omitted) (internal quotation marks omitted).

179. *Id.* (“[U]nlike 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.”).

180. *Id.* at 561-62.

181. *See* Katz v. United States, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”).
as they deem necessary.\textsuperscript{182} Therefore, while it is unlikely that police would engage in this type of monitoring, the possibility still exists, and individuals consequently expect that police could track them.

Outside the realm of electronic surveillance, the Supreme Court has considered the question of a reasonable expectation of privacy in a number of circumstances.\textsuperscript{183} In \textit{California v. Greenwood}, the Court found that a person does not have a reasonable expectation of privacy in the contents in trashcans left on the curb because they are accessible to the general public.\textsuperscript{184} The Supreme Court stated: “the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public.”\textsuperscript{185} In \textit{California v. Ciraolo}, the Supreme Court held that a person’s expectation of privacy from visual surveillance of the curtilage surrounding his home was not reasonable as the area was viewable from public airspace.\textsuperscript{186} In both cases, the Supreme Court found that there was no reasonable expectation of privacy due to the possibility that someone legally could have accessed or seen what the defendant attempted to hide, not that the person should have expected that the situation would actually happen.\textsuperscript{187} With the cases at hand (\textit{Garcia, Pineda-Moreno, and Maynard}), public roadways are not subject to any expectation of privacy, and although it is unlikely that a person’s movements will be intensely scrutinized over an extended period of time, the possibility exists.\textsuperscript{188} When people place trash on their curb, they do not anticipate anyone rummaging through it; however, people are aware that there is a chance that this could happen and therefore do not have a reasonable expectation of privacy in their trash.\textsuperscript{189}

Similarly, when people drive on public thoroughfares, they voluntarily provide information as to their whereabouts to the public, unlike trash disposal, which is at least concealed in bags and cans.\textsuperscript{190} When a person gets in a car, he exposes the movements of that trip to

\begin{thebibliography}{9}


\bibitem{184} \textit{Id.} at 40.

\bibitem{185} \textit{Id.} at 41.


\bibitem{187} \textit{Greenwood}, 486 U.S. at 39 (finding that there was no expectation of privacy even though, “[t]he trash was only temporarily on the street, and there was little likelihood that it would be inspected by anyone”); \textit{Ciraolo}, 476 U.S. at 215.

\bibitem{188} See cases cited \textit{supra} note 177.

\bibitem{189} \textit{See Greenwood}, 486 U.S. at 40.

\end{thebibliography}
Anyone who is also on the road. The accumulation of trips is made available for anyone who wishes to watch or follow. Therefore, there is no justification for constitutional protection over the totality of one’s movements on public thoroughfares just because those movements as a whole reveal a different story than any one trip.

Furthermore, the Supreme Court acquiesced to long-term technological tracking in Karo. While it held that the police’s activities were unacceptable under the Fourth Amendment, it did not do so based on the concern that police had used technology to track a can of ether for longer than four months. In holding there was probable cause to issue a search warrant for the defendant’s home in Karo, the Supreme Court referenced evidence obtained by the tracking device that did not violate constitutional protections, including the movements of the defendant’s car. Thus, the Court was implicitly condoning prolonged beeper tracking.

The Court held that the information obtained by the tracking device was improper because it led to information regarding the contents of the defendant’s home when the ether can containing the beeper device was removed from the defendant’s car. Essentially, the Court found that evidence obtained by tracking devices is permissible, even in a prolonged search, as long as the tracking device is not used to peer into a constitutionally protected private area.

D. Analogy to Video Technology Surveillance

In Garcia, the Seventh Circuit references the similarities between GPS tracking and prolonged use of video surveillance. While the Supreme Court has never reviewed video surveillance of public areas, circuit courts have widely held that the practice does not

191. Id.
192. See cases cited supra note 177.
193. See supra notes 178-80 and accompanying text.
195. Id. at 714-18.
196. Id. at 719.
197. Id.
198. Id. at 721 (“[T]here was no violation of the Fourth Amendment as to anyone with or without standing to complain about monitoring the beeper while it was located in [the defendant’s] truck.”).
199. Id. at 719.
200. See United States v. Garcia, 474 F.3d 994, 997-98 (7th Cir. 2007) (discussing cameras mounted on lampposts).
infringe on Fourth Amendment rights. Many of the arguments in support of allowing video surveillance of public areas mirror those in the GPS cases—most notably that the video surveillance does not give authorities any information that could not be obtained by warrantless in-person visual surveillance and that the technology does not peer into constitutionally protected private areas. Holding that the government could use long-range cameras to record activity in an open field, the Fourth Circuit stated, “Under our jurisprudence, [police] could have stationed agents to surveil [the defendant’s] property twenty-four hours a day. That the agents chose to use a more resource-efficient surveillance method does not change our Fourth Amendment analysis.”

Prolonged video surveillance often gives police much of the same information that prolonged GPS tracking does, allowing police to learn if a person is repeatedly visiting certain places. To follow the D.C. Circuit’s “mosaic” totality of movement theory would implicitly contradict the analysis and holdings of the video surveillance cases. A rule of law which states that evidence collected through GPS tracking in public areas is not afforded Fourth Amendment protection—as individuals do not have a reasonable expectation of privacy in those areas—is consistent with federal decisions regarding video surveillance. If the Supreme Court adopts the D.C. Circuit’s holding and analysis, it would effectively throw all of the previously settled rules of law regarding video surveillance into disarray. If the Court were to adopt the “mosaic theory,” it may need to consider the issue of whether the use of basic surveillance cameras also crosses constitutional lines.

E. Bright-Line Benefits

In terms of application, a rule that permits the use of GPS surveillance for any duration of time is more easily administered from the perspective of both the police and the courts than the ambiguous standard promulgated by the D.C. Circuit. There are a number of

---

201. E.g., United States v. Vankesteren, 553 F.3d 286, 287 (4th Cir. 2009); United States v. McIver, 186 F.3d 1119, 1125 (9th Cir. 1999); United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991).

202. See Taketa, 923 F.2d at 677 (“Videotaping of suspects in public places, such as banks, does not violate the [F]ourth [A]mendment; the police may record what they normally may view with the naked eye.”).

203. Vankesteren, 553 F.3d at 291 (citation omitted).

204. See, e.g., id. (noting that video surveillance can show multiple trips to a single location).

205. See, e.g., id.; McIver, 186 F.3d at 1125.

206. See supra Part II.B.
arguments for bright-line rules in lieu of ambiguous standards. Professor Kathleen Sullivan lays out the benefits of these rules in her article *The Justices of Rules and Standards*. First, bright-line rules promote fairness and equality by removing the arbitrariness and bias from judicial decision making. Next, rules provide certainty and predictability. Within the GPS surveillance context, a bright-line rule would allow police to know that they are able to use GPS tracking without having to worry that their actions may be challenged in court. Bright-line rules also release courts from much of their burden by “minimizing the elaborate, time-consuming, and repetitive application of background principles to facts.” Finally, rules are essential to liberty; rules allow people to know how the government will use its power, and permits individuals to plan their “affairs on the basis of this knowledge.”

There are a number of benefits to standards as well, including intensive analysis and application to particular facts. Standards force judges to deliberate and think carefully about the implications of their decisions. Despite this, rules are better suited to the use of GPS tracking. Prohibiting GPS surveillance over a “prolonged period of time” is an ambiguous and open-ended standard. It provides police with no guidance as to what is prolonged and what surveillance is acceptable without a warrant. Vague standards offer no suggestion as to the threshold where surveillance becomes a search under the Fourth Amendment. Because GPS surveillance does not require a warrant on Fourth Amendment grounds, courts should universally adopt a bright-line rule allowing law enforcement to use tracking devices for any duration of time.

208. Id.
209. Id.
210. Id.
211. Id. at 63.
212. Id. at 64.
213. Id. at 66-67.
214. Id. at 67.
216. Id.
IV. CONCLUSION

The open roads of America are exactly that—open to anyone who wants to use them. Every movement and turn is traceable to the public.\(^{217}\) While driving in public, you expose yourself to the public and have no reasonable expectation of privacy for your movements.\(^{218}\) Recently, police have used GPS technology to help monitor the movements of criminal suspects. Police can install a small device on a suspect’s car and let it collect information on the car’s movements instead of requiring twenty-four-hour, in-person monitoring.\(^{219}\) The GPS device records only information that could be picked up by the naked eye.\(^{220}\) Unlike other technologies that enhance the senses, GPS tracking provides police with information they could have otherwise procured. Law enforcement’s ability to use GPS tracking devices to monitor suspects’ movements is not without its critics outside the legal arena.\(^{221}\) A recent *Time Magazine* article states,

> After all, if government agents can track people with secretly planted GPS devices virtually anytime they want, without having to go to a court for a warrant, we are one step closer to a classic police state—with technology taking on the role of the KGB or the East German Stasi.\(^{222}\)

However, as long as police are able to track a vehicle in person without a warrant, the rule for GPS tracking should be the same. So, next time you are driving around and you feel like you are being followed, your instincts may be correct. With no expectation of privacy on the open road, you might be transporting a little black box in your vehicle. Drivers beware—somebody may be watching you!

*Stephen A. Josey*

---

\(^{217}\) *See* Katz v. United States, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”).

\(^{218}\) *See* discussion *supra* Part III.

\(^{219}\) *See* discussion *supra* Part I.D.

\(^{220}\) *See* discussion *supra* Part I.D.


\(^{222}\) *Id.* Justice Sotomayor echoed these fears during oral arguments for *Jones*, “The GPS technology today is limited only by the cost of the instrument, which frankly right now is so small that it wouldn’t take that much of a budget, local budget, to place a GPS on every car in the nation.” Transcript of Oral Argument at 25, United States v. Jones, No. 10-1259 (Nov. 8, 2011).

* J.D. Candidate, Vanderbilt University Law School, 2012; B.A. Economics and Organizational Studies, University of Michigan, 2009. I would like to thank the VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW editorial staff as well as my parents for their help in improving this Note.