

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**UNITED STATES OF AMERICA,
Appellee,**

v.

**Case No. 08-3030
(Consolidated with 08-3034)**

**ANTOINE JONES and LAWRENCE MAYNARD,
Appellants.**

Appellant Jones' Opposition to Petition for Rehearing *En Banc*

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Counterstatement of the Issues and Reasons Why the Court Should Deny Rehearing *En Banc*

The Court should deny the Government's Petition for Rehearing *En Banc* of the panel's August 6, 2010 ruling in *United States v. Maynard* ("Maynard").¹

Summary

In *Maynard*, a unanimous panel held that the Government's warrantless use of a GPS to track Jones' movement every seven seconds for a month violated the Fourth Amendment's prohibition on unreasonable searches. The Court held that monitoring the "whole of a person's movements over the course of a month" exposes dramatically more intimate information than the beeper-assisted surveillance of single movements that had been approved in *United States v. Knotts*.² Such a practice invades the public's reasonable expectation of privacy.

The Government's petition does not come close to meeting either of the standards under Fed. R. App. 35(a) for *en banc* reconsideration.

(1) Rehearing is unnecessary to maintain uniformity with the Court's decision in *United States v. Gbemisola*.³ *Maynard* explained that *Gbemisola* is an easily distinguishable case on both the facts and the law.

¹ __ F.3d __, 2010 U.S. App. LEXIS 16417 (D.C. Cir. Aug. 6, 2010).

² 460 U.S. 276 (1983).

³ 225 F.3d 753 (D.C. Cir. 2000).

(2) Nor does this case present a question of exceptional importance that genuinely warrants the commitment of scarce judicial resources that would be consumed by a rehearing *en banc*. Both *Maynard*'s scholarly analysis and its application of the governing authorities to the facts are well-reasoned and persuasive. The *Maynard* decision simply requires agents to get a warrant before engaging in prolonged use of GPS in a criminal investigation. Indeed that is something they originally did here, only to let the warrant expire.

Furthermore, the Government's "sky is falling" claim offers no empirical or even sensible basis to believe that *Maynard* will interfere with legitimate law enforcement needs. And there is no such basis. As the Supreme Court noted in *United States v. Karo*, a decision on which the Government relies, "[t]he argument that a warrant requirement would oblige the Government to obtain warrants in a large number of cases is hardly a compelling argument against the requirement."⁴

Argument

A. Gbemisola neither controls nor resembles this case.

Maynard creates no conflict with *Gbemisola*, as the cases are factually distinct and governed by different principles. *Maynard* explained that *Gbemisola* involved neither GPS tracking nor prolonged surveillance: the agents' visual surveillance and radio-based tracking occurred for less than one day from when a "tagged"

⁴ 468 U.S. 705, 718 (1984).

package with contraband was picked up to when the target opened it.⁵ Once the suspect opened the box inside a taxi, a device inside the box activated and the police closed in. In those circumstances “one cannot have a reasonable expectation of privacy concerning an act performed within the visual range of a complete stranger [the driver], [and] the Fourth Amendment’s warrant requirement was not implicated.”⁶

Such a scenario, *Maynard* found, differed greatly from the facts at hand:

[W]e hold that the whole of a person’s movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil. It is one thing for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again the next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person’s hitherto private routine.⁷

In short, the supposed conflict with *Gbemisola* is a phantom.

B. *Maynard* persuasively explains why the Government’s reliance on *Knotts* and several sister circuits’ decisions is erroneous.

Nor is *Maynard* a vehicle for *en banc* review under Rule 35(a)’s alternative standard. The Government erroneously claims that *Maynard* misapplied the Supreme Court’s decision in *Knotts* and those of several circuit courts of appeals

⁵ *Gbemisola*, 225 F.3d at 755-57.

⁶ *Maynard*, 2010 U.S. App. LEXIS 16417, at *34-*35 (quoting *Gbemisola*, 225 F.3d at 759).

⁷ *Maynard*, 2010 U.S. App. LEXIS 16417, at *35-*36.

that had permitted warrantless GPS surveillance. *Maynard* explained in some detail why these cases present no conflict with its decision.

Knotts surely does not support the Government's position here. There the police had used a "beeper" transmitter to help track a vehicle's progress as it moved from one place to a destination 100 miles away.⁸ The Supreme Court held that there had been no search because the subject, by driving on the highways, had "voluntarily conveyed to anyone who wanted to look" his progress, so he could not reasonably expect privacy in "the fact of his final destination."⁹

However, as *Maynard* emphasized, the Court in *Knotts* had "explicitly distinguished between the limited information discovered by use of [a] beeper — movements during a discrete journey — and more comprehensive or sustained monitoring of the sort at issue in [*Maynard*]." ¹⁰ *Knotts* "specifically reserved the question whether a warrant would be required in a case involving 'twenty-four hour surveillance,' by stating that 'if such dragnet type law enforcement practices

⁸ *Knotts*, 460 U.S. at 277.

⁹ *Id.* 460 U.S. at 281-82.

¹⁰ *Maynard*, 2010 U.S. App. LEXIS 16417, at *22-*23 (citing *Knotts*, 460 U.S. at 283-85).

... should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.’’¹¹

Although the Government also suggests that *Knotts*’ reference to “dragnet” searches meant merely “high-volume searches that are conducted without articulable suspicion” (Govt. Brief at 6 n. 4, 7), *Maynard* teaches us “that is not what happened” in *Knotts*. Instead the Supreme Court was addressing -- and reserving judgment -- on claims raised in the defendant’s brief that referred to “twenty-four hour surveillance” techniques.¹²

Nor was *Knotts* a case in which the technology made constant, 24/7 remote surveillance possible. As five judges of the Ninth Circuit recently pointed out, “[t]he GPS electronic tracking devices used by the police in this case have little in common with the primitive devices in *Knotts*.’’¹³ The fact of the matter is that “[y]ou can preserve your anonymity from prying eyes, even in public, by traveling at night, through heavy traffic, in crowds, by using a circuitous route, disguising

¹¹ *Id.*, 2010 U.S. App. LEXIS 16417, at *23 (quoting *Knotts*, 460 U.S. at 284)). See also Renee McDonald Hutchins, “Tied Up in *Knotts*? GPS Technology and the Fourth Amendment,” 55 *UCLA L. Rev.* 409, 457 (2007)(explaining how *Knotts* reserved ruling on the issue of prolonged intimate surveillance).

¹² *Maynard*, 2010 U.S. App. LEXIS 16417, at *22-*26 & n.*.

¹³ *Pineda-Moreno*, 2010 U.S. App. LEXIS 16708, at *11 (9th Cir. Aug. 12, 2010)(Kozinski, C.J., Reinhardt, Wardlaw, Paez & Berzon, JJ, dissenting) (similarly distinguishing *Knotts*).

your appearance, passing in and out of buildings and being careful not to be followed. But there's no hiding from the all-seeing network of GPS satellites that hover overhead, which never sleep, never blink, never get confused and never lose attention.”¹⁴

We respectfully suggest that such an electronic recreation of Jeremy Bentham's storied “Panopticon” wouldn't be the country envisioned by those who wrote the Fourth Amendment.¹⁵

Maynard also recognized that the circumstances of this case -- where for more than a month, the Government recorded *all* of Jones's movements over time and space -- differ greatly from *Knotts*. *Maynard* recognized that the warrantless use of GPS “turn[s] a person into a broadcaster of his own affairs and travels, without his knowledge or consent, for as long as the government may wish to use him where no warrant places a limit on surveillance. To allow warrantless ...monitoring, particularly under the standard urged by the government here

¹⁴ *Pineda-Moreno*, 2010 U.S. App. LEXIS 16708, at *16-*17.

¹⁵ Dorothy J. Glancy, “Symposium: Privacy on the Open Road,” 30 *Ohio N.U.L. Rev.* 295, 328-329 (2004)(referring to Bentham's proposed circular prison monitored from above by a supervisor in a central tower in order that inmates would always feel themselves as if under inspection.)

(‘reasonable suspicion’), would allow virtually limitless intrusion into the affairs of private citizens.”¹⁶ Nowhere does the government tackle this critical concern.

Maynard also considered and answered the Government’s point that three federal circuit courts have upheld the warrantless use of GPS tracking. The *Maynard* panel demonstrated how those courts had erroneously believed that *Knotts* had reserved only the question whether “wholesale” or “mass” electronic surveillance required a warrant, whereas “in *Knotts*, the Court actually reserved the issue of prolonged surveillance.”¹⁷ (We add that three state supreme courts have reached the same conclusion as *Maynard*, and have held that prolonged GPS surveillance requires a warrant.¹⁸)

Maynard adheres to another principle overlooked by the government: “the Constitution recognizes higher values than speed and efficiency.”¹⁹ The *Maynard*

¹⁶ *Maynard*, 2010 U.S. App. LEXIS 16417, at *24 (quoting Brief for Repondent in *Knotts* at 9-10 (No. 81-1801)).

¹⁷ *Maynard*, 2010 U.S. App. LEXIS 16417, at *26-*29 (distinguishing *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010); *United States v. Pineda-Moreno*, 591 F.3d 1212, *reh’g en banc denied*, __ F.3d __, 2010 U.S. App. LEXIS 16708 (9th Cir. Aug. 17, 2010); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007)).

¹⁸ *Maynard*, 2010 U.S. App. LEXIS 16417, at *45-*47 (citing *Commonwealth v. Connolly*, 913 N.E.2d 356, 369-70 (Mass. 2009); *People v. Weaver*, 909 N.E.2d 1195, 1199 (N.Y. 2009); *State v. Jackson*, 76 P.3d 217, 224 (Wash. 2003)(*en banc*)). *See also State v. Campbell*, 306 Or. 157, 172, 759 P.2d 1040 (1988)(invalidating warrantless surreptitious use of high power radio transmitter).

¹⁹ *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

panel did not handicap the police in using scientific enhancements to more efficiently perform functions that they had been doing lawfully before. *Maynard* simply prevents agents from deploying without a warrant, and for a full month, exceptionally intrusive, low-cost remote devices to expand into 24/7 levels surveillance that they could never have practically accomplished previously.

C. Maynard rests on sound Fourth Amendment principles and precedent.

The Government's characterization of *Maynard* as reflecting aberrant reasoning does the decision grave injustice. In reality, the opinion demonstrates an impeccable understanding of Fourth Amendment jurisprudence.

After explaining why *Knotts* does not govern this case, *Maynard* analyzed whether Jones had a reasonable expectation of privacy in the pattern of his movements over a month. *Maynard* reviewed such rulings as *Bond v. United States*²⁰ (agent's "physical manipulation" of a bus passenger's bag "violated the Fourth Amendment") and *Kyllo v. United States*²¹ (invalidating use of thermal imaging device to detect heat in a home). *Maynard* then summarized these and other precedents by finding that "[i]n considering whether something is 'exposed' to the public as that term was used in *Katz* we ask not what another person can

²⁰ 529 U.S. 334 (2000).

²¹ 533 U.S. 27 (2001).

physically and may lawfully do but rather what a reasonable person expects another might actually do.”²² The Government didn’t dispute this conclusion.

In language that distills the essence of this case, *Maynard* found that reasonable persons would not expect that “the whole of a person’s movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil.”²³ This, too, remains unrebutted in the Government’s petition.

The unanimous panel in *Maynard* did not let matters rest there. The court went on to address whether Jones had constructively exposed the pattern of his movements over the month that the GPS device was operating by having conducted each of his movements in public view. It rightly concluded that he had not, for prolonged surveillance of all movement reveals information that differs in kind, not just in degree, from what bystanders learn by observing individual movements.²⁴ The “whole reveals more -- sometimes a great deal more --- than does the sum of its parts,” the panel explained. While a single visit to a particular

²² *Maynard*, 2010 U.S. App. LEXIS 16417, at *30-*31 (citations omitted).

²³ *Id.*, at *35-*36. *See also* Stephen Henderson, “Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search,” 56 *Mercer L. Rev.* 507, 547-48 (2005)(“most drivers don’t think they are conveying their entire driving route to bystanders.”).

²⁴ *Maynard*, 2010 U.S. App. LEXIS 16417, at *36-*37.

location might not reveal much, a pattern of visits would reveal if a person “is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups — and not just one such fact about a person, but all such facts.”²⁵

This commonsense principle, that the whole differs significantly from the parts, also explains the flaw in the government’s reliance on the *Karo* decision. *Karo* found that Fourth Amendment prohibited “the monitoring of a beeper in a private residence, a location not open to visual surveillance....”²⁶ It did not address the issue reserved in *Knotts* of “twenty-four hour surveillance,” let alone movements, and therefore provides no support for the Government.²⁷ Moreover the Court assumed that some of the beeper surveillance was conducted unconstitutionally.²⁸

Here the agents obtained several thousand pages of data showing Jones’s whereabouts, every seven seconds from the moment he left his driveway each morning until he returned in the evening, for a month. Unlike *Karo*, the Government made the pattern of Jones’s movements, rather than any one

²⁵ *Maynard*, 2010 U.S. App. LEXIS 16417, at *30, *39-*40.

²⁶ *Karo*, 468 U.S. at 714.

²⁷ In *Karo* a beeper was used to locate suspected contraband at a warehouse one day and its movement several months later to a home. 468 U.S. at 708-09, 720-21. This case involves 24/7 electronic surveillance and recording of movement.

²⁸ *Id.*, 468 U.S. at 720.

movement, central to its case, reinforcing the distinctive quality of that collection of data.²⁹ *Maynard* sensibly found that “[a] reasonable person does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there; rather, he expects each of those movements to remain ‘disconnected and anonymous.’”³⁰

Correctly reasoning that prolonged GPS monitoring of a subject’s vehicular travels reveals a picture of his life so intimate that he expects no one except perhaps his spouse to have it, *Maynard* held that Jones’s expectation of privacy in such information was reasonable.³¹ In particular, *Maynard* observed that:

The intrusion such monitoring makes into the subject’s private affairs stands in stark contrast to the relatively brief intrusion at issue in *Knotts*; indeed it exceeds the intrusions occasioned by every police practice the Supreme Court has deemed a search under *Katz*, such as a urine test, see *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989) (urine test could “reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic:); use of an electronic listening device to tap a payphone, *Katz*, 389 U.S. at 352 (user of telephone booth “entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world”); inspection of a traveler’s luggage, *Bond [v. United States]*, 529 U.S. [334,]at 338 [(2000)](“travelers are particularly concerned about their carry-on luggage”); or use of a thermal imaging device to discover the temperature inside a home, *Kyllo [v. United States]*, 533 U.S. [21,] at 37 [(2001)] (“In the home, all details are intimate details”).³²

²⁹ *Maynard*, 2010 U.S. App. LEXIS 16417, at *40n.*.

³⁰ *Id.*, 2010 U.S. App. LEXIS 16417, at *42 (citation omitted).

³¹ *Id.*, 2010 U.S. App. LEXIS 16417, at *44.

³² *Id.*, 2010 U.S. App. LEXIS 16417, at *44-*45.

The Government also attacks the panel's reference to cases addressing the "mosaic" theory, including a FOIA decision, and baldly claims that they "do not inform" the issue. (Petition at 5, 9.) Once more its assault is mistaken. The panel applied a variety of precedents to illustrate the principle that information which reveals the whole of a person's activity "'is something different than the sum of its parts'" and invades privacy more than simple disclosure of disconnected pieces of information.³³ Indeed, it is conspicuous that the Government offers no contrary decisions from the Supreme Court or other courts, and it is even more telling that the Government ignores the fact that its core position concerned the Supreme Court enough in *Knotts* to have reserved judgment on the issue.³⁴

³³ *Maynard*, 2010 U.S. App. LEXIS 16417, at *36-*39 & n. * (citing *Smith v. Maryland*, 442 U.S. 735 (1979)(separately analyzing the reasonable expectation of privacy entailed in collecting a list of all of a person's telephone calls vs. disclosure of individual calls); *Department of Justice v. National Reporters Committee*, 489 U.S. 749 (1989)(FOIA; persons with criminal records had a protectable privacy interest in the "whole" of their criminal record vs. the "bits of information" of which it was composed); *CIA v. Sims*, 471 U.S. 159, 178 (1985) (the "mosaic" often used in national security cases is based on the principle that "one who has a broad view of the scene" can detect more than one who observes individual actions); *J. Roderick MacArthur Found. v. F.B.I.*, 102 F.3d 600, 6042 (D.C. Cir. 1996)("intelligence gathering is 'akin to the construction of a mosaic'"); *Galella v. Onassis*, 353 F. Supp. 196, 227-28 (S.D.N.Y. 1972)(invasion of privacy where plaintiff's "endless snooping" has "insinuated himself into the very fabric of Mrs. Onassis's life"), *aff'd in relevant part*, 487 F.2d 986, 994 & n. 12 (2nd Cir. 1973). As evidence of current public expectations for privacy, *Maynard* also referred to at least eight states that have enacted laws that prohibit warrantless use of electronic tracking devices. (Slip Op. at 33.)

³⁴ *Id.*, 2010 U.S. App. LEXIS 16417, at *36-*37.

D. Maynard imposes no legitimate obstacle on law enforcement.

In a vague footnote statement that it uses GPS surveillance “with great regularity,” the Government proclaims that *Maynard* will “enormously” impair law enforcement.³⁵ No data or information is proffered to support this unadorned claim. Notably, the Government made the same statement below, which the panel rejected by referring to the Supreme Court’s statement in *Dow Chemical Co. v. United States* that ““Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations,”” and that the Court has ““never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment.””³⁶

In any event, if the Government is using these devices with such great regularity, it is hardly an answer to permit it to deploy them in a way that would stand the Warrant Clause on its head. Police search homes and vehicles with great regularity also. Yet the courts have never used that as a reason to ignore the Fourth Amendment.

The actual facts of this case amply demonstrate that the Government’s argument is hyperbole and that applying for and obtaining a warrant is not an

³⁵ Govt. Pet. at 2n.1; 14-15.

³⁶ *Maynard*, 2010 U.S. App. LEXIS 16417, at *52 (quoting *Dow Chemical Co. v. United States*, 476 U.S. 227, 238 n.5 (1986)(internal citations omitted)).

obstacle, much less an enormous one, to law enforcement. Here the Government initially secured a warrant to install a GPS in D.C. but let it expire. (It also easily secured several warrants authorizing eavesdropping on Jones's and co-appellant Maynard's cell phones.)³⁷ It hardly seems extremism to require that agents seeking *ex parte* prolonged electronic surveillance of movement devote the modest time necessary to preparing an application sufficient to convince a federal court that there's a sound basis to deploy an intrusive device such as a GPS.

Today the Government strives to overturn *Maynard* by claiming that the panel decision is "vague and unworkable" and that "bright lines" are needed. These rhetorical flourishes are unhelpful. The decision is neither vague nor unworkable: the watershed decision in *Katz*, which fashioned the modern test under which Fourth Amendment claims are analyzed, is the quintessential example that refutes the Government's claim. The judiciary decided the general principle under which searches and seizures would be found reasonable or unreasonable. Afterwards this Court and many others have applied that standard to particularized facts.

The Government's demand for rehearing to formulate bright lines -- that it has suggested none is conspicuous -- is equally meritless. There will be ample opportunity for the courts to decide on particularized facts if GPS surveillance

³⁷ *Maynard*, 2010 U.S. App. LEXIS 16417, at *5.

lasting less than a full month (in this case it lasted a month) is sufficiently prolonged and invasive as to violate citizens' reasonable expectation of privacy.

Finally, there is a certain irony in the Government's position that *Maynard* wrongly distinguished the Seventh Circuit decision in *United States v. Garcia*.³⁸ Even *Garcia* agreed that warrantless use of GPS would raise constitutional implications where mass monitoring is employed.³⁹ Since the Government tells us that GPS is used with "great frequency," the Seventh Circuit presumably would agree with the panel that *Garcia* is inapplicable here.

Conclusion

The Government's underlying decisions to undertake warrantless GPS should have consequences, but an *en banc* rehearing is not one of them. The Petition should be denied.

Respectfully submitted,

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³⁸ 474 F.3d 994 (7th Cir. 2007).

³⁹ *Id.*, 474 F.3d at 997-98.

Certificate of Service

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