

High Tech Monitoring of First Amendment Activities



**MARK H. NEWBOLD
POLICE LEGAL ADVISOR
CHARLOTTE-MECKLENBURG
POLICE DEPARTMENT**

Surveillance



- **Traditional**
 - **Open**
 - **UCs**
 - **Public Source**
 - **Informants**
 - **Photo/video**
 - **Manned air craft**
- **High Tech**
 - **Network of Surveillance cameras**
 - **Drones**
 - **Nano Air Vehicles**
 - **MEMS**
 - **RFIDS**
 - **Wi-Fi Data interceptors**
 - **Revamped Facial Recognition Software**
 - **Iris Scanners**

Nano Air Vehicle



DARPA Nano Air Vehicle Program

Development of the AeroVironment
'Nano Hummingbird'

August 2006 to February 2011

Fourth Amendment Backdrop



- From Trespass to Reasonable Expectation of Privacy to Jones
 - **Boyd v. United States, 116 U.S. 616 (1885)**
 - **Olmstead v United States, 277 U.S. 438 (1928)**
 - **Katz v United States, 389 U.S. 347 (1967)**
 - **Maynard v. United States, 615 F.3d. (2010)**
 - **United States v. Jones, 132 S. Ct. 945 (2012)**

Expanding Protection



- *Katz's* and its progeny.
 - ✦ “For 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. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” *Katz v. United States*, 389 U.S. 347, 351-352 (U.S. 1967)

The not so famous quote from Justice Harlan



- This case requires us to reconsider Goldman, and I agree that it should now be overruled. Its limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.”
Katz v. United States, 389 U.S. 347, 361-362 (U.S. 1967)

1 Revelation 3



- This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Smith v. Md.*, 442 U.S. 735, 744 (U.S. 1979)

Electronic Enhancement -Beepers



- *Knotts and Karo*
- Nothing in the Fourth Amendment prohibits the police from augmenting their sensory faculties bestowed upon them at birth with such enhancement such as science and technology. *United States v. Knotts*, 460 U.S. 276, 282 (U.S. 1983)
- It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence *United States v. Karo*, 468 U.S. 705, 712 (U.S. 1984)

Aerial Surveillance



- Public Vantage Point / Aircraft
 - Aircraft
 - ✦ The observations by Officers Shutz and Rodriguez in this case took place within public navigable airspace, in a physically nonintrusive manner; from this point they were able to observe plants readily discernible to the naked eye as marijuana . . . Cal. v. Ciraolo, 476 U.S. 207, 213-214 (U.S. 1986)
 - ✦ Riley could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft. Fla. v. Riley, 488 U.S. 445, 450-451 (U.S. 1989)

The Mosaic Theory



- The Mosaic Theory
 - *Maynard*
 - *United States v Jones*
 - ✦ “It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.”
 - ✦ Sotomayor’s and Alito’s “concurring” opinion.
 - ✦ Persistent surveillance and the loss of personal integrity may be a protected privacy interest even in a public place.

The Mosaic Theory



- Duration + Persistency + Linkage = Intrusion
 - Duration
 - ✦ “longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.” United States v. Jones, 132 S. Ct. 945, 955 (U.S. 2012)

● **Persistency**

○ Comprehensive

- ✦ “[M]onitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. See, e.g., *People v. Weaver*, 12 N. Y. 3d 433, 441-442, 909 N.E.2d 1195, 1199, 882 N.Y.S.2d 357 (2009) (“Disclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on”). The Government can store such records and efficiently mine them for information years into the future. *Pineda-Moreno*, 617 F. 3d, at 1124 (opinion of Kozinski, C. J.). And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: “limited police resources and community hostility.” *Illinois v. Lidster*, 540 U.S. 419, 426, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004).

United States v. Jones, 132 S. Ct. 945, 955-956 (U.S. 2012)

Evolution of Reasonable Expectation of Privacy



- Societal recognition of high tech privacy interest
 - Location
 - Duration of surveillance
 - Pervasiveness
 - Storage of Data
- Reasonable expectation of privacy in a public place

First Amendment Backdrop



- The right to associate and privacy in group association .
 - *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-461 (U.S. 1958)
 - *Buckley v. Valeo*, 424 U.S. 1, 15 (U.S. 1976)
- The right to anonymity.
 - *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 200 (U.S. 1999)

Other Sources for Restrictions on High Tech Surveillance



- **Expect Legislative Proposals**
 - Preserving Freedom from Unwarranted Surveillance Act of 2012
 - ✦ Requires warrant based on probable cause before conducting drone surveillance.
 - Preserving American Privacy Act of 2012 H.R. (6199)
 - ✦ Drone surveillance requires warrant and only for felony.
 - Farmer Privacy Act H.R. 5961

In the meantime



- Community input on Directives/ Policy
- Specific statement affirming 1st and 4th Amendment Principles.
- Specific and justifiable objectives for surveillance of First Amendment activity.
- Specific surveillance continuum.
- Regular reviews of tactics and written justification for continuing surveillance.
- Requirement that surveillance be terminated if not related to a legitimate law enforcement objective.
- Tactics and justification signed off by Police Executive and counsel.
- Limitations on retention / prohibition on maintaining individual files.

Legitimate Law Enforcement Objectives



- The detection and investigation of criminal behavior.
- The apprehension and prosecution of criminals.
- The identification of potential acts of civil disobedience designed to disrupt legitimate and lawful activities.
- The identification of governmental resources necessary to staff an event.

1st Amendment Regulating Electronic Surveillance



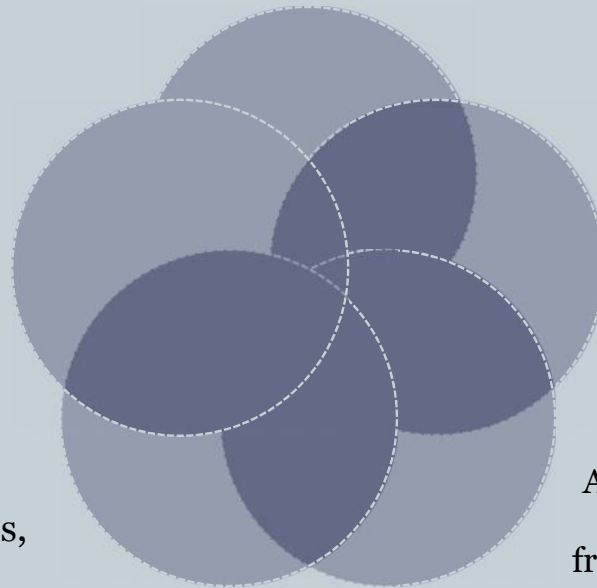
Societal concepts of
right to privacy

Political
Platforms/
Treaties

State and
local
Legislative
Boundaries

Security in Persons,
Houses
Papers and Effects

Anonymity/personal
integrity crucial to
freedom of expression
and assembly



Reading List



- Report on Investigation of MPD's Police and Practice in Handling Demonstrations in the District of Columbia.
<http://epic.org/privacy/surveillance/spotlight/1205/mpdrep5304.pdf>
- Drones in Domestic Surveillance Operations: Fourth Amendment Implications and Legislative Responses
<http://www.fas.org/sgp/crs/natsec/R42701.pdf>
- Post Guidelines, Crowd Management Intervention and Controls.
- Law Enforcement Guidelines for First Amendment Protected Events. DOJ 2011
- Critical Issues in Policing: Managing Major Events. PERF 2011.

(END)



- **“Every man should know that his conversations, his correspondence, and his personal life are private.”** Lyndon B. Johnson