Oklahoma Law Review

Volume 56 | Number 1

1-1-2003

Criminal Procedure: Searching High and Low for a Search in *Kyllo*: Justice Scalia Reaffirms Core Protections of the Fourth Amendment

Scott Byrd

NOTES

Criminal Procedure: Searching High and Low for a Search in *Kyllo*: Justice Scalia Reaffirms Core Protections of the Fourth Amendment

I. Introduction

"At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there to be free from unreasonable governmental intrusion."[1] The Supreme Court recently reaffirmed the sanctity of the home in *Kyllo v. United States*.[2] In *Kyllo*, the Court held that when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[3] The "device" at issue in *Kyllo* was a thermal imager,[4] a sense-enhancing device, the use of which many circuit courts had previously held was not a "search" falling within Fourth Amendment protection.[5] That the Supreme Court found otherwise is surprising to some,[6] especially considering the pro-law enforcement "war-on-drugs" attitude taken by the Court in recent years.[7] Perhaps more surprising is that Justice Scalia[8] wrote the majority opinion for the Court, while Justice Stevens dissented.

---

1. Silverman v. United States, 365 U.S. 505, 511 (1961).

2. 533 U.S. 27 (2001).

3. *Id.* at 40.

4. *See infra* notes 91-94 and accompanying text (description of thermal imager).

5. *See* United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995); United States v. Myers, 46 F.3d 668 (7th Cir 1995); United States v. Ford, 34 F.3d 992 (11th Cir. 1994); United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994).

6. *See* Annabelle L. Lisic, *Thermal Imaging and the Fourth Amendment*, MD. B.J., Feb. 2001, at 16, 21 ("Under any analysis employed by the Court in *Smith*, *Knotts*, *Karo*, *Place*, *Ciraolo*, *Dow Chemical*, or *Riley*, warrantless use of thermal imaging devices passes constitutional muster.").

7. *See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 303-07.

8. *See* Kenneth Lerner, *Privacy in the Balance: Do Scientific Advances Render Our Traditional Notions of Privacy Obsolete?*, OR. ST. B. BULL., May 2001, at 9, 13 ("I made the mistake of thinking that Justice Scalia might be a persuadable vote."). This interesting article by Kyllo's attorney, written after oral arguments but before the Court announced its decision, reveals his experiences before the Court and gives his impressions of the workings of the Court.

This note discusses the need for the new rule advanced by Justice Scalia, a rule that correctly finds a core of privacy protected by the warrant requirement of the Fourth Amendment. Part II of this note focuses on the interpretive methods used by Justice Scalia when working with a constitutional question, including his strong adherence to textualism, his views on originalism, and his preference for clear, general principles that foster predictability. Part III of this note briefly surveys the history of the Court's interpretation of the Fourth Amendment, including the tension between the "value-oriented" and "means" models. Part IV examines *Kyllo* and explores how Justice Scalia's interpretive techniques and judicial philosophy influenced the new rule. Part V analyzes *Kyllo* and addresses the advantages and disadvantages of the rule announced by Justice Scalia, while exploring some of the alternatives that were available — alternatives that would have stopped short of creating a new rule.

This note argues that Justice Scalia's opinion in *Kyllo* stems from the "new Fourth Amendment originalism"[9] movement led by Justice Scalia within the Court. Originalism, plus Justice Scalia's preference for establishing clear, general principles of decision and his belief in textualism, help explain (1) Justice Scalia's presence in the majority and (2) the shift toward a "value model"[10] of the Fourth Amendment from the "means model" that has gained increasing favor with the Court. Justice Scalia's textualism led him to place particular significance on the fact that the police searched Kyllo's *home*, one of the enumerated "protected objects of privacy" in the Fourth Amendment. His version of originalism led him to "follow the trajectory" of the Fourth Amendment when confronted with a new technology, such as thermal imaging. In addition, Justice Scalia's preference for clearly established rules led him to craft a rule that combined several elements of other tests used by the Court to decide Fourth Amendment cases, making the law clearer for the police, the people, and courts.

II. Justice Scalia's Interpretative Methods: Textualism, Originalism, Clear General Principles, and Predictability

To fully comprehend Justice Scalia's opinion in *Kyllo*, it helps to understand the methods he uses to interpret the law, whether statutes or

9. *See* David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1739 (2000).

10. *See* Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 680-87 (1988).

constitutional text. Justice Scalia adheres to three guiding principles: textualism, originalism, and the desirability of clear rules in judicial decisions.[11]

A. Textualism

In describing textualism, Justice Scalia quotes approvingly the words of Justice Jackson: "'We do not inquire what the legislature meant; we ask only what the statute means.'"[12] Justice Scalia firmly believes that "'[j]udges should be restricted to the text in front of them. . . . According to [his] judicial philosophy, [he] feels bound not by what [he] think[s] . . . but what the text and tradition actually say.'"[13] He looks to the "objective indication of the words, rather than the intent of the legislature" to find the law.[14] Justice Scalia has asserted that at the core of his textualism is the belief that the Constitution is "an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law."[15]

The difficulty of relying on textualism is determining what the words of a given law actually mean. This problem only increases when a judge applies textualism to constitutional analysis because the Constitution lays out broad principles such as, "[t]he right of the people to be secure . . . against unreasonable searches and seizures."[16] To discern meaning, Justice Scalia uses an interpretive technique known as phiology, the formalistic study of words.[17] This emphasis leads Justice Scalia to place great significance on the "ordinary social and dictionary meaning of individual words" when analyzing a constitutional provision.[18] "Justice Scalia interprets text 'in as semantically precise [a] way as possible,' with close attention to the formal rules of grammar."[19] He uses, sometimes exclusively,

---

11. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-85 (1989).

12. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997) (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 397 (1951) (Jackson, J., concurring)).

13. Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 30 (1994) (quoting an interview with Justice Scalia in Dan Izenberg, *Clinging to the Constitution*, JERUSALEM POST, Feb. 19, 1990).

14. SCALIA, *supra* note 12, at 29.

15. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

16. U.S. CONST. amend. IV.

17. *See* David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1389 (1999).

18. *Id.*

19. *Id.* (alteration in original) (quoting George Kannar, Comment, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1308 (1990)).

the dictionary meaning of words when interpreting statutes because of their narrowly drawn words or phrases.[20] Indeed, he evidences a bias toward defining the words narrowly instead of giving statutes more expansive readings.[21]

When it comes to constitutional interpretation, Justice Scalia takes a different approach. He believes that "[i]n textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation — though not an interpretation that the language will not bear."[22] Nevertheless, Justice Scalia has used this broader interpretive technique when addressing even specific constitutional clauses or phrases.[23] One example of Justice Scalia's contextual approach in interpreting the Fourth Amendment is his decision in *California v. Hodari D.*,[24] in which he relied on an 1828 dictionary to define the word "seizure" to mean "physically grasped" when a suspect refuses to submit.[25] This decision altered the existing precedent that a "seizure" generally occurs when a reasonable person would not feel free to leave.[26] Justice Scalia has used textualism primarily as a means to restrict the expansion of constitutional rights, such as substantive constitutional rights which he consistently interprets narrowly.[27] Justice Scalia, however, has had difficulty relying solely on textualism to resolve constitutional problems.

B. Originalism

In addition to textualism, Justice Scalia employs originalism: the "theory that the U.S. Constitution should be interpreted according to the intent of

---

20. *See infra* note 23 and accompanying text.

21. Zlotnick, *supra* note 17, at 1390.

22. SCALIA, *supra* note 12, at 37.

23. *See* Dep't of Commerce v. United States House of Rep., 525 U.S. 316, 346-47 (1999) (Scalia, J., concurring) ("Dictionaries roughly contemporaneous with the ratification of the Constitution demonstrate that 'enumeration' requires an actual counting, and not just an estimation of number."); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 595 (1998) (Scalia, J., concurring in part, concurring in the judgment) (using a 1796 dictionary to define "abridging" to determine if statute violated freedom of speech guarantee in the First Amendment); California v. Hodari D., 499 U.S. 621, 624 (1991) (using Webster's *An American Dictionary of the English Language* from 1828 to define "seizure" as "taking possession").

24. 499 U.S. 621 (1991).

25. *Id.* at 624.

26. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980).

27. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 480 (1990) (Scalia, J., concurring in part and dissenting in part); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990) (Scalia, J., concurring).

those who drafted and adopted it."[28] At first blush this might appear to conflict with textualism and Justice Scalia's statement that he looks to "objective indication of the words, rather than the intent of the legislature" to find the law.[29] Scalia, however, employs his own version of originalism. His version, called "original meaning," is different from other forms of originalism because instead of looking for the drafter's unexpressed subjective intent, he looks for the original meaning of the text.[30] As he stated before the U.S. Senate, "[T]he text of the document and what it meant to the society that adopted it . . . [is] the starting point and beginning of wisdom."[31]

To determine the original meaning of constitutional provisions, Justice Scalia often grounds his originalism in longstanding historical practices.[32] In cases that he cannot resolve by using textual analysis, Justice Scalia examines "whether the activity existed at common law and during the drafting/ratification period."[33] Indeed, an essential element of the "new Fourth Amendment originalism" is the belief that the Fourth Amendment preserved the particular legal protections in place at the time of its framing, putting "beyond time, place, and judicial predilection" certain "traditional common-law guarantees."[34] Justice Scalia's version of originalism, however, can also provide guidance when new situations arise that the Framers could not have contemplated. He states:

> There is plenty of room for disagreement as to what the original meaning was, and even more as to how that original meaning applies to the situation before the court. But the originalist at least knows what he is looking for: the original meaning of the text. . . . and sometimes there will be disagreement as *to how that original meaning applies to new and unforeseen phenomena.* How, for example, does the First Amendment guarantee of "the freedom of speech" apply to *new technologies that did not exist when the guarantee was created* — to sound trucks, or to government-licensed over-the-air television? *In such new fields*

28. BLACK'S LAW DICTIONARY 1126 (7th ed. 1999).

29. *See supra* note 14 and accompanying text.

30. *See* SCALIA, *supra* note 12, at 38 ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

31. *Hearings on the Nomination of Judge Antonin Scalia Before the Senate Comm. on the Judiciary*, 99th Cong. 108 (1986).

32. Zlotnick, *supra* note 17, at 1393.

33. *Id.*

34. County of Riverside v. McLaughlin, 500 U.S. 44, 66 (1991) (Scalia, J., dissenting).

> *the Court must follow the trajectory of the First Amendment*, so to speak, to *determine what it requires* — and assuredly that enterprise is not entirely cut-and-dried but requires the exercise of judgment.[35]

C. Clear General Principles of Decision

The final element in Justice Scalia's methodology is his desire to establish clear, general principles of decision.[36] Over the years, he has rejected the view that courts should narrowly write the "holding" of a decision narrowly to leave greater discretion to future courts.[37] He proposes several reasons for this approach, some theoretical and some practical.[38] First, he argues that the creation of a holding involves many competing values, of which creating the precise expression of the law is but a part.[39] Another competing value is the appearance of equal treatment.[40] He believes that "the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well."[41] Therefore, he thinks that for the system of justice to command respect, two cases decided differently must not only be different but must be seen to be so.[42] Indeed, Justice Scalia contends that it is better, "even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision."[43]

Scalia finds a discretion-conferring approach particularly ill-suited to the Supreme Court's holdings because that Court revisits cases so infrequently.[44] Accordingly, he believes that the "idyllic notion of 'the court' gradually closing in on a fully articulated rule of law by deciding one discrete fact situation after another until (by process of elimination, as it were) the truly operative facts become apparent," to be particularly inappropriate.[45] In

35. SCALIA, *supra* note 12, at 45 (emphasis added).
36. Scalia, *supra* note 11, at 1179.
37. *Id.* at 1178.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 1178-79 ("The number of federal cases heard by [the Supreme Court] represented about one-twentieth of one percent of all the cases decided by federal district courts, and less than one-half of one percent of all cases decided by federal courts of appeals.").
45. *Id.* at 1178

addition, he contends that such an approach would lead to a great deal of nonuniformity because after the Court decides a case on the basis of the totality-of-the-circumstances test, for instance, it is unlikely that it will return to that issue in the foreseeable future.[46] The thirteen circuit courts must then "close in on the law," which creates greater unpredictability.[47]

D. Predictability

Justice Scalia advances the desire for predictability as another reason to create clear, general principles.[48] He argues that people must be able to ascertain what the law is and what it means. In addition, Justice Scalia finds judicial restraint in announcing a general rule. By announcing a general rule, the Court constrains not only lower courts but also the Supreme Court by stare decisis because the Court will have committed itself to the governing principle that is the basis of its decision.[49] Under a totality-of-the-circumstances test, the Court, or even a lower court, could conclude that it should decide a case differently "on balance."[50] This approach would allow a court to inject its own political or policy preferences and would not provide the predictability the law requires.[51] Justice Scalia believes that "[o]nly by announcing rules do we hedge ourselves in."[52]

In addition to constraining courts, Justice Scalia believes that announcing general rules empowers courts.[53] Justice Scalia recognizes that society often calls on judges to be courageous in making unpopular decisions.[54] He sees the protection of the "individual criminal defendant against the occasional excesses of [the] popular will" and the preservation of "the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will"[55] as two of a judge's most significant roles. Justice Scalia believes that the ability to stand behind a "solid shield of a firm, clear principle enunciated in earlier cases" helps judges make unpopular decisions, for instance ones that result in the release of convicted felons or in the exclusion of evidence.[56] In

46. *Id.* at 1179.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 1179-80.
51. *See id.*
52. *Id.* at 1180.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

contrast, under a totality-of-the-circumstances test, the popular will might pressure judges to find otherwise.[57]

All three of Justice Scalia's interpretive tools work together in varying degrees. Justice Scalia believes that the extent to which judges can extract general rules from a statutory or constitutional command "depends considerably upon how clear and categorical one understands the command to be, which in turn depends considerably upon one's method of textual exegesis."[58] He claims that it is easier for him to develop general rules because he is more "inclined to adhere closely to the plain meaning of a text."[59] For Justice Scalia, originalism also plays a part in the judicial crafting of general rules:

> Just as that manner of textual exegesis facilitates the formulation of general rules, so does, in the constitutional field, adherence to a more or less originalist theory of construction. The raw material for the general rule is readily apparent. If a barn was not considered the curtilage of a house in 1791 or 1868 and the Fourth Amendment did not cover it then, unlawful entry into a barn today may be a trespass, but not an unconstitutional search and seizure.[60]

Appreciating which interpretive philosophy Justice Scalia brings to *Kyllo* is just one part of understanding the decision. One must also understand the history of the Fourth Amendment and the tug-of-war between the "value" and "means" models of Fourth Amendment jurisprudence.

III. The Less-than-Smooth Course of the Fourth Amendment

A. Tug-of-War: The Search for an Analytical Framework

Justice Frankfurter once complained, "The course of true law pertaining to searches and seizures, as enunciated here, has not — to put it mildly — run smoothly."[61] Justice Frankfurter also noted that because searches and seizures play such a frequent part in federal criminal trials, the law should be "as clear and unconfusing as the nature of the subject-matter permits."[62] The protections of the Fourth Amendment have fluctuated over the years depending on how the Court has interpreted "[t]he right of the people to be

57. *Id.*
58. *Id.* at 1183-84.
59. *Id.* at 1184.
60. *Id.* (footnote omitted).
61. Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).
62. *Id.*

secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[63]

At present, the Court adheres to the test developed in *Katz v. United States*[64] to determine if there has been a "search" deserving of constitutional protection. But it is also necessary to consider *Boyd v. United States*[65] and *Olmstead v. United States*[66] to comprehend fully the tension that has plagued the Fourth Amendment's history. These two cases represent opposite ends of the tension between the "value-oriented model" and the "means model" of Fourth Amendment analysis. Under a value-oriented model, there is a core degree of privacy protected by the Fourth Amendment — a core that the amendment protects for its own sake and that has nothing to do with the means employed by the government in a particular search.[67] In contrast, the means model concentrates on the methods used by the government as the determining factor of whether the government has violated the Fourth Amendment.

1. Boyd v. United States

In *Boyd*, Justice Bradley, writing for the Court, embraced the value-oriented model[68] by noting that it was not the manner by which the government obtained the information that constituted the offense.[69] Bradley declared that the Fourth Amendment applied to

> all invasions on the part of the government . . . of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property.[70]

2. Olmstead v. United States

This value-oriented view of the Fourth Amendment would last just forty-two years. In 1928, the Court in *Olmstead* substantially reduced the scope of its Fourth Amendment protections by finding that a government wiretap of a

63. U.S. CONST. amend. IV.
64. 389 U.S. 347 (1967).
65. 116 U.S. 616 (1886).
66. 277 U.S. 438 (1928).
67. Gutterman, *supra* note 10, at 649.
68. *Id.* at 654 (stating that Justice Bradley "charted the course that placed the fourth amendment upon 'a value-oriented model'").
69. *Boyd*, 116 U.S. at 630.
70. *Id.*

telephone conversation did not constitute a search and seizure within the meaning of the Fourth Amendment as long as it did not physically enter the home or office.[71] Thus, the *Olmstead* Court judged the government conduct by the means employed, not the value of the privacy interest to be protected.

Olmstead was a clear break from the Court's precedents and introduced the principle that a physical trespass was a prerequisite to a finding of an unreasonable search.[72] The *Olmstead* Court determined the extent of the protection provided based on the trespass doctrine of *Hester v. United States*,[73] a case that recognized certain constitutionally "protected areas." For instance, the home, an area specifically enumerated in the Constitution, and the area around the home known as the curtilage, were given constitutional protection.[74]

B. Katz v. United State: The Return of the Value Model

Katz v. United States[75] signaled yet another change — the return to the value model. The *Katz* Court believed that its predecessors were wrong in maintaining that property concepts, such as trespass, had any place in defining the limits of Fourth Amendment protections.[76] Instead, the Court focused on

---

71. *See Olmstead*, 277 U.S. at 465-66. Justice Brandeis dissented, stating:

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . .
>
> . . . .
>
> . . . The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 474, 478 (Brandeis, J., dissenting).

72. *See* Lopez v. United States, 373 U.S. 427, 459 (1963) (Brennan, J., dissenting) ("*Olmstead*'s illiberal interpretation of the Fourth Amendment as limited to the tangible fruits of actual trespasses was a departure from the Court's previous decisions, notably *Boyd*, and a misreading of the history and purpose of the Amendment.").

73. 265 U.S. 57 (1924).

74. *Id.* at 59.

75. 389 U.S. 347 (1967).

76. *Id.* at 353. Indeed, the *Katz* Court rejected he requirement of physical trespass for a

the privacy right violated when government agents, acting without a search warrant, attached an electronic listening device to the outside of a public telephone booth to overhear Katz's conversation.[77] The *Katz* majority recognized that although Katz had no property right in the public telephone booth, he nevertheless had an expectation of privacy in his telephone conversations.[78]

The Court presented the general rule: "[w]hat 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."[79] The Court further stressed that the amendment protects people, not simply places.[80]

The test to determine if a search has occurred, known as the *Katz* test, actually derives from Justice Harlan's concurring opinion. Justice Harlan refined the majority's rule by devising the following two-part test:[81] (1) the person must have exhibited an actual, subjective expectation of privacy; and (2) that expectation must be one that society is prepared to recognize as "reasonable."[82] The *Katz* Court clearly rejected the trespass requirement,[83] implicitly rejected the constitutionally protected areas standard,[84] and held that Katz had a reasonable expectation of privacy, even while talking on a public telephone.[85]

C. Subsequent Limitation of Katz and the Return of the Means Model

The *Katz* Court intended to expand the protection of the Fourth Amendment and to free it from the narrow confines of the trespass and constitutionally-protected-area doctrines.[86] In reaching the decision, the Court recognized the privacy value that the Fourth Amendment protects. Unfortunately, while attempting to explain that the Fourth Amendment protects people not places,

---

Fourth Amendment violation. *See id.*

77. *Id.* at 348.

78. *Id.* at 352.

79. *Id.* at 351-52 (citations omitted).

80. *Id.* at 351.

81. *Id.* at 361 (Harlan, J., concurring).

82. *Id.*

83. *Id.* at 352.

84. *See id.* at 351-53. Although the *Katz* Court noted that the Fourth Amendment "protects people not places," Justice Harlan added, "The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.'" *Id.* at 361 (Harlan, J., concurring).

85. *Id.* at 352.

86. *See supra* note 76 and accompanying text.

the opinion provided language that subsequent courts have used to limit the promise of *Katz*.

By announcing that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection,"[87] the *Katz* Court provided the tools to undercut the Court's expanded reading of the Fourth Amendment's protections. Once again, the focus shifted to examining the methods used by the police. Under this approach, a showing that a person exposed information to others can often defeat the person's claim to a legitimate expectation of privacy. Such exposure could be minimal, as was the case in *California v. Greenwood*,[88] in which the "mere possibility that unwelcome meddlers [might] open and rummage through the containers" was enough to defeat any claim of a legitimate expectation of privacy in trash placed for collection on the curb.

IV. Kyllo v. United States

A. Facts and Procedural History of Kyllo

In *Kyllo*, Agent William Elliot of the United States Department of the Interior suspected that Danny Kyllo was growing marijuana in his home, which was part of a triplex in Florence, Oregon.[89] Indoor marijuana cultivation frequently requires high-intensity lamps that produce a significant amount of heat.[90] Agent Elliott, interested in determining whether Kyllo was using these heat-producing lamps, used, without a warrant, an Agema Thermovision 210 thermal imager to scan the triplex.[91] A thermal imager detects infrared radiation, which virtually all objects emit, but which is of a wavelength not visible to the unaided eye.[92] The thermal imager creates images based on the relative warmth of objects and displays them on a video screen.[93] The imager displays areas that are relatively hot — compared to other objects in view as white, and objects that are relatively cool as black.[94] In just a few minutes, Agent Elliott and another agent scanned Kyllo's home from two different angles — once from across the street in front of the house and again from a street behind the house.[95] The agents accomplished both

87. *Katz*, 389 U.S. at 351-52.
88. 486 U.S. 35, 39 (1988).
89. Kyllo v. United States, 533 U.S. 27, 30 (2001).
90. *Id.* at 29.
91. *Id.* at 30.
92. *Id.*
93. *Id.* at 29-30.
94. *Id.*
95. *Id.*

scans from the passenger seat of Agent Elliott's vehicle while located on a public street.[96] These scans showed that the garage roof and the side wall of Kyllo's home were relatively hot compared to the rest of the home and to the neighboring homes located in the triplex.[97]

From this information, Agent Elliott concluded that Kyllo was using halide lamps to grow marijuana in his home.[98] Using this evidence, tips from informants, and utility records showing increased electrical use, Agent Elliott obtained a warrant to search Kyllo's home.[99] The search revealed that Kyllo was indeed growing more than 100 marijuana plants in his residence, and he was subsequently indicted on one count of manufacturing marijuana, in violation of 21 U.S.C. § 841(a)(1).[100] Kyllo entered a conditional guilty plea after unsuccessfully moving to suppress the evidence seized from his home.[101]

On appeal, the United States Court of Appeals for the Ninth Circuit remanded the case for an evidentiary hearing to determine the intrusiveness of thermal imaging.[102] On remand, the district court found that the Agema 210 (1) "is 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"; (2) "did not show any people or activity within the walls of the structure"; (3) "cannot penetrate walls or windows to reveal conversations or human activities"; and (4) did not reveal "intimate details of the home."[103] Based on these findings, the district court upheld the validity of the warrant and reaffirmed its denial of the motion to suppress.[104] By a two-to-one decision, the Ninth Circuit initially reversed,[105] but then affirmed the decision after a change in composition of the panel,[106] with one judge dissenting.[107] The Ninth Circuit, relying on evidence that Kyllo purposefully vented the heat from his home, held that under the *Katz* test, Kyllo had shown no subjective expectation of

96. *Id.* at 30.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. United States v. Kyllo, 37 F.3d 526, 531 (9th Cir. 1994).
103. United States v. Kyllo, 1996 WL 125594, at *2 (D. Or. Mar. 15, 1996).
104. *Id.* at *3.
105. United States v. Kyllo, 140 F.3d 1249, 1255 (9th Cir. 1998), *withdrawn*, 184 F.3d 1059, 1059 (9th Cir. 1999).
106. United States v. Kyllo, 190 F.3d 1041, 1043 (9th Cir. 1999), *rev'd*, 533 U.S. 27 (2001). This change in composition of the panel resulted from one of the members of the majority resigning because of health reasons and being replaced by a member who agreed with the former dissent.
107. *Id.* at 1047-51 (Noonan, J., dissenting).

privacy because he had not attempted to conceal the heat escaping from his home.[108] Even if Kyllo could have shown a subjective expectation, the court found no objectively reasonable expectation of privacy because the imager failed to "expose any intimate details of Kyllo's life."[109]

B. The Kyllo Opinion

Kenneth Lerner, Kyllo's attorney, argued in his brief that the *Katz* test should not apply to the search of a home.[110] He claimed that the Court should only apply the test in cases dealing with "expectations of privacy in places other than the home, where individual and societal expectations of privacy are less clear."[111] Lerner asked the Court to focus on the "core value" of personal privacy that the Fourth Amendment was meant to protect, noting that "'the overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic.'"[112] Only after making this argument did he address the possibility that the Court would apply the *Katz* test. If *Katz* were to apply, Lerner argued that Kyllo had a subjective and reasonable expectation of privacy in the activities he conducted in his home.[113] This argument was probably particularly appealing because Mr. Lerner's brief appeared to be targeted at persuading Justice Scalia.[114]

In *Kyllo*, Justice Scalia pointed out that the "*Katz* test — whether the individual has an expectation of privacy that society is prepared to recognize as reasonable — has often been criticized as circular, and hence subjective and unpredictable."[115] In addition to citing several notable authorities who shared this criticism of *Katz*,[116] Justice Scalia cited his concurring opinion in *Minnesota v. Carter*,[117] in which he described *Katz* as the "notoriously

108. *Id.* at 1046.

109. *Id.* at 1047.

110. Petitioner's Opening Brief at 12, Kyllo v. United States, 533 U.S. 27 (2001) (No. 99-8508), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/99-8508/99-8508.mer.aa.rtf (last visited Mar. 28, 2003).

111. *Id.*

112. *Id.* at 15-16 (alteration in original) (quoting Payton v. New York, 445 U.S. 573, 601 (1980)).

113. *Id.* at 27-32.

114. *See supra* note 8.

115. *Kyllo*, 533 U.S. at 34.

116. *Id.*; *see also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.1(d), at 393-94 (3d ed. 1996); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 188.

117. 525 U.S. 83 (1998).

unhelpful test adopted in a 'benchmar[k]' decision that is 31 years old."[118] He attacked the test as subjective and "self-indulgent" and claimed that the past three decades have established that, "unsurprisingly, those 'actual (subjective) expectation[s] of privacy' 'that society is prepared to recognize as "reasonable"' bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable."[119] Justice Scalia then explained that the Fourth Amendment's text did not guarantee some generalized "right to privacy" and then leave it to the Court to determine which particular manifestations of the value of privacy "society is prepared to recognize as reasonable."[120] Rather, the text "enumerated ('persons, houses, papers, and effects') the objects of privacy protection to which the *Constitution* would extend, leaving further expansion to the good judgment, not of th[e] Court but of the people through their representatives in the legislature."[121] With this in mind, it is not difficult to see why Justice Scalia would find an argument against the use of the *Katz* test appealing.

Justice Scalia acknowledged that the Court looks to the *Katz* test to answer the threshold question of whether a Fourth Amendment search has occurred, i.e., whether the government violated a subjective expectation of privacy that society recognizes as reasonable.[122] Indeed, only when a search has occurred is it constitutionally necessary that it be reasonable. Even while recognizing that the Court adheres to the *Katz* test to determine when government action amounts to a search, Justice Scalia related in a footnote the 1828 *Webster's Dictionary* definition of "search," stating, "When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.'"[123] The inclusion of this footnote drawn from the same dictionary Justice Scalia used in *California v. Hodari D.*, in which he found the plain meaning of "seizure,"[124] suggests that he would like to bring a similar plain meaning — not the subjective *Katz* test — definition of "search" to Fourth Amendment law.

---

118. *Id.* at 97 (Scalia, J., concurring). The quotation marks around "benchmark" suggest Scalia's cynicism toward the *Katz* opinion.

119. *Id.* (citation omitted) (alterations in original) (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

120. *Id.*

121. *Id.* at 97-98 (Scalia, J., concurring).

122. Kyllo v. United States, 533 U.S. 27, 32-33 (2001).

123. *Id.* at 32 n.1 (alteration in original) (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (1828) (reprint 6th ed. 1989)).

124. *See supra* notes 24-25 and accompanying text.

In determining whether the government had conducted a "search" of Kyllo's home, Justice Scalia, in true originalist fashion, looked to the common law traditions.[125] Justice Scalia acknowledged that it is often difficult to refine *Katz* when the search is of "areas such as telephone booths, automobiles, or even the curtilage[[126]] and uncovered portions of residences."[127] A search of the interior of a home, a place specifically addressed by the Fourth Amendment, however, is "[t]he prototypical and hence most commonly litigated area of protected privacy — there is a ready criterion, with roots deep in common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*."[128] In addition he wrote that "[t]o withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment."[129]

It is difficult to tell from the opinion the extent to which Justice Scalia applied the *Katz* test. He never explicitly stated that *Katz* does not apply to searches of homes, as Kyllo's attorney argued.[130] Justice Scalia appears to have combined Mr. Lerner's arguments by using the traditional core value of the Fourth Amendment — the protection of the sanctity of the home — to satisfy the *Katz* test's second requirement — an expectation of privacy that society recognizes as reasonable. The phrase "expectation of privacy that *exists*, and that is acknowledged to be *reasonable*"[131] in Scalia's description of the common law view of the home suggests that he tailored his language to fit the *Katz* test. At the same time, the fact that Justice Scalia used the 1828 dictionary definition of "search"[132] and failed to address the first element of the *Katz* test — the subjective expectation of privacy — creates doubts that he applied *Katz* fully or at all.

The absence of any discussion of the subjective component of *Katz* is not uncommon, as the Court, which relies on the objective component more readily to dispose of search and seizure cases, often ignores or glosses over this element.[133] Indeed, defendants often easily meet the subjective element,

---

125. *See supra* notes 21, 32-34 and accompanying text (discussing the rise of the use of common law traditions to help determine "original meaning").

126. Curtilage is defined as "[t]he land or yard adjoining a house, usually within an enclosure." BLACK'S LAW DICTIONARY 389 (7th ed. 1999).

127. *Kyllo*, 533 U.S. at 34.

128. *Id.*

129. *Id.*

130. *See supra* note 110 and accompanying text.

131. *See supra* note 128 and accompanying text.

132. *See supra* note 123 and accompanying text.

133. *See* California v. Greenwood, 486 U.S. 35, 39 (1988) ("It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public."); California v. Ciraolo, 476 U.S. 207 (1986) (subjective

as illustrated by *United States v. Ishmael*.[134] In *Ishmael*, the Fifth Circuit Court of Appeals found that a marijuana grower had a subjective expectation in his waste heat but ultimately concluded that this expectation was not one which society was prepared to recognize as reasonable.[135] In reaching this conclusion, the *Ishmael* court observed that the defendant in *Katz* had not taken every precaution against electronic eavesdropping, but the court nevertheless concluded that he exhibited a subjective expectation of privacy.[136] Similarly, in *California v. Ciraolo*,[137] a defendant was cultivating marijuana in his backyard and had erected two high fences to prevent observation from the ground.[138] Even though the defendant did not take measures to prevent observation from the air, the Court concluded that the defendant "[c]learly . . . ha[d] met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits."[139]

The fact that the subjective component did not receive any treatment in Justice Scalia's opinion probably stems from reasons similar to those of the Fifth Circuit, in addition to the fact that the Court chose to adopt Kyllo's view of the interest invaded by the government.[140] The circuit courts that had addressed similar searches had all framed the issue in terms of a subjective expectation in the "waste heat" emitted from the house — trying to justify it under the plain-view or public-exposure doctrines.[141] The Court rejected this mechanical interpretation and concluded that a thermal imager revealed the relative heat of various rooms in the home.[142] Because Justice Scalia found a reasonable expectation of privacy in the home,[143] and the defendant

---

expectation of privacy requirement satisfied by ten-foot fence, with respect to street traffic, enough to satisfy requirement as to aerial observation); Oliver v. United States, 466 U.S. 170, 177 (1984) (not discussing the subjective prong, and simply stating that "[t]he Amendment does not protect the merely subjective expectation of privacy"); United States v. White, 401 U.S. 745, 751 (1971) ("Very probably, individual defendants neither know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. Otherwise, conversation would cease . . . .").

134. 48 F.3d 850 (5th Cir. 1995).

135. *Id.* at 855-56.

136. *Id.* at 854.

137. 476 U.S. 207 (1986).

138. *Id.* at 210.

139. *Id.* at 211.

140. Kyllo v. United States, 533 U.S. 27, 27 (2001).

141. *See* United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995); United States v. Myers, 46 F.3d 668 (7th Cir. 1995); United States v. Ford, 34 F.3d 992 (11th Cir. 1994); United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994).

142. *Kyllo*, 533 U.S. at 35.

143. *Id.* at 34.

concentrated his activities in the home, it is possible that Justice Scalia viewed this first prong as obviously satisfied.

In addition to employing originalism in the *Kyllo* opinion, Justice Scalia was concerned about line drawing and constructing clear, general rules.[144] The rule crafted in *Kyllo* is an attempt to provide a bright-line standard to guide the actions of police and to provide security of privacy for the people.[145] In support of this proposed rule, Justice Scalia cited *Carroll v. United States* for the proposition that "'[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.'"[146] Justice Scalia echoed this quote when he stated that his new rule "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[147] In his attempt to preserve the degree of privacy contemplated when the Framers drafted the Fourth Amendment, *Kyllo* presented Justice Scalia with a technological advance never conceived of by those who adopted the amendment. To deal with this problem, he "follow[ed] the trajectory" of the Fourth Amendment to determine what its provisions require.[148]

The creation of the *Kyllo* rule[149] serves many of Justice Scalia's aims of establishing clear, general rules. It creates predictability, just as *Katz* did for electronic eavesdropping cases, by declaring presumptively unreasonable the warrantless use of devices that provide details of the home that would previously have been unknowable without physical intrusion.[150] It avoids the uncertainty of the standard suggested by the dissent, which would allow such surveillance as long as it revealed no intimate details.[151] It also avoids the unenviable task of constructing a jurisprudence specifying which home activities are "intimate" enough to warrant Fourth Amendment protection.[152] In addition, Justice Scalia pointed out that even if the Court could develop such jurisprudence, an individual police officer would have no idea what

144. *See supra* Part II.C.

145. *Kyllo*, 533 U.S. at 38-39.

146. *Id.* at 40 (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)).

147. *Id.* at 34.

148. *See supra* note 35 and accompanying text.

149. "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo*, 533 U.S. at 40.

150. *Id.*

151. *Id.* at 38.

152. *Id.* at 38-39.

activities he would detect before a scan, whether intimate or not, so that he could never really know whether his "search" would be constitutional.[153]

C. The Dissent's Criticism of Justice Scalia's Opinion

Justice Stevens, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, dissented in *Kyllo*.[154] They contended that the proper way to classify the interest invaded by the government's use of the imager was as "waste heat" escaping from Kyllo's home in which he did not have a legitimate expectation of privacy.[155] The dissent asserted that the voluntary exposure of the heat to the rest of the world through Kyllo's venting brought the case within the plain-view exception because "'[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'"[156] As noted above, it was the proper classification of this interest — either as "waste heat" akin to the trash in *California v. Greenwood*, or as the heat-generating activities within the home — which had divided circuit courts.[157]

Justice Stevens criticized Justice Scalia's new rule because its protection appears to dissipate as soon as the relevant technology is in "general public use."[158] He suggested that the thermal-imagining device used in the case met this requirement but also pointed out that the Court did not provide any criteria for judging when a specific technology is in "general public use."[159] In support of his assertion that the thermal imager was in general public use, Justice Stevens noted that upwards of 12,000 thermal imagers were in use in the United States.[160] Whatever Justice Scalia meant by "general public use," this number apparently did not satisfy the criteria.

Justice Stevens' dissent also attacked Justice Scalia's "newly minted rule" as being both too broad and too narrow.[161] He argued that it is too broad

153. *Id.* at 39.

154. *Id.* at 41 (Stevens, J., dissenting).

155. *Id.*

156. *Id.* at 42 (Stevens, J., dissenting) (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)).

157. After circuit courts made this classification, the application of the *Katz* test created predictable results. If the focus was on the heat-generating activities within the home, the lower courts found a "search"; where the focus was on "waste heat," they found no "search." *See* United States v. Robinson, 62 F.3d 1325 (11th Cir. 1995) (no subjective expectation of privacy); United States v. Myers, 46 F.3d 668 (7th Cir. 1995) (same); United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994) (same).

158. *Kyllo*, 533 U.S. at 47 (Stevens, J., dissenting).

159. *Id.*

160. *Id.* at 47 n.5 (Stevens, J., dissenting).

161. *Id.* at 48 (Stevens, J., dissenting).

because it would encompass things such as mechanical substitutes for dogs trained to react when they sniff narcotics.[162] He noted that the Court had ruled in *United States v. Place*[163] that a canine sniff was not a "search" because it only "discloses the presence or absence of narcotics," and he argued that it must follow that sense-enhancing equipment that identifies nothing but illegal activity is not a search either.[164] This argument, however, does not necessarily follow.

The Washington Supreme Court rejected the canine sniff analogy in *State v. Young*,[165] by relying on another case, *United States v. Thomas*,[166] a Second Circuit opinion that held that canine sniffs of private residences constitute a Fourth Amendment search.[167] The *Thomas* court noted that

> [w]ith a trained dog police may obtain information about what is *inside a dwelling that they could not derive from the use of their senses*. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument.[168]

Justice Stevens also argued that the rule is too narrow in that it only applies to information regarding the "interior" of the home.[169] He argued that Justice Scalia should not limit to the home a rule designed to protect individuals from

---

162. *Id.*

163. 462 U.S. 696 (1983). *Place* was an unnecessary decision, mere dictum in a case decided on other grounds, but dictum that the Court has shown no willingness to readdress and which it has reaffirmed implicitly in recent cases such as *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

In *Place*, Justice Blackmun argued:

> The Court's resolution of the status of dog sniffs under the Fourth Amendment is troubling for a different reason. . . . The issue also was not presented to or decided by the Court of Appeals. Moreover, contrary to the Court's apparent intimation, an answer to the question is not necessary to the decision. For the purpose of this case, the precise nature of the legitimate investigative activity is irrelevant. Regardless of the validity of a dog sniff under the Fourth Amendment, the seizure was too intrusive. The Court has no need to decide the issue here.
>
> . . . Neither party has had opportunity to brief the issue, and the Court grasps for the appropriate analysis of the problem. . . . The Court is certainly in no position to consider all the ramifications of this important issue.

Place, 462 U.S. at 723-24 (Blackmun, J., dissenting) (citation omitted).

164. *Kyllo*, 533 U.S. at 47 (Stevens, J., dissenting).

165. 867 P.2d 593 (Wash. 1994).

166. 757 F.2d 1359 (2d Cir. 1985).

167. *Id.* at 1367.

168. *Id.* (emphasis added).

169. *Kyllo*, 533 U.S. at 48 (Stevens, J., dissenting).

the intrusive use of sense-enhancing equipment by the government, citing *Katz*'s proposition that "'the Fourth Amendment protects people, not places.'"[170] In response to this criticism, a continuation of the quote from *Katz* is helpful. It continues, "The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.'"[171] For Justice Scalia, as noted, the home is the "prototypical and hence most commonly litigated area of protected privacy" and thus deserves significant constitutional protections.[172]

V. Analysis of Kyllo

The *Kyllo* opinion is perhaps as significant as *Katz*, and it will serve as the guidepost for future decisions involving the home and inevitable advances in technology. It is also an opinion that the Court did not necessarily have to reach. The majority could have decided the case by merely applying the *Katz* test to the facts.[173] As noted, when the *Katz* test is applied with the focus on the heat-generating activities in the home instead of on so-called "waste heat," lower courts and state supreme courts had found a violation of a reasonable expectation of privacy.[174] The *Kyllo* majority could have easily adopted this already developed body of law to resolve this case.

By adopting a traditional *Katz* analysis, Fourth Amendment law would have remained uniform instead of splintered into a series of different rules for courts to apply to different fact patterns. As it stands, the *Katz* test applies in all situations in which government activity might have invaded a constitutionally protected expectation of privacy, except when this activity involves the use of an electronic device and the expectation of privacy centers on a home. The *Kyllo* opinion thus adds another bump in the course of Fourth Amendment jurisprudence, which has not "run smoothly."[175]

The dissent accurately identified one of the disadvantages of adopting Justice Scalia's new rule, one that the recent terrorist attacks of September 11th make even more compelling:

---

170. *Id.* at 49 (Stevens, J., dissenting) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

171. *Katz*, 389 U.S. at 361.

172. *Kyllo*, 533 U.S. at 34; *see also supra* notes 121, 128 and accompanying text.

173. *See* United States v. Cusumano, 67 F.3d 1497 (10th Cir. 1995), *rev'd on other grounds*, 83 F.3d 1247 (10th Cir. 1996); People v. Deutsch, 44 Cal. App. 4th 1224, 1227 (Cal. Ct. App. 1996).

174. *See supra* note 157 and accompanying text.

175. *See supra* note 61 and accompanying text.

> [P]ublic officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community. In my judgment, monitoring such emissions with "sense-enhancing technology," and drawing useful conclusions from such monitoring, is an entirely reasonable public service.
>
> On the other hand, the countervailing privacy interest is at best trivial.[176]

The advantages of the new rule, however, outweigh any disadvantages. As noted, Justice Scalia's methodology and philosophy greatly influenced the creation of the rule, both of which hold many advantages.[177] His textualist and originalist views led him to adopt a rule that "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[178] His new rule — "[w]here . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant"[179] — is a significant improvement over *Katz*. It combines the best elements of the never explicitly abandoned constitutionally-protected-area doctrine and the *Katz* test. It looks to the text of the Fourth Amendment, with its specifically enumerated protection of the home, to find a reasonable expectation of privacy in the home. It does away with the subjective component of the *Katz* test and raises a presumption that any search using such a device is unreasonable. Abandoning the subjective component and the finding that it is reasonable to expect privacy in one's home are excellent improvements on *Katz*. Now, instead of a criminal defendant having to show that he had both a subjective and legitimate expectation of privacy in the illegal activities conducted in the home, the burden shifts to the state to justify its search. The state can justify searches by showing an exception to the warrant requirement, by showing that the device is in "general public use," or by obtaining a warrant.

The requirement that the device not be in "general public use" incorporates elements of the *Katz* test. The presumption that a search of a home is unreasonable dissipates if the device used to search is widely used by the

176. *Kyllo*, 533 U.S. at 45 (Stevens, J., dissenting) (citation omitted).
177. *See supra* notes 125-53 and accompanying text.
178. *Kyllo*, 533 U.S. at 33.
179. *Id.* at 40.

public. In *Katz* terms, a person cannot claim a reasonable expectation of privacy in such a situation because he would know that his activities were open to public view. This allows the test to remain viable and responsive to the needs of law enforcement while providing a greater degree of protection than the *Katz* test might provide for the core privacy value protected by the Fourth Amendment.

VI. Conclusion

Kyllo illustrates how Justice Scalia's belief in textualism, his adherence to originalism, and his desire for clear principles of decision helped craft a bright-line rule addressing the advances of technology. By taking the long view of the threat of technology to the privacy of the home, Justice Scalia constructed a rule that avoids what Mr. Lerner, Kyllo's attorney, predicted would happen during oral arguments:

> I think that you will probably have then a series of cases every time a thermal imager is used on a different wall or on a window or the newest version of the technology comes up, and I think it really makes sense, unless the Court wants to revisit this every few years, to look at what the capability of the science is.[180]

Kyllo prevents this situation and moves the Court closer to realizing Justice Scalia's goal:

> It is my inclination — once we have taken the law as far as it can go, once there is no general principle that will make this particular search valid or invalid, once there is nothing left to be done but determine from the totality of the circumstances whether this [particular] search and seizure was "reasonable" — to leave that essentially factual determination to the lower courts. We should take one case now and then, perhaps, just to establish the margins of tolerable diversity.[181]

The future consequences of Justice Scalia's originalism on Fourth Amendment law are difficult to estimate, but in the case of *Kyllo*, they have helped slow the erosion of the values protected by the Fourth Amendment.

Scott Byrd

---

180. Oral Argument of Kenneth Lerner on Behalf of the Petitioner, Kyllo v. United States, 533 U.S. 27 (2001) (No. 99-8508), *available at* 2001 WL 168056, at *10.

181. Scalia, *supra* note 11, at 1186.