KYLLO V. UNITED STATES: INNOVATIVE OR ORIGINALIST?

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ABSTRACT: *When the American Founders crafted the Fourth Amendment to the Constitution, they could not have foreseen the impact of twentieth-century technology on warrantless "search and seizure." Consequently, originalist rulings, such as* Olmstead v. United States *or* Goldman v. United States*, favored the federal government's use of technology to "search" citizens, since the government was not physically going beyond the bounds set by the Fourth Amendment.* Katz v. United States *reversed this precedent, but it was Justice Scalia's opinion in* Kyllo v. United States *which truly returned to the original intent of the Fourth Amendment, setting objective boundaries for governmental "search and seizure" by designating the home as a "constitutionally protected area."*

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The development of new technology has complicated the founder's intent for the Fourth Amendment, which has historically protected United States citizens from unreasonable searches or seizures. Techniques such as thermal imaging or wiretapping give the government the potential to strip citizens of nearly all their privacy unless the Supreme Court rules that the Fourth Amendment protects against such intrusion. Anticipating this, Justice William O. Douglas cautioned that the "'privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps.' As a consequence of technological developments, we risk creating 'a society in which government may intrude into the secret regions of man's life at will.'"[1] *Katz v. United States,* 389 U.S. 347 (1967), which ruled that "reasonable expectation of privacy" exempted information from search and seizure, expanded the scope of the amendment but repudiated historical precedent by doing so. *Kyllo v. United States,* 533 U.S. 27 (2001) similarly upheld individual privacy rights by defining a thermal scan as an impermissible search. Yet while *Kyllo v. United States* depended heavily on the precedent set by *Katz,* it also departed from it significantly but subtly, revealing inconsistencies in the *Katz* decision and significantly changing how the Fourth Amendment had been interpreted. Ultimately, the ruling in *Kyllo* would uphold the traditional privacy of the individual granted by the the Fourth Amendment. At the same time, the Supreme Court broadened its interpretation to maintain its original purpose of protecting cit-

1 Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 303 (2010).

izens from search and seizure in an era where technology was expanding government power.

The Fourth Amendment reads, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[2] According to legal scholar Thomas Davies, the Framers of the Constitution sought to protect against general search warrants in private homes because this was the most common violation of Fourth Amendment type rights in their era. Due to this "inherent illegality of any searches or seizures that might be made under general warrants," the Founders never envisioned "the warrantless officer as being capable of posing a significant threat to the security of person or house,"[3] since no one took the warrantless officer seriously during colonial times. As a result, they found no need to further specify the meaning of the phrase "unreasonable searches and seizures," which they understood to mean house searches under general warrants, to include warrantless searches. Yet as warrantless searches began to increase in the late nineteenth century, mainly to enforce the Interstate Commerce Act of 1887, the Sherman Anti-Trust Law of 1890, and—most importantly—the National Prohibition Act of 1919, the Judiciary began to address the constitutionality of warrantless searches apart from those with general warrants,

2 U.S. CONST. amend. IV.

3 Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999).

concluding that warrantless searches, especially those within the home were unconstitutional.[4]

The early twentieth century confronted the amendment with another challenge as federal agents began using technology to obtain information. In this situation, the judiciary proved less willing to modify its application of the Fourth Amendment as it had done by specifically extending protection against warrantless searches to respond to changing circumstances. This reluctance occurred because the wording "secure in their persons, houses, papers, and effects" had always indicated physical security.[5] *Olmstead v. United States,* 277 U.S. 438 (1928) questioned whether the government's use of wiretapping in Roy Olmstead's office building to convict him of bootlegging constituted an unreasonable search and seizure under the Fourth Amendment. Strictly adhering to historical precedent but failing to adequately consider the massive changes in law enforcement capabilities, the Supreme Court ruled:

> [Neither] the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.[6]

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4 *Id.* at 552; Nelson B. Lasson, The history and development of the Fourth amendment to the united states constitution 106 (1937).

5 Davies, *supra* note 3, at 552; Thomas K. Clancy, The Fourth Amendment: Its History and Interpretation 310 (2008).

6 Olmstead v. United States, 277 U.S. 438, 466 (1928).

Similarly, *Goldman v. United States,* 316 U.S. 129 (1942) ruled that the use of a dictaphone by federal agents to overhear the conversation of the defendant in his office did not violate the Fourth Amendment.[7]

Until the late 1960s, then, the Court upheld the standard interpretation of the Fourth Amendment, even as rapidly developing technology was empowering the government to collect information about its citizens. However, the landmark case *Katz v. United States* overturned the ruling in *Olmstead,* marking a significant change in the way in which the Court viewed the powerful impact of technology as a means of invading privacy. The FBI had suspected that the defendant, Charles Katz, had made numerous phone calls to engage in illegal interstate gambling, noticing that he consistently made these calls in Los Angeles telephone booths at the same time each day. The Bureau attached microphones and tape recorders to the outside of these booths, recording only the phone calls of the defendant for the span of a week. Based on this evidence, a trial court convicted Katz of interstate betting. The defendant's attorneys contested that the government had conducted a warrantless search that violated his Fourth Amendment rights, but the Court of Appeals for the Ninth Circuit rejected his argument, relying on precedent from *Olmstead* and *Goldman v. United States* to rule that since the microphone had been placed on the exterior of the phone booths, the FBI had not violated Fourth Amendment stipulations.[8]

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7 Goldman v. United States, 316 U.S. 129, 135 (1942).

8 Edmund W. Kitch, *Katz v. United States: Limits to the Fourth Amendment,* 1968 Sup. Ct. Rev. 133, 135 (1968).

On appeal, the Supreme Court agreed to hear the case and overturned the ruling of the Court of Appeals, declaring that the government had violated the Fourth Amendment. Famously stating that "the Fourth Amendment protects people, not places," Justice Potter Stewart refused to consider whether the telephone both was a constitutionally protected area, and he instead relied on a new "reasonable expectation of privacy" test based on whether the defendant rationally assumed that he would enjoy freedom from observation.[9] With this rationale, Justice Stewart concluded, "The premise that property interests control the right of the Government to search and seize has been discredited."[10] Instead, the case depended on whether the defendant harbored a legitimate reason to believe that his correspondence would remain private, regardless of where his actions occurred.

Since the defendant did not suspect that anyone was listening to his conversation in the telephone booth, the Court held that the FBI had conducted an unreasonable search without a warrant, violating an individual's rights. In his concurrence, Justice John Marshall Harlan II added to Stewart's new interpretation of the Fourth Amendment by developing a "two-part test" which requiring that an individual not only have a subjective expectation of privacy but that society accepts this expectation as rational.[11] However, the majority ruled that electronic, as well as physical intrusion into a constitutionally protected area constituted a search which required a warrant, rendering the wiretapping in

9 Katz v. United States, 389 U.S. 347, 351 (1967).

10 *Id.* at 354.

11 *Id.* at 361.

Katz unconstitutional. Thus, in contrast to the rulings in *Olmstead* and *Goldman,* the opinion in *Katz* discarded the "trespass" doctrine of the Fourth Amendment that only protected against search and seizure of private possessions and material objects. In doing so, it replaced the reliance on location with a focus on subjective expectation as a determining factor. Recognizing that technology could render the Fourth Amendment ineffectual, *Katz* broke with historical precedent and attempted, with mixed success, to adapt the Constitution to the changing times.[12]

While *Katz* appropriately sought to address the government's growing ability to obtain information through technology, it ultimately proved to be inadequate. First, Justices Harlan and Stewart offered no constitutional rationale for their "reasonable expectation of privacy" test, seeming to formulate this standard arbitrarily. Most importantly, while the two-part test applied well to the *Katz* descision, it was too vague to use as an objective standard. Individual and even societal conceptions of privacy could vary, proving controversial and giving the judicial branch arbitrary power in deciding the nature of a search. Edmund Kitch observes, "*Olmstead*, decided 5 to 4, was probably overripe for extinction….But Olmstead did provide a principled ground for decision. It is the responsibility of the Court, not only to abandon the old law, but to build the new. The brave, broad reading of the Fourth Amendment in Katz has a hollow ring when tested against the Court's [decision in *Olmstead*]."[13] According

12 Asheen J. Radshan, *The Case for Stewart over Harlan on 24/7 Physical Surveillance,* 88 TEX. L. REV. 1475, 1476 (2010).

13 Kitch, *supra* note 8, at 152.

to Melissa Arbus, post-*Katz* cases often forced defendants to go to "extraordinary measures" to protect their Fourth Amendment rights under the new *Katz* precedent. For instance, in *Florida v. Riley*, 488 U.S. 445 (1989), the Florida State Supreme Court ruled that the Fourth Amendment did not protect the defendant's greenhouse because parts of it were open to aerial observation, through no ordinary passer-by could see into it. Clearly, the ruling in this case against the defendant differed greatly from that in *Katz,* demonstrating the malleable standards developed from the latter.[14] Similarly, the post-*Katz* cases used the "third-party" doctrine, the idea that "a person loses Fourth Amendment protections over anything she knowingly exposes to another person."[15] The problem arose when Justices began applying this rule even if the evidence was visible only through technological monitoring, like the heat emissions from marijuana cultivation coming from the mobile home of the defendant in *United States v. Ford* 34 F.3d (11th Cir. 1994). Clearly, by the 1990s, courts across the United States were manipulating the opinion in *Katz* to mean the opposite of what Stewart and Harlan had intended, giving more power to the government to conduct warrantless "searches" and to violate the civilians' expectations of privacy.[16]

The decision in Kyllo v. United States marked another attempt to expand Fourth Amendment rights to accommodate technological advances, this time to address the impact of heat-

14 Melissa Arbus, *Legal U-Turn: The Rehnquist Court Changes Direction and Steers Back to the Privacy Norms of the Warren Era,* 89 VA. L. REV. 1729, 1763 (2003).

15 Crocker, *supra* note 1, at 305.

16 Arbus, *supra* note 14, at 1765.

detecting sensors to monitor activity in the home. The Bureau of Land Management had become confident that defendant Danny Kyllo was growing marijuana in his home, based on information from informants and Kyllo's abnormally high utility bills. As a result, an investigator scanned Kyllo's home from a car at about 3 a.m. using a thermal imager. He found abnormally high heat emissions on one side of the house, which the police used obtain a warrant to physically search Kyllo's home. They found marijuana plants as well as illegal weapons. The trial court found Kyllo guilty, ignoring the defendant's claim that the thermal scan constituted an unreasonable search under the Fourth Amendment and required a warrant. On appeal, the United States Court of Appeals for the Ninth Circuit agreed to hear the case. The justices initially concluded that the scan did constitute a warrantless search, but later they ruled that the search was reasonable because it revealed no intimate details of the home, only revealing warm spots on the home's exterior.[17]

When the case reached the Supreme Court, the close and unusual voting alignment among the justices highlighted the difficult nature of the issue. Political scientist Thomas Hensley notes that Justices Antonin Scalia and Clarence Thomas allied with the more liberal Stephen Breyer, Ruth Bader Ginsburg, and David Souter in upholding individual privacy rights while William Rehnquist, Sandra Day O'Connor, Anthony Kennedy, and John Paul Stevens argued for the government's right to conduct

17 Thomas B. Colbridge, *Kyllo v. United States: Technology Versus Individual Privacy*, 70 FBI Law Enforcement Bulletin 25, 27 (2001).

the scan. Yet they united on one issue: "the important emphasis within the Fourth Amendment on the privacy of one's home and the need for law enforcement officials to obtain a warrant before searching a home."[18] In writing for the majority, Scalia drew upon the ruling in *Silverman v. United States* 365 U.S. 505 (1961) to determine the legitimacy of the defendant's expectation of privacy, concluding that the government had no right to intrude upon a person's home: "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"[19] Drawing upon precedent and his understanding of common law, Scalia affirmed the decision in *Katz* but departed from the two-part test to uphold the privacy of the home as the basis for protection against warrantless searches. Instead, he returned to the pre-*Katz* standard of using physical location as the primary determinant of the individual's right to privacy.[20]

However, by focusing on location as the most important standard for Fourth Amendment protections, Scalia did not return to the stance in *Olmstead*. He recognized that technology had the potential to significantly limit the autonomy of the individual and that a completely originalist approach to the Fourth Amendment was obsolete: "The question we confront today is what limits there are upon this power of technology to shrink the realm of

18 Thomas R. Hensley with Kathleen Hale, Carl Snook, The Rehnquist Court 159 (2006).

19 Kyllo v. United States, 533 U.S. 27, 31 (2001).

20 Richard Henry Seamon, *Kyllo v. United States and the Partial Ascendance of Justice Scalia's Fourteenth Amendment,* Wash. U. L. Q. 1, 3 (2002).

guaranteed privacy."[21] Citing the decision in *Katz* to classify the wiretapping of the phone booth as a warrantless search despite the fact that technology had not actually penetrated the booth, Scalia upheld the two-part test as a legitimate means of determining the constitutionality of a non-physical search. In doing so, he departed from the pre-*Katz* understanding of the Fourth Amendment which only protected against physical searches.[22] In response to the dissent's contention that the scan in Kyllo revealed "no intimate details of the home," Scalia responded:

> We think that obtaining by sense enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman,* 365 U. S., at 512, constitutes a search at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.[23]

Thus, *Kyllo* upheld all the privacy protections in *Katz*, clarifying the intent of the latter but also adding another protection based on common law: the immunity of the home from warrantless searches.

However, law professor Richard Henry Seamon points out that in addition to upholding and clarifying the two-part test,

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21 Kyllo, *supra* note 19, at 34.

22 Seamon, *supra* note 20, at 9.

23 Kyllo, *supra* note 19, at 34.

Kyllo also criticized the opinion in *Katz* for several reasons. First, Justice Scalia disagreed that it had departed so far from its original application to property, becoming a mere measure of opinion.[24] According to Scalia, the whole purpose of the Fourth Amendment was to preserve "that degree of respect for the privacy of persons and the inviolability of their property."[25] In addition, the subjectivity of the test rendered it "notoriously unhelpful" when applied as the lone standard to cases. Finally, he acknowledged that relying on the two-part test alone gave too much power to judges in deciding when privacy expectations were "reasonable."[26] To Scalia, returning the focus to the location of the search and giving the home express protection against inspection significantly remedy these ambiguities.

In the dissent, Justice Stevens accused the new standards framed by the majority opinion of being "at once too broad and too narrow, and he argued that the Court's explanation did not justify its adoption."[27] Stevens argued the Scalia's opinion went too far in limiting the use of imaging devices, saying, "I would not erect a constitutional impediment to the use of sense-enhancing technology unless it provides its user with the functional equivalent of actual presence in the area being searched."[28] However, his complaint ignores the contention that if the results of technological search can expose details that an observer could not have

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24 Seamon, *supra* note 20, at 15.

25 David A Sklanski, *Back to the Future: Kyllo, Katz, and Common Law*, 89 Miss. L.J. 143, 162 (2005).

26 Seamon, *supra* note 20, at 15.

27 Kyllo, *supra* note 19, at 47.

28 *Id.*

historically obtained without a physical search and can provide the means of obtaining a warrant, governmental use of technology should require some sort of warrant itself.

Additionally, Stevens criticized the majority for establishing arbitrary guidelines which had no basis in precedent and were too vague for future search and seizure cases. In particular, he expressed concern that the ruling would prevent future searches from obtaining "information concerning the outside of the building that could lead to (however many) inferences 'regarding' what might be inside."[29] However, the hypothetical situations that he uses to illustrate his point—such as labeling as a search the use of an infrared camera to learn whether someone likes pizza—seem unlikely to occur under reasonable standards and seem preferable to an invasion of privacy within the home, one of the only places where one goes to seek seclusion from curious onlookers outside. David Sklanski agrees that *Kyllo* approached the Fourth Amendment in a new way, while also signifying a return to the past by emphasizing the importance of the location of the surveillance:

> The originalism in *Kyllo* is not the originalism the Court has applied in other recent Fourth Amendment cases…the Court has shifted its attention…from the content of eighteenth-century rules of search and seizure to what those rules accomplished. In these respects, the methodology of *Kyllo* itself represents something of a return to the past—albeit a past more open to the future.[30]

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29 *Id.* at 48.

30 Sklanski, *supra* note 25, at 3.

Thomas Davies agrees that though *Kyllo* combined the precedent of *Katz* with more original, property-focused interpretations of the Fourth Amendment, it ultimately signaled a return to the original intent of the Founding Fathers as well as the majority in *Katz*. Ultimately, Davies argues, the Framers desired to limit police power and uphold the security of the individual, putting the burden of proof on the government when it sought to justify any expansion to its power of search and seizure.[31] Thus, Scalia had a firm basis both for adhering to *Katz* by upholding individual privacy. Yet his departure from it and return to pre-*Katz* emphasis on property and location also relied on precedent and protected the intent of the Fourth Amendment in the modern age.

As a landmark Supreme Court decision on such a complex, controversial issue as Fourth Amendment interpretation, *Kyllo* wields a great amount of influence in criminal and constitutional law. Most obviously, it clarified that use of thermal imagers and other similar technologies as searches require warrants, at least on private premises, though law enforcement may still use these devices without a warrant on public property or in a dangerous situation such as a kidnapping where there is no time to obtain a warrant.[32] More importantly, the decision has larger constitutional implications, the most significant being its recognition that a person has a reasonable expectation of privacy inside his home, though he forfeits that when he appears in public or when evidence is clearly visible to a third party without the aid of

31 Davies, *supra* note 3, at 750.

32 Colbridge, *supra* note 17, at 29.

a technological device. Thus, even the non-physical scrutiny of the home constitutes a Fourth Amendment search if it is seeking to obtain information that is not visible to the naked eye. By clarifying *Katz* when it upheld individual privacy over government security, *Kyllo* eliminated the need for citizens to take "extraordinary precautions" to keep their actions from "public exposure" to qualify for Fourth Amendment protection.[33] Most importantly, Scalia's opinion has set a balanced, coherent precedent which favors the rights of individuals for future court cases involving search and seizure.

The decision in *Kyllo v. United States* has given government officials, lawmakers, and judges rational guidelines for protecting the safety of American citizens without invading their privacy. Scalia's respect for individuals combined with his deference to precedent, common law, and the intent of the Founders has resulted in an opinion in *Kyllo v. United States* which upheld the ruling in *Katz* but offered a more objective, historical approach to the issue. While his stance represented a new way of approaching the Fourth Amendment, it also sustained the original interpretation of the Fourth Amendment by protecting privacy in an age where unrestrained police power and technological abilities have the capacity to destroy American freedom.

33 Arbus, *supra* note 14, at 1761-1765.