
COMMENTS

WILLAMETTE LAW REVIEW

41:4 Fall 2005

SENSE-ENHANCING TECHNOLOGY AND THE SEARCH IN THE WAKE OF *KYLLO V. UNITED STATES*: WILL PREVALENCE KILL PRIVACY?

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The effect of the [Fourth] Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, . . . against all unreasonable searches and seizures under the guise of law.¹

I. INTRODUCTION

The Fourth Amendment to the United States Constitution provides:

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

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1. *Weeks v. United States*, 232 U.S. 383, 391-92 (1914).

seized.²

The Fourth Amendment does not regulate all government observance of private individuals. By its very terms, the Fourth Amendment only concerns governmental conduct that constitutes a “search.” In that situation, the language provides that a warrant based on probable cause must issue before the search can take place. Conversely, if there is no search then the mandates of the Fourth Amendment do not apply. Consequently, federal courts, including the Supreme Court, have endeavored to define the meaning of the term “search.”³ If, however, the Constitution is indeed a document that is, as Chief Justice Marshall admonished, “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs[,]”⁴ then the interpreters of that law must be prescient enough to anticipate, to some extent, the crises of modern Americans. What was before not a search may now have to be termed one, and likewise what was thought an objectively reasonable search under current precedent might later no longer remain a search. The concept of the search is in constant flux under federal law, and must be open to re-evaluation in light of changed social, cultural or (as the topic of this Comment explores) technological circumstances.

In the realm of advanced sense-enhancing technologies, the law must be on the vanguard of progress, rather than act as a reactionary force. The law must take this role because these sense-enhancing technologies have the power to eviscerate the protections enshrined in the Fourth Amendment to the Constitution. Some technologies currently utilized, particularly thermal imaging and image-enhancement devices, present a host of substantial concerns that simply could not have been predicted in 1791, when the first Congress adopted the Fourth Amendment. In the law enforcement community, these devices have become a mainstay of the criminal investigatory process.

This Comment will consider the history and technology of current thermal imaging and image-enhancement devices, with a particular focus on the myriad uses and tasks for these technologies. The benefits of such modern technology, as will be discussed in detail in Part II, are substantial. However, the discussion will also deal with the implications for privacy that these technologies present.

Part III discusses the relevant background requisite to an under-

2. U.S. CONST. amend. IV.

3. *Katz v. United States*, 389 U.S. 347, 350 (1967).

4. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (emphasis omitted).

standing of the Supreme Court's approach to the question in *Kyllo v. United States*,⁵ where the Court, badly divided, held that the use of certain technologies are "searches" under the Constitution, and therefore must be preceded with a warrant in order to be constitutional.⁶ The Judiciary, and more specifically the United States Supreme Court, is the body that is charged with "say[ing] what the law is,"⁷ and its most recent pronouncement on the topic has left the lower federal courts with a host of unresolved questions. The dissent in *Kyllo* raises some of these questions,⁸ and Part IV considers several of the lower court decisions in the three years following *Kyllo*. Specifically, one of the most potentially troublesome issues is the institution of a constitutional standard that constrains law enforcement based on whether or not the technology in question is in general public use. After looking at the federal courts, Part IV analyzes a selection of state cases that are analogous to *Kyllo*, yet may ultimately offer a better solution. The goal of this piece to show that the general public use standard, while purporting to adhere to the public officer/private individual search rules the Court has set forth in the past, is ill-suited to handle the novel issues of law and privacy that advanced thermal imaging and image-enhancing devices present. Part V contemplates the ultimate future of the general public use language, as well as a solution that would reconcile the current privacy regime of the latter half of the twentieth century and beyond with the growing sophistication and availability of devices that have the potential to substantially reduce or altogether eliminate privacy. Finally, Part VI provides a brief conclusion to this Comment.

5. 533 U.S. 27 (2001).

6. *Id.* at 34.

7. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

8. *Kyllo*, 533 U.S. at 41 (Stevens, J., dissenting).