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NOTE

KYLLO V. UNITED STATES: A LUKEWARM INTERPRETATION OF THE FOURTH AMENDMENT

Jessica T. Kobos*

I. INTRODUCTION

Over the last twenty years law enforcement has expanded the use of surveillance technology to keep up with an increase in criminal activities. One such technology is thermal imaging. A thermal image device detects infrared radiation based on heat emitted from structures. Law enforcement has used thermal image devices to determine if a private home is emitting an abnormal amount of heat, a common result of an indoor marijuana growing operation.

Prior to the United States Supreme Court’s holding in *Kyllo v. United States*, law enforcement personnel was permitted to use thermal image devices without a warrant. The accepted use

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2. *Id.*

of thermal image devices without a warrant was predicated on a long line of Supreme Court case law, clearly outlining the rights of private individuals and law enforcement. Interpreting that case law, nearly every federal circuit allowed the warrantless use of thermal imaging devices. Based on federal case law, it appeared the Supreme Court’s decision in *Kyllo* would have been a predictable one: allowing the warrantless use of thermal image devices. However, the Rehnquist Court, known for its protection of states rights, appears to have instead followed a trend seen in several states affording extended privacy rights to individuals. The Supreme Court’s holding in *Kyllo* rejects its earlier case law and reasoning concerning law enforcement personnel’s use of technology without a warrant; instead seeming to follow decisions from two state supreme courts without giving credence to either.

This comment briefly analyzes the federal case law prior to *Kyllo v. United States* and offers an alternative to the Court’s majority holding. Part II discusses the Supreme Court case law dealing with Fourth Amendment jurisprudence. Part III outlines federal circuit court opinions regarding the constitutionality of warrantless search and seizure. Part IV outlines the thermal image discussions from Washington and Montana. Part V details the facts and holdings of *United States v. Kyllo*. Part VI offers an alternative analysis to that offered by the Court in *Kyllo* on the warrantless use of thermal image technology by law enforcement and concludes that the Supreme Court followed a state trend towards greater privacy protection of individuals as opposed to following the clearly delineated federal case law and reasoning.

II. PRECEDENTIAL FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment provides for “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”4 The Fourth Amendment protects ordinary citizens from unjustifiable government invasion of their private homes and papers.5

The Fourth Amendment prohibits all searches and seizures by law enforcement personnel which are unreasonable in

4. U.S. Const. amend. IV.
A search is reasonable when carried out according to the warrant requirement of the Fourth Amendment. Evidence obtained in violation of the Fourth Amendment is inadmissible against a defendant under the exclusionary rule. Any evidence obtained as a result of a search in violation of the Fourth Amendment is also excluded as “fruit of the poisonous tree.”

The constitutional issue raised by law enforcement personnel’s use of thermal imaging technology is whether the use of such a device constitutes a search thus deserving of Fourth Amendment protection.

A. United States Supreme Court Cases

The cases preceding Kyllo painted a different picture of when a warrant is required to comply with the Fourth Amendment than the one depicted in the Kyllo majority opinion. The cases leading up to Kyllo outlined fairly concise rules as to when the Fourth Amendment required a warrant before a method of surveillance could be used by law enforcement. Thirty-six years of federal case law demonstrated that the use of a thermal image device by law enforcement personnel without a warrant was not a search and accordingly not a violation of the Fourth Amendment.

In Silverman v. United States, law enforcement used an electronic listening device called a “spike mike” to eavesdrop on a building believed to be the headquarters of a gambling operation. The Court held because the “spike mike” was inserted in the heating duct of the house, thus turning the buildings heating system into a conductor of sound, the spike mike constituted a physical invasion of the home and was a violation of the Fourth Amendment protection against warrantless search.

Six years later, in Katz v. United States, the Court created the enduring Katz test determining whether a Fourth Amendment violation had occurred.

9. 365 U.S. 505, 506 (1961). A “spike mike” is a foot-long spike attached to a microphone, which is inserted into small areas and acts as a transmitter of sounds to waiting law enforcement. Id. at 506-7.
10. Id. at 509.
Amendment search had occurred. In *Katz*, FBI agents placed a listening and recording device on the outside of a public telephone booth from which Katz was believed to be transmitting wagering information across state lines. The Court held, "the Fourth Amendment protects people, not places." The Court clarified what a person knowingly exposes to the public, even if in his own home, is not subject to Fourth Amendment protection. In this drastic step the Court shifted Fourth Amendment interpretation from a narrow focus on the home, to a broad focus on the person and their subjective expectations of privacy. In Justice Harlan's concurring opinion the two prong test for determining if a search occurred was enunciated: 1) did the individual believe he/she had a subjective expectation of privacy; and 2) is that individual's objective expectation of privacy one that society is willing to recognize as reasonable?

In *Smith v. Maryland*, the Court held the use of a "pen register" to record the numbers dialed out on a private phone, as part of a burglary investigation, was not a Fourth Amendment search. The Court applied the *Katz* test and found Smith did not have a legitimate expectation of privacy, nor did the Court believe that society would recognize such a right as reasonable because a third party, the phone company, had access to the information.

The distinction between open fields and curtilage has been an important consideration for the Court in past decisions regarding the Fourth Amendment. The Fourth Amendment protection against unreasonable search and seizure does not extend to the open areas surrounding ones personal residence. While the area immediately adjacent to the home, that an

12. *Id.* at 348.
13. *Id.* at 351.
14. *Id.*
15. *Id.* at 361 (Harlan, J., concurring).
16. 442 U.S. 735, 745-46 (1979). "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." *Id.* at 736 n.1 (quoting United States v. New York Tel. Co., 434 U.S. 159, 161 n.1 (1977)).
17. *Id.* at 741-42. The Supreme Court had consistently held that a person had no legitimate expectation of privacy in information they voluntarily turned over to a third party. See, e.g., United States v. Miller, 425 U.S. 435, 442-44 (1976).
individual can expect to remain private has been defined as the curtilage. In 1984, the Supreme Court had the opportunity to answer two privacy questions concerning the Fourth Amendment protection of open fields and private homes. In Oliver v. United States, following a tip law enforcement entered private property and discovered a field of marijuana plants approximately a mile from Oliver's home. Oliver was arrested and indicted for manufacturing a controlled substance. Oliver later moved to suppress the marijuana claiming it was not found in an open field as contemplated by Hester v. United States and was thus a violation of his Fourth Amendment right against warrantless search and seizure. The Court held the special protection of the Fourth Amendment does not extend to open fields. An individual may not legitimately expect privacy for any activities conducted outdoors except in those areas immediately surrounding the home.

Later that same year United States v. Karo was decided. In Karo, several individuals ordered a large amount of ether to be used to extract cocaine from illegally imported clothing. Federal agents placed a beeper monitor in one of the cans of ether. After the individuals picked up the cans, the government was able to track where the cans of ether were taken. The monitoring enabled the government to discern the cans of ether had been inside several of the individual's homes. Using this information the agents filed for search warrants. After being arrested and indicted, the individuals moved to suppress the evidence obtained from the monitoring. The Supreme Court upheld the suppression of the evidence based on the monitoring. The Court believed the beeper provided the agents with information not made known to the general public, namely concerning the interior of private residences. Thus, the

21. Oliver, 466 U.S. at 173.
22. Id.
23. 265 U.S. at 57, 59.
25. Id. at 180. See also, Boyd v. United States, 116 U.S. 616 (1886).
26. 468 U.S. 705.
27. Id. at 708.
28. Id.
29. Id. at 709-11.
30. Id. at 715.
beeper monitoring was a violation of the Fourth Amendment right against unreasonable searches.\textsuperscript{31}

In 1986, two cases resolved the question of whether or not aerial surveillance constituted a Fourth Amendment search; \textit{California v. Ciraolo} and \textit{Dow Chemical Co. v. United States}.\textsuperscript{32}

In \textit{Ciraolo}, law enforcement personnel used a private plane to fly over a home suspected of growing marijuana.\textsuperscript{33} At an altitude of 1,000 feet the officers made naked-eye observations of numerous marijuana plants growing in Ciraolo’s enclosed back yard.\textsuperscript{34} The Court held that because the police observations took place in public navigable airspace and were not physically intrusive upon private property there was no legitimate expectation of privacy.\textsuperscript{35} The Court went on to state that society was not prepared to recognize Ciraolo’s expectation that his “garden” was protected from aerial surveillance, thus failing both prongs of the \textit{Katz} test.\textsuperscript{36}

In \textit{Dow Chemical}, the Environmental Protection Agency (EPA) took aerial photographs of a factory complex to monitor emissions from a facility’s power plants without first obtaining a search warrant.\textsuperscript{37} The Court held that the photographs in question were “not so revealing of intimate details as to raise constitutional concerns.”\textsuperscript{38} The taking of aerial photographs of the Dow plant from public airspace was not a search prohibited by the Fourth Amendment.\textsuperscript{39} Thus, the Fourth Amendment does not protect anything visible aerially to a third party.

In \textit{California v. Greenwood}, the Court applied the \textit{Katz} test to a private individual’s garbage.\textsuperscript{40} In \textit{Greenwood}, the defendant’s garbage was confiscated and searched for evidence of narcotics after being placed on the curb.\textsuperscript{41} Law enforcement personnel found indications of narcotics use, which was then used to obtain a warrant to search Greenwood’s home.\textsuperscript{42} Greenwood appealed claiming the search of his garbage was an

\textsuperscript{31} \textit{Karo}, 466 U.S. at 714-15.
\textsuperscript{32} 476 U.S. 207 (1986); 476 U.S. 227 (1986).
\textsuperscript{33} 476 U.S. at 209.
\textsuperscript{34} \textit{Id}.
\textsuperscript{35} \textit{Id.} at 212-15.
\textsuperscript{36} \textit{Id.} at 214.
\textsuperscript{37} 476 U.S. at 232.
\textsuperscript{38} \textit{Id.} at 238.
\textsuperscript{39} \textit{Id.} at 239.
\textsuperscript{40} 486 U.S. 35, 37 (1988).
\textsuperscript{41} \textit{Id}.
\textsuperscript{42} \textit{Id.} at 38.
unlawful invasion of his privacy and a violation of the Fourth Amendment's prohibition against unlawful searches.\(^{43}\) The Court applied the \textit{Katz} test and found although Greenwood may have had a subjective expectation of privacy, as in \textit{Smith v. Maryland} the case involving law enforcement personnel's use of a pen register, it was not an expectation society was willing to recognize as legitimate.\(^{44}\) The Court reasoned that when garbage is placed on the curb it becomes "readily accessible to animals, children, scavengers, snoops and other members of the public."\(^{45}\) The knowing possibility of exposure to a third party, even in one's own home or office, negates any Fourth Amendment claim.\(^{46}\)

\textbf{B. Federal Circuit Court Trends}

The United States Supreme Court is the final word on federal law and cases with the federal circuit courts acting as sources of doctrinal development for most legal issues.\(^{47}\) As such the federal circuit has increasingly "defined and developed principles of law and policy directly governing their respective regions and indirectly affecting the rest of the nation."\(^{48}\) In the cases preceding \textit{Kyllo} a majority of federal courts followed the delineated legal precedent of the Supreme Court and held that thermal imaging was not a search and therefore not violative of the Fourth Amendment.\(^{49}\) The trend in the federal courts revealed the generally accepted interpretation of the federal case law surrounding the Fourth Amendment and demonstrated the inconsistencies of the \textit{Kyllo} opinion.

In \textit{United States v. Penny-Feeney}, the district court upheld the warrantless use of thermal image technology.\(^{50}\) Following a lengthy police investigation a couple was charged with growing marijuana in their home. The couple contended that law

\(^{43}\) \textit{Id.} at 37.

\(^{44}\) \textit{Id.} at 41.

\(^{45}\) \textit{Id.} at 40.

\(^{46}\) \textit{Greenwood}, 486 U.S. at 41.


\(^{48}\) \textit{Id.} at 1635-36.

\(^{49}\) For a further discussion of the state and federal district court splits on the warrantless use of thermal image technology see \textit{United States v. Field}, 855 F. Supp. 1518, 1525-31 (W.D. Wis. 1994).

\(^{50}\) 773 F. Supp. 220 (D. Haw. 1991), \textit{aff'd on other grounds sub nom} United States v. Feeney, 984 F.2d 1053 (9th Cir. 1993).
enforcement personnel's use of thermal image devices violated their Fourth Amendment protection against unreasonable searches. The court found that the defendants did not manifest an actual expectation of privacy in the heat waste produced by the grow lamps. The court held the couple voluntarily vented the heat waste outside and in no way attempted to impede its escape or exercise dominion over it. The court went on to state that even if defendants were capable of demonstrating a subjective expectation of privacy in the heat waste, the Supreme Court's holding in Greenwood would suggest that such an expectation would "not be one that society would be willing to accept as objectively reasonable." Both cases involved a homeowner disposing of waste matter in areas exposed to the general public. Although the Court of Appeals for the Ninth Circuit, in upholding the lower court's decision, explicitly declined to rule on the warrantless use of thermal image devices, Penny-Feeney was one of the most quoted cases in support of the warrantless use of such devices because of its clear and succinct analysis.

In United States v. Pinson, the Eighth Circuit Court of Appeals also found thermal imaging to be an acceptable warrantless surveillance tool. The Pinson court relied heavily on the logic from the Penny-Feeney decision using the analogy from Greenwood as further evidence of the acceptability of thermal imaging technology. The court went on to clarify that, "none of the interests which form the basis for the need for protection of a residence, namely the intimacy, personal autonomy, and privacy associated with a home, are threatened by thermal imagery."

In United States v. Ford, the Eleventh Circuit also followed the logic of Penny-Feeney and Pinson and found thermal imagery to be a constitutional method of warrantless surveillance. The Ford court based its decision in large part on the analogous relationship between Greenwood and cases involving thermal

52. Id.
53. Id.
55. 24 F.3d 1056 (8th Cir. 1994).
56. Id. at 1058.
57. Id. at 1059.
58. 34 F.3d 992 (11th Cir. 1994).
imaging technology.\textsuperscript{59} The court went on to clarify the inability of the thermal imager to reveal intimate details of its subjects' activities stating, "the thermal imagery at issue here appears to be of such low resolution as to render it incapable of revealing the intimacy of detail and activity protected by the Fourth Amendment."\textsuperscript{60}

In \textit{United States v. Myers}, the Seventh Circuit Court of Appeals held the use of thermal image devices without a warrant harmless.\textsuperscript{61} The court held that because Myers took no steps to conceal or contain the waste heat emissions from his home he had no subjective expectation of privacy as required by the first prong of the \textit{Katz} test.\textsuperscript{62} The court went on to clarify that the thermal imager in question did not "intrude in any way into the privacy and sanctity of the home."\textsuperscript{63}

The Fifth Circuit Court of Appeals dealt with the question of thermal imaging in \textit{United States v. Ishmael}.\textsuperscript{64} In \textit{Ishmael}, a married couple was suspected of having constructed a large, underground, marijuana greenhouse on their property in Texas. After a tip from a confidential informant, agents from the Drug Enforcement Agency (DEA) used a thermal imager to twice measure the amount of heat emanating from the suspected structure. The first reading taken aerially showed an increased level of heat being pushed out of the building. The second reading, taken from the ground, again demonstrated activity consistent with a drug growing operation.\textsuperscript{65} The Ishmaels were arrested and the building was searched pursuant to a warrant predicated on telephone records, utility records, and the thermal image readouts.\textsuperscript{66} The search resulted in the confiscation of firearms and 770 marijuana plants.\textsuperscript{67} The Ishmaels challenged the admission of the evidence of marijuana cultivation based on the thermal image read-outs. The district court suppressed the evidence and on appeal the Fifth Circuit reversed.\textsuperscript{68} The court believed the Ishmaels demonstrated a subjective expectation of

\begin{thebibliography}{99}
\bibitem{59} \textit{Id.} at 997.
\bibitem{60} \textit{Id.} at 996.
\bibitem{61} 46 F.3d 668 (9th Cir. 1995).
\bibitem{62} \textit{Id.} at 669.
\bibitem{63} \textit{Id.} at 670.
\bibitem{64} 48 F.3d 850 (5th Cir. 1995).
\bibitem{65} \textit{Id.} at 851-52.
\bibitem{66} \textit{Id.} at 852.
\bibitem{67} \textit{Id.}
\bibitem{68} \textit{Id.} at 853.
\end{thebibliography}
privacy, but failed to agree with their contention that the government's intrusion upon their subjective expectation of privacy was not a reasonable one and as such, not to be recognized by society. The court based its decision on early cases from other circuit courts, which also found thermal imaging to be a constitutional surveillance technique not requiring a warrant. Specifically, the court pointed to the holdings in *Myers* and *Pinson*, that a thermal imager "does not intrude in any way into the privacy and sanctity of the home." The federal circuit courts clarified that as demonstrated in *Penny-Feeney*, a thermal imager is a passive, non-intrusive instrument that does not "send any beams or rays into the area on which it is fixed or in any way penetrate structures within that area." Further the use of a thermal imager posed no greater an intrusion than other accepted forms of surveillance like the aerial photography discussed in *Dow Chemical* or the pen register at the local phone company as seen in *Smith*. The federal circuit had "defined and developed" the case law surrounding law enforcement personnel's use of thermal image devices through the preceding case law: the Supreme Court disregarded that progression.

III. WASHINGTON, MONTANA AND STATE CONSTITUTIONAL PRIVACY CLAUSES

While the federal courts were interpreting the Supreme Courts case law, several state courts were cultivating a much more protected privacy right for state citizens. Washington and Montana's supreme courts were asked to decide whether or not the use of thermal image devices by law enforcement personnel was search years before the question was granted certiorari by the United States Supreme Court. Both states found the use of a thermal image device without a warrant an unconstitutional search based on the privacy clauses in their state constitutions.

In 1994, in *State v. Young*, Washington's Supreme Court found thermal imaging violative of the state constitution's protection of citizen's private affairs. In *Young*, local law

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69. *Ishmael*, 48 F.3d at 855-57.
70. *Id.* at 856.
71. *Id.*
72. *Id.* at 855-56.
73. See George, *supra* note 47.
74. 867 P.2d 593 (Wash. 1994).
enforcement received a tip that an individual was growing marijuana in his home. The investigators looked at the individual’s utility bills and later used a thermal imager to scan the home for abnormal hot spots which were indicative of marijuana cultivation. The two investigators determined from the thermal image read outs that there was a marijuana growing operation in the home. Following Young’s conviction on charges of marijuana possession with intent to manufacture or deliver, he appealed. Young argued the use of a thermal image read-out as justification for the warrant was a violation of Article 1, Section 7 of the Washington State Constitution. The Washington Supreme Court held the use of a thermal image device was a search and thus a violation of the Washington Constitution, Article 1, Section 7.

The Washington Supreme Court based their decision on the language of Article 1, Section 7, “no person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The court specifically noted that the drafters at the State Constitutional Convention intentionally rejected the language of the United State’s Constitutions Fourth Amendment. Additionally, the Washington Constitution specifically placed a greater emphasis on the right to privacy than its federal counterpart. The court also clarified the difference between the Katz inquiry under the Fourth Amendment and the Washington analysis, which questions whether or not the state had unreasonably intruded into a person’s private affairs. Again the court stated the private affairs inquiry used in Washington was far broader than the reasonable expectation test used in the federal courts. The right of privacy in Washington is not restricted to “the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives.” The protection afforded to citizens of Washington under the private affairs inquiry goes so far as to limit warrantless access to individual’s utility bills, and

75. Id. at 595.
76. Id.
77. Id.
78. Id. at 599.
79. WASH. CONST. art. 1, § 7.
80. Young, 867 P.2d at 596.
81. Id. at 597. See also State v. Myrick, 688 P.2d 151 (1984).
82. Young, 867 P.2d at 597.
overruling the federal case Greenwood, granting citizens a measure of privacy concerning their garbage.\(^{83}\)

Clearly a heightened level of privacy protection exists in Washington based on its state constitution. The logic behind the state court's opinion regarding the use of thermal imaging is apparent. The court protected the rights of its citizens as dictated by its own interpretation of the Washington Constitution and its own case law.

In 1997, in State v. Siegel, the state of Montana was also confronted with the question of warrantless thermal imaging by law enforcement.\(^{84}\) In Siegel, law enforcement used a thermal imager to scan a shed suspected of housing a marijuana grow operation. The building registered a reading consistent with the heat produced by the grow lamps necessary to sustain marijuana plants.\(^{85}\) Based on the read out from the thermal imager and information obtained from citizen informants a search warrant was issued. The search yielded marijuana and marijuana plants.\(^{86}\) Siegel, one of three individuals arrested, was charged with criminal possession with intent to sell and criminal production or manufacture of a dangerous drug under Montana law.\(^{87}\) After pleading guilty, Siegel appealed the district court's denial of his motion to suppress all evidence linked with law enforcement's warrantless use of a thermal imager.\(^{88}\) The Montana Supreme Court held that under the state's heightened privacy rights warrantless thermal imaging was a violation of the Montana Constitution Article II, Sections 10 and 11.\(^{89}\)

The Montana Supreme Court based its decision squarely on the privacy language found in Article II, Section 10 and 11 of the Montana Constitution. Article II, section 10 of the Montana Constitution states: "Right of Privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."\(^{90}\) The Montana court relied on the U.S. Supreme

83. Young, 867 P.2d at 604 n.3. See also In re Rosier, 717 P.2d 1353 (Wash. 1986); State v. Boland, 800 P.2d 1112 (Wash. 1990).
85. Siegel, 281 Mont. at 254, 934 P.2d at 178.
86. Siegel, 281 Mont. at 255, 934 P.2d at 178-79.
88. Siegel, 281 Mont. at 256, 934 P.2d at 180.
89. Siegel, 281 Mont. at 257, 934 P.2d at 180.
90. MONT. CONST. art. II, §10.
Court's holdings in *Katz* and *Smith*, including the two-prong *Katz* test. However, the court also used the "unique privacy provisions" found in Montana's Constitution.³¹ The Montana Constitution affords broader protection to citizens than does the Fourth Amendment of the Federal Constitution. The Montana Supreme Court went further and clarified when independent grounds exist for a decision to break with federal law, that federal law will not bind Montana.³² The Montana court applied the *Katz* test and found Siegel did have a subjective expectation of privacy as to his property based on the steps taken to demarcate the property as private. Siegel's property contained, "No Trespassing" signs, fencing and an enclosed shed.³³ The second prong of the *Katz* test was also upheld under an earlier holding which grants a citizen of Montana an "expectation of privacy in an area of land that is beyond the curtilage which the society of this state is willing to recognize as reasonable."³⁴ The Montana court stated Montanans would be "shocked" if the court were to allow warrantless thermal imaging of private residences.³⁵

Texts from the 1972 Montana Constitutional Convention also speak to the framers' intentions to create a right of privacy on par with other inalienable rights.³⁶ Finally, the court concluded that absent a compelling state interest, other than the enforcement of the criminal code, thermal imaging without a warrant was a violation of Article II, Section 10 and 11 of the Montana Constitution.³⁷

While the structure of the analysis between the Washington and Montana courts is fundamentally the same as that applied by the Supreme Court the difference lies in the privacy clauses imbedded in the states constitutions. While it makes perfect sense under the heightened expectation of privacy in Washington and Montana to disallow the use of thermal image devices without a warrant, the same cannot be said in a federal system void of just such a constitutionally protected heightened

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³¹ *Siegel*, 281 Mont. at 262, 934 P.2d at 183.
³³ *Siegel*, 281 Mont. at 274, 934 P.2d at 190.
³⁴ *Id.* (quoting *State v. Bullock*, 272 Mont. 361, 384, 901 P.2d 61, 75-76 (1995)).
³⁵ *Id.*
³⁶ *Siegel*, 281 Mont. at 276, 934 P.2d at 191-92 (quoting Delegate Campbell, Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, pages 1681-82).
³⁷ *Siegel*, 281 Mont. at 278, 934 P.2d at 192.
expectation of privacy.

IV. KYLLO V. UNITED STATES

In Kyllo v. United States 98 the Supreme Court was asked to address ever developing technology and its collision course with the Fourth Amendment. As surveillance technology continued to evolve, law enforcement personnel's arsenal of tools also evolved. This created a situation where the proverbial lines between privacy and public safety began to blur for law enforcement agencies as advanced surveillance technology, specifically thermal imaging, became a tool in the war against drugs in the United States.99

A. Facts and Lower Courts Holding

In 1991, the United States Department of the Interior suspected Danny Kyllo was running a marijuana growing operation out of his home, a triplex in Florence, Oregon. In order to corroborate the informant's tip and to gather further evidence, agents went to Kyllo's address to scan the area with an Agema Thermovision 210. The agents scanned the front and back of the home while remaining in their vehicle. The thermal imager showed uncharacteristic warmth on the roof over the garage and in a sidewall of Kyllo's home as compared to his neighbors' homes.100

A Federal Magistrate Judge issued a search warrant for Kyllo's home based on utility bills, informants' tips, and the thermal image read out. During the search of Kyllo's home agents found an indoor growing operation with over 100 plants. The government indicted Kyllo on one count of manufacturing marijuana.101

In Federal District Court Kyllo moved to suppress the evidence seized from his home. Following denial of his motion, Kyllo entered a guilty plea conditional to his appeal. The Court of Appeals for the Ninth Circuit remanded the case back to the District Court for an evidentiary hearing to determine the intrusiveness of thermal imaging. The District Court held thermal imaging was non-intrusive and thus no warrant was

99. See supra note 1.
100. Kyllo, 533 U.S. at 30.
101. Id.
required. The lower court reasoned that the device "did not show any people or activity within the walls of the structure."\textsuperscript{102} Based upon their findings the District Court upheld the validity of the warrant based on thermal imaging and reaffirmed the denial of Kyllo's motion to suppress.\textsuperscript{103}

The Court of Appeals for the Ninth Circuit affirmed the lower court decision. The Ninth Circuit held that Kyllo had not subjectively manifested his intent to protect his privacy by concealing the heat emanations from his home. Moreover, even if Kyllo had tried to hide the emanations, there was no objectively reasonable expectation of privacy for "amorphous 'hot spots' on the roof and exterior wall."\textsuperscript{104}

On application to the United States Supreme Court the question before the court was whether or not warrantless thermal imaging of a private residence was a violation of the Fourth Amendment prohibition against unreasonable search and seizure.\textsuperscript{105}

\textbf{B. Majority Holding}

The U.S. Supreme Court held warrantless exterior thermal imaging of a private home was a violation of an individual's right to be free from unreasonable search under the Fourth Amendment. The Court stated that any sense-enhancing technology that would permit law enforcement access to information otherwise not available without physical intrusion into the home was a violation of the Fourth Amendment.\textsuperscript{106}

The Court first looked to determine if the warrantless use of a thermal image device was a search under the \textit{Katz} test.\textsuperscript{107} The Court specifically looked to whether or not "the individual manifested a subjective expectation of privacy in the object of the challenged search" and whether society was willing to recognize that expectation as reasonable.\textsuperscript{108} The Court explained that under the modified \textit{Katz} test, neither the pen register in \textit{Smith}\textsuperscript{109} nor the aerial surveillance in \textit{Ciraolo}\textsuperscript{110} constituted

\begin{thebibliography}{9}
\bibitem{102} Id. at 30.
\bibitem{103} Id.
\bibitem{104} Id. at 31.
\bibitem{105} Id. at 29.
\bibitem{106} \textit{Kyllo}, 533 U.S. at 34.
\bibitem{107} Id. at 32.
\bibitem{108} Id. at 33 (quoting \textit{Ciraolo}, 476 U.S. at 211).
\bibitem{109} 442 U.S. at 743-744.
\bibitem{110} 476 U.S. at 211.
\end{thebibliography}
searches under the Fourth Amendment. However, the Court distinguished the use of a thermal image device from the use of advanced aerial surveillance equipment because the area being viewed was immediately adjacent to a private home "where privacy expectations are most heightened."\textsuperscript{111} Based on the heightened expectation the Court afforded to a private home and the area immediately adjacent to that home, the information acquired by the thermal imager was held to be the result of a search.\textsuperscript{112}

The Court went on to clarify that a bright line exists at the entrance of an individual's home and to withdraw any protection from that area of law would be "to permit police technology to erode the privacy guaranteed by the Fourth Amendment."\textsuperscript{113} The Court created a "general public use" standard to clarify which technology requires a warrant. "General public use" was defined as when the government uses a device generally available to the public to explore details of a home.\textsuperscript{114} Any information obtained as a result of surveillance by technology available to the general public is not a search and does not require a warrant to fall within the confines of the Fourth Amendment.\textsuperscript{115}

The Court dismissed the Government's contention that thermal imaging was constitutional because it only detected heat radiating from the external surfaces of the home.\textsuperscript{116} The Court held that all details of a home should be considered intimate details, including how warm or cold an individual keeps their residence.\textsuperscript{117}

The use of a thermal image device was ruled a search and held to be an unconstitutional violation of an individual's Fourth Amendment protection against warrantless search and seizure.\textsuperscript{118}

\textit{C. Dissent}

The four dissenting Justices argued that the majority created a new, unclear rule when the previous rule had been

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\item \textsuperscript{111} \textit{Kyllo}, 533 U.S. at 33 (quoting \textit{Ciraolo}, 476 U.S. at 213).
\item \textsuperscript{112} \textit{Kyllo}, 533 U.S. at 34-35.
\item \textsuperscript{113} \textit{Id.} at 34.
\item \textsuperscript{114} \textit{Id.} at 34-35.
\item \textsuperscript{115} \textit{Id.} at 40.
\item \textsuperscript{116} \textit{Id.} at 36.
\item \textsuperscript{117} \textit{Id.} at 38.
\item \textsuperscript{118} \textit{Kyllo}, 533 U.S. at 40.
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clearly delineated by the Court's own case law. The dissent characterized the majority opinion as "unprecedented [and] quite difficult to take seriously."119 The Fourth Amendment protects against searches and seizures inside a home and the technology involved in this case is dealing only with emanations detected outside of a home.120 The dissent based its opinion on the basic principle that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."121

The dissent argued that there exists a distinction between "through the wall surveillance" and "off the wall surveillance."122 "Through the wall surveillance" applies when the method of surveillance allows the user to have direct access to information in otherwise constitutionally protected areas. "Off the wall surveillance" is taken from the outside of the home.123 The use of "off the wall surveillance" does not invade an area otherwise constitutionally protected nor does the dissent believe that heat emanations are protected as part of the home.124 Kyllo specifically vented his home to release the increased amount of heat in his home from his growing operation.125

The dissent argued that by strictly following the Katz test the Court should have upheld the warrantless thermal imaging as constitutional. The first prong of the Katz test asks whether or not the individual has a reasonable expectation of privacy in the area being searched. The dissent argued that the homeowner had a reasonable expectation of privacy concerning only what takes place within the home. The thermal imaging in question did not obtain "any information regarding the interior of the home."126 The dissent determined that the exterior venting of Kyllo's home removed any subjective expectation of privacy Kyllo could have possessed.127

The dissent looked to the second half of the Katz test as to whether society would recognize a drug grower's expectation of

119. Id. at 43 (J. Stevens, dissenting).
120. Id. at 42.
121. Id.
122. Id. at 41.
123. Id.
124. Kyllo, 533 U.S. at 41.
125. Id. at 42-43.
126. Id. at 44.
127. Id. at 43.
privacy for his ventilation of the heat from his marijuana crop.\textsuperscript{128} The dissent stated they were confident that an individual's expectation that heat waves would remain private was "surely not 'one that society is prepared to recognize as reasonable."\textsuperscript{129}

The Court had previously held that warrantless searches of property in plain view are constitutional.\textsuperscript{130} The dissent found it difficult to comprehend that the framers intended to protect the venting of heat emanations from a drug grower's home under the Fourth Amendment protection against the warrantless physical intrusion of the home.\textsuperscript{131} The dissent compares the inference obtained by a thermal image device with the similar inference that can be obtained by looking through someone's garbage once it is placed outside the home.\textsuperscript{132} The indirect information obtained through both methods of surveillance should not be constitutionally protected. An inference should not be considered a constitutionally protected search.\textsuperscript{133}

The dissent concluded by commending the majority on its attempt to protect citizens from threats to privacy by advancing technology, however, they also pointed out that the majority opinion is a perfect demonstration of a lack of judicial restraint. The dissent instead would have preferred the majority to leave the regulation of surveillance equipment to legislators "rather than to shackle them with prematurely devised constitutional constraints."\textsuperscript{134}

V. ANALYSIS

The Court's decision in \textit{Kyllo} was a blanket decision attempting to cover all advances in surveillance technology while ignoring previous case law and the lower courts interpretation of that case law. The Rehnquist Court, known for its conservative majority, often focuses its attention on state rights.\textsuperscript{135} States like Washington and Montana had already sent a clear message to the high court and the bench was listening. The Supreme Courts holding in \textit{Kyllo} seemed to follow decisions

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\item \textsuperscript{128} \textit{Kyllo}, 533 U.S. at 44.
\item \textsuperscript{129} \textit{Id.} at 44 (quoting \textit{Katz}, 389 U.S. at 361).
\item \textsuperscript{130} \textit{Payton}, 445 U.S. at 586.
\item \textsuperscript{131} \textit{Kyllo}, 533 U.S. at 47-48.
\item \textsuperscript{132} \textit{California v. Greenwood}, 486 U.S. 35 (1988).
\item \textsuperscript{133} \textit{Kyllo}, 533 U.S. at 44.
\item \textsuperscript{134} \textit{Id.} at 51.
\item \textsuperscript{135} Ruth Colker & Kevin M. Scott, \textit{Dissing States?: Invalidation of State Action During the Rehnquist Era}, 88 VA. L.REV. 1301, 1303 (2002).
\end{itemize}
from two state supreme courts, based on state constitution privacy clauses, summarily rejecting earlier federal case law and reasoning concerning law enforcement personnel's use of technology without a warrant.

First, the federal case law that existed prior to *Kyllo* painted a clear picture of when surveillance technology could be utilized by law enforcement without a warrant. If the Court had properly applied the *Katz* test, under the previous federal case law, the warrantless thermal imaging of a private home would not be a violation of the Fourth Amendment as demonstrated by the many federal courts having used that standard. Starting with the *Silverman* case, the Court made it very clear that while the home was to be considered a protected private sphere, it was not absolute. In *Katz*, a test was created to determine when a privacy expectation is protected, but the Court went on to clarify that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Following the logic of the Court's reasoning, anything vented to the outside of a home should be considered exposed to the public and not subject to Fourth Amendment protection. The increased warm air vented to the outside of a small triplex community would most definitely be noticed by the neighbors, this analysis points to one of the problems in the *Kyllo* opinion.

A correct application of the *Katz* test, as developed by the aforementioned case law should have led the Court to find that the warrantless thermal imaging of a private residence is an acceptable tool of law enforcement. The first prong of the *Katz* test asks whether the individual had a subjective expectation of privacy to the area being searched, if so, was society willing to recognize such an expectation as reasonable? If both prongs of the *Katz* test are met then the act was a search and falls under Fourth Amendment protection. In *Kyllo*, the suspect was growing over 100 marijuana plants in a community of triplex apartments; he was aware of his increased utility usage and the excess heat that had to be vented to the exterior of his home. The evidence obtained through the cursory thermal image scan was information readily obtainable from Kyllo's utility company.

136. 365 U.S. at 511.
137. 389 U.S. at 351.
as well as from observant neighbors.

Because common sense dictates that air vents release the air from a private home into public airspace it would have been a much more logical step for the Court to have likened such activity to the aerial surveillance discussed in Ciraolo and Dow Chemical. In both Ciraolo and Dow Chemical aerial surveillance was upheld without a warrant because the flyovers of private homes were not considered a search at all. Further, under the Court's holding in Oliver, the case involving a marijuana crop in an open field adjacent to a private home, the Fourth Amendment does not extend to open fields. The heated air surrounding the home that was used by the crude thermal imaging equipment to show "amorphous hot spots" by the federal agents would not be considered a search under the case law created in both the aerial surveillance and open field cases.

Under a correct application of the Katz test, no search occurred, so it would be unnecessary to move on to the second prong of the Katz test. However, under the correct application of the case law pertaining to the second prong of the Katz test, thermal imaging technology would also not be considered by society as a violation of a legitimate privacy expectation. Although the Supreme Court held that the Fourth Amendment "draws a firm line at the entrance to the house," the technology involved was not an invasion of privacy as no intimate details were observable.

Second, although technology has advanced since 1991, and the Court's decision in 2001, the only piece of equipment before the court was the crude, low tech Thermo Vision 210, and thus any speculation as to other technologies or possible privacy invasions was inappropriate. However, even with the advancements in technology over the last decade the problem does not lie with the Court's holding but with the logic behind the decision. The technology available today certainly makes it easier to understand why the Court made such a far-reaching decision, but herein lies the problem. The Court's decision was based on the fear of marauding bands of law enforcement peering into individual homes without restraint and not on the existing federal case law.

141. 476 U.S. at 218; 476 U.S. at 238.
142. 466 U.S. at 176.
144. Payton, 445 U.S. at 590.
The Court makes it clear that the opinion being rendered in *Kyllo* was not being limited to the facts presented; instead the Court attempted to answer all questions regarding technological advances in surveillance equipment with its general public use doctrine.\(^{145}\) If a device is in general public use then it is acceptable to use without a warrant, any high tech devices would be relegated to the land of the Fourth Amendment warrant requirement.\(^{146}\) In the facts presented in *Kyllo* general police work would have produced the same results and facts for a warrant. A walk about the premises, on the public sidewalks, a conversation with neighbors concerning strange warm areas in adjacent yards, or strange odors coming from a nearby vent would all have given law enforcement the same information that the general thermal image scan produced.\(^{147}\) All of the available extrinsic evidence would allow law enforcement the same information following further investigation, thus overcoming the *Karo* standard that the information garnered cannot be discoverable only from inside the home.\(^{148}\) The key behind law enforcements use of thermal imaging is the ability to quickly answer questions concerning possible drug manufacturing.

Although the inferences discovered through the use of a thermal image device were crude in the facts of *Kyllo*, technology continues to develop at an astonishing rate. The difficulty with the *Kyllo* decision is that the Court was asked a specific question regarding technology that measured the external temperature of a home from a public vantage point and turned it into one of the foremost cases on an individual's right to privacy in the home. Technology does continue to develop but the Court should have followed its own advice, "Fourth Amendment cases must be decided on the facts of each case."\(^{149}\) While the protection extended to private homes by the U.S. Constitution and the U.S. Supreme Court is of high importance it should not be placed above the paramount goal of the court system, which should be to create unambiguous law to be applied by the rest of judiciary. It was inappropriate of the Court to disregard the law and generically extend the holding in *Kyllo* to still unrealized technology. The application of any right created out of the mists of the halls of justice creates a slippery

\(^{145}\) 533 U.S. at 34.
\(^{146}\) *Id.* at 35.
\(^{147}\) *Id.* at 43.
\(^{148}\) 468 U.S. at 718-19.
\(^{149}\) *Dow Chemical*, 476 U.S. at 238, n.5.
slope, which could allow for further seemingly random decisions.

Finally, both the Washington and the Montana supreme courts describe the Fourth Amendment of the Federal Constitution as "provid[ing] the minimum protection afforded citizens against unreasonable searches by the government."150 While both states also tackled the Fourth Amendment analysis, their holdings were based on state law. The logic used by both states to end the warrantless use of thermal imaging technology is compelling. Both state courts realized their constitutions offered more protection than the federal government and qualified their holdings based strictly on their state laws. But surprisingly, the United States Supreme Court was able to fashion an opinion that more closely resembled the state court decisions than any other previous federal opinion regarding privacy and all of this was accomplished without the aid of the specific privacy clauses used by the state supreme courts.

VI. CONCLUSION

It appears the United States Supreme Court looked at two well crafted state opinions and saw a level of privacy they believed should exist for all citizens under the federal government. However, under the federal case law and the rulings of lower federal courts such a far reaching right to privacy does not make sense. The Supreme Court demonstrated a lack of judicial restraint when it silently adopted as the new federal mandate the logic of state courts with privacy clauses. Not only did the Court change the direction of privacy law in the United States but it also created a privacy right established on weak precedent and state court decisions based on state constitution privacy clauses. Several issues were never even addressed by the majority opinion. For instance, when does a surveillance device become available for general public use, the new standard created in Kyllo? Is it when the item can be purchased online, or when it is available on the shelves of Walmart? An even larger question looms with regard to the Kyllo holding for non-residential buildings. With the majority’s focus on the importance of protecting the sanctity of the home, does the Kyllo holding extend to a marijuana operation in an office building?151 Unfortunately, in its eagerness to protect

150. Young, 867 P.2d at 596; Siegel, 281 Mont. at 275, 934 P.2d at 191.
151. Currently the Fourth Amendment protection of offices and commercial buildings is based upon the perceived expectation of privacy and societies willingness to
privacy from technological advancements the Court created a rule that only muddies the scope of constitutional warrantless searches and leaves more unanswered questions than legal guidance.
