If It Ain't Broke, Don't Fix It: The Supreme Court's Unnecessary Departure from Precedent in KYLLO v. United States

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Introduction

At 8:45 a.m. (EDT) on September 11, 2001, a hijacked passenger jet, American Airlines Flight 11\(^1\) crashed into the North Tower of the World Trade Center in New York City.\(^2\) Watching from our televisions and listening to our radios, Americans united in similar thoughts and questions. Was this an accident? Failure of the air traffic control? A pilot error? How could this have happened? A stunned nation could do nothing but watch as eighteen minutes later a second hijacked aircraft, United Airlines Flight 175,\(^3\) slammed into the South Tower of the World Trade Center.\(^4\) One commercial jetliner crashing accidentally into one of the world's tallest buildings seemed marginally feasible—but when a second airplane hit, it started to become clear that this was no accident. As the buildings blazed and rescue workers tried courageously to reach those trapped in the injured towers, desperate employees in the two buildings jumped some seventy stories or more to their deaths.\(^5\)

At 9:30 a.m., President George W. Bush, speaking from Sarasota, Florida, announced that the nation had been struck by an “apparent terrorist attack.”\(^6\) Any remaining doubt about whether this was an act of terrorism was dispelled when not thirteen minutes after the President’s announcement, American Airlines Flight 77\(^7\) crashed into the Pentagon.\(^8\) At 10:10 a.m., the nightmare continued when a fourth hi-

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3. Flight 175 was also out of Boston, Massachusetts. *September 11: Chronology of Terror*, *supra* note 1.
5. Id.
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jacked plane, United Airlines Flight 93,9 crashed in Somerset County, Pennsylvania.10

A nation strangled by fear, devastation, and uncertainty mourned as later that morning on September 11, both World Trade Towers collapsed into an unimaginable heap of dust, debris, metal, and horrifically, human life.11 Among those lost were over seventy-eight police officers and roughly two hundred New York firefighters who, upon response to the scene, raced courageously into the burning buildings.12 Hundreds of airline passengers were sacrificed when their airplanes became virtual bombs.13 Thousands of Pentagon workers and tenants of the World Trade Center have never been found. It is safe to say, after such an unprecedented attack on our homeland, this nation will never be the same again.

As the shock of the attacks lessened in the days immediately following September 11 and the information started to become available, our questions changed from wondering, “Why?” to instead asking, “Who?”14 Well-founded suspicions have turned on the involvement of former Saudi businessman Osama bin Laden,15 who had allegedly been planning attacks on the United States from a military training

9. Flight 93 departed from Newark Airport at 8:01 am and was destined for San Francisco. United Airlines Addresses the Tragedy: The Official Statements Confirm the Horrible Truth, AMERICA AT WAR, Issue 02, 2001, at 24.

10. September 11: Chronology of Terror, supra note 1.

11. Id.

12. Id.


15. Frontline: A Biography of Osama bin Laden, at www.pbs.org/wgbh/pages/frontline/shows/binladen/who/bio.html (last visited June 2, 2002) (on file with DePaul Law Review). Born in 1957, bin Laden is the son of a construction mogul in the Saudi Kingdom. Id. Bin Laden was raised by a very dominating and disciplined father who died when bin Laden was 13 years old. Id. Bin Laden is highly educated, having graduated from King Abdul Aziz University in 1981. Id.

At an early age, bin Laden began forming an Islamic responsibility and lobbied “with his brothers, relatives, and friends at school to support the mujahedeen,” a religious organization. Id. In 1982, he decided to go to Afghanistan, and began to support military training camps in the defense of the mujahedeen. In 1986, bin Laden founded at least six of his own camps and fought against the Soviet army. Id. He spent about eight months of the year in Afghanistan, as opposed to his homeland, Saudi Arabia. Frontline: A Biography of Osama Bin Laden, supra.

Feeling that his organization was not properly structured, in 1988 Osama bin Laden called his complex “Al-Qa’edah,” which is Arabic for “The Base,” and arranged for proper documentation, which tracked the records of all visitors. Id. This is the base that has largely been responsible for the training and dissemination of anti-American warriors and literature. Id.
base in Afghanistan. The ruthless terrorists, whom he creates, will stop at nothing to wage Jihad, or Holy War, on the United States.

There is a new enemy, perhaps the most ruthless one we, as a nation, ever faced . . . the invisible foe . . . the terrorist! We do not know who they are or where they are. They do not follow any rules of engagement, have no regard for human life, even their own. They will kill or slaughter women and children and use them as pawns in their holy wars and crusade.

In the face of an event so horrific and uncontrollable, how will American intelligence ensure that something comparable or worse does not happen again? It appears as if conventional methods of surveillance will no longer suffice; "[t]he fact is that there is a level of sophistication and coordination no counter-terrorism experts had ever previously anticipated."

The Fourth Amendment, however, protects against unreasonable searches and seizures. When will the search for terrorists become unreasonable? Recently, the Supreme Court went to great lengths to prevent an improper search and seizure when it decided Kyllo v. United States. Justice Antonin Scalia, writing for the majority, laid down a hard-line rule: So long as the technology being employed to perform a search of one's home is not within the "general public use," the surveillance is a search within the meaning of the Fourth Amendment and is presumptively unreasonable when unaccompanied by a warrant. In the aftermath of September 11, this appears to be a problematic holding for two main reasons: (1) terrorists are simply not using conventional methods of communication, and therefore, traditional methods of surveillance will not be enough to ensure this sort of attack cannot be replicated; and (2) these terrorists are on American soil, right in our own backyard. It seems obvious then, in order to stop these terrorists from killing even more innocent civilians, intelligence is undoubtedly going to have to turn to technology that may not

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16. Id.
19. See infra note 71 and accompanying text.
21. Id. at 2046.
22. The Pearl Harbor of Terrorism, supra note 18 (quoting Anthony Cardesman).
23. Hijackers Identified: Swift Investigation Tracks Down Identities of Terrorists, supra note 14, at 58-59 (stating that the investigation for terrorists has taken authorities to Florida, Boston, Rhode Island, Maine, Massachusetts, as well as New York and Washington D.C.). Additionally, each of the four crashed jetliners are believed to have been flown by hijackers trained as pilots in the United States, according to Attorney General John Ashcroft.
be in the "general public use." In the wake of this devastating assault, when the safety of the United States is more volatile than it has arguably ever been, is the Supreme Court going to deny the U.S. government the right to perform the necessary terrorist surveillance and searches just because it lacks a warrant? It is highly unlikely. Realistically, the Court will probably bend over backwards to allow U.S. intelligence to take whatever measures are necessary in order to ensure that more American lives are not lost in vain.

When speaking of Fourth Amendment rights, it is generally hard to draw the line where issues of national security are at odds with personal liberty. However, the Supreme Court, with its holding in Kyllo, has set itself up for criticism. Not only has it created an all-encompassing rule regarding the use of technology, which will undoubtedly be undermined in the course of terrorist-hunting, but the holding from this case is also a vast departure from Fourth Amendment precedent. This Note explores the issue in detail.

Because Kyllo v. United States involved a young man who used high intensity lamps to grow marijuana in his home, Part II of this Note will begin by providing an overview of drug use and marijuana in the United States. This Note will explain how halide lights are used in indoor marijuana growth and the relevancy of thermal imaging to the crackdown on drug manufactures. A brief background on the Fourth Amendment and relevant search and seizure rules regarding the home is also appropriate and necessary, and is included in the background section. In greater detail, this Note will describe the facts and holdings from four pertinent cases, which are significant as precedent for the decision in Kyllo, which is discussed at length in Part III. Part IV will make comparisons between these cases and the Kyllo decision to show how the reasoning employed by the majority of the Kyllo Court was a faulty departure from pertinent precedent by which the Court is bound. Finally, in Part V of this Note, the concerns for the future of search and seizure law in the aftermath of the Kyllo decision will be addressed.

24. Kyllo, 121 S. Ct. at 2046.
25. Id.
26. See infra notes 33-54 and accompanying text.
27. See infra notes 55-70 and accompanying text.
28. See infra notes 71-80 and accompanying text.
30. See infra notes 196-238 and accompanying text.
31. See infra notes 239-340 and accompanying text.
32. See infra notes 341-365 and accompanying text.
II. BACKGROUND

This section will provide background information on drug use in the United States. It also explains how halide lights enable indoor marijuana growth, as well as how police authorities are using thermal imaging devices to regulate this new type of greenhousing. A brief discussion of pertinent Fourth Amendment search and seizure law is necessary for understanding the legal environment from which Kyllo was cultivated. Finally, there are four Fourth Amendment cases from which comparisons with Kyllo will ultimately be drawn in the Analysis section.

A. Overview of Drug Use in the United States

Although there are a number of illicit drugs available to those who so desire, the most commonly used drug in the United States is marijuana. These drugs are increasingly pervasive in American life. They cut across every gender, race, and socioeconomic level. In 1999, it was estimated that roughly 14.8 million Americans were current users of illicit drugs. Of teens between the ages of twelve and seventeen, more than one in ten used illegal drugs in 1995. Although this was a decrease since the 1970s, it was up almost 50% since


34. Drug Enforcement Administration. Marijuana, at http://www.usdoj.gov/dea/concern/marijuana.html (last visited June 2, 2002) (on file with DePaul Law Review). Marijuana refers to the leaves and flowering tops of the cannabis plants. Id. This drug can be consumed in one of two fashions: inhaling or ingesting it. Id. Marijuana comes in varying degrees of potency, depending on the breeding of the particular plant that is used to produce it. Id. Two derivative substances of the cannabis plant, sinsemilla and hashish, are particularly popular with habitual marijuana users. Id. This is because both substances have an extremely high concentration of delta-9-tetrahydrocannabinol, or THC, the active chemical in marijuana. Id. A greater concentration of THC in marijuana creates an intensified high for the user. The average THC content of cannabis products has risen over ten percentage points in the past several decades. Drug Enforcement Administration, Marijuana, supra.

Smoking or swallowing marijuana will generate a psychoactive effect on almost all users. It manifests itself by causing “euphoria, slowed thinking, and reaction time, confusion, impaired balance and coordination/cough, frequent respiratory infections; impaired memory and learning; [as well as] increased heart rate, anxiety; panic attacks; tolerance [and] addiction.” National Institute on Drug Abuse, Commonly Used Drugs, supra note 33.


37. Id.
1992. Of youths between the ages of eighteen and twenty-five, over 17% reported consuming illicit drugs in 1999. Five point one percent of the population ages twelve and older were monthly marijuana users in 1999. Marijuana was also the drug of choice for 87% of teenagers entering drug rehabilitation programs in 1999 in New York City. In 1999, almost 50% of high school seniors said they had used marijuana at least once in their lives, which was an increase since 1992.

In Chicago in 1999, 44.6% of adult males tested positive for marijuana consumption at the time of arrest. A shocking 74.4% of adult males who were arrested had positive traces of an illicit drug in their bloodstream, not exclusively marijuana. Logically speaking, it is apparent that there is a direct and significant correlation between drug abuse and crime in the United States.

Therefore, the United States is waging an ongoing battle in the war on drugs with the guidance of the Drug Enforcement Administration (DEA). In 2000, the DEA employed 9132 employees, 4561 of which were special agents actually investigating and taking down drug perpetrators and users. The DEA spent approximately $1.55 billion in an effort to combat drug abuse and trafficking in 2000 alone. However, the investment is paying off; since 1986 the DEA has seized 1,084,653 kilograms of marijuana during highway interdiction seizures. In that time, it has also intercepted other drugs worth an estimated street value of $592 million. In 1999 alone, the DEA made 328,490 domestic arrests for drug violation charges.

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38. The rate was highest in 1979 at 16.3%, declined to 5.3% in 1992, then increased to 10.9% in 1995. 
39. Drug Enforcement Administration, Marijuana, supra note 34. 
40. Id. 
41. Id. 
42. Id. In 1992, 32.6% of high school seniors reported using marijuana at least once in their lives. 
44. Id. 
46. Id. 
48. Id. 
Because of the increase in the prevalence of marijuana, the DEA has created the Domestic Cannabis Eradication and Suppression Program (DCE/SP), which focuses exclusively on the elimination of marijuana. Thirteen million dollars of the $1.55 billion DEA budget is allocated to DCE/SP. In 1999 alone, the program was credited with the elimination of 3,413,083 outdoor marijuana plants and 208,027 indoor plants. The Program also made 11,922 marijuana related arrests and seized almost $30 million in assets.

B. High Intensity Discharge Lamps and the Indoor Growth of Marijuana

With the advent of the DCE/SP and the pressure on the DEA to crack down on marijuana growth, trafficking, and consumption, many producers of the plant have relegated their business to indoor growing factories. These marijuana horticulturists use sophisticated indoor growing techniques such as high intensity halide lights, computerized

50. Drug Enforcement Administration: Marijuana Eradication, at http://www.usdoj.gov/dea/programs/marijuana/htm (last visited June 2, 2002) (on file with DePaul Law Review). Because marijuana is the most widely used and available drug in the United States, the DEA took an initiative to help eradicate marijuana with the introduction of a new program. Id. The DCE/SP was created by the DEA in 1979 and is the only nationwide program that exclusively addresses marijuana use and eradication. Id. DCE/SP began in Hawaii and California, but by 1985 it had reached the rest of the fifty states as well. Id. Success of the DCE/SP program has been attributed to the ability of participating agencies to share their information, technology, and field agents. Id. The DCE/SP has been triumphant in preventing the dissemination of domestically grown marijuana. Id.

51. Drug Enforcement Administration: Marijuana Eradication, supra note 50.

52. Id.

53. Id.

54. Id. $26,911,262 worth of marijuana was seized. Id.

55. Id.

56. Gardener's Supply Company, Growing Under Lights; Grow Plants Even When the Sun Doesn't Shine, at http://www.gardeners.com/gardening/BGB_underlightsc.asp (last visited June 2, 2002) (on file with DePaul Law Review). High Intensity Discharge Lamps, or HID's, are utilized largely by indoor commercial gardeners and intense horticulturists. These ultra-high wattage lights are extremely bright and efficient. There are four categories of HID lamps: high pressure sodium, metal halide, low pressure sodium, and mercury vapor. Id. A four hundred-watt high pressure sodium or metal halide bulb can illuminate a growing area of up to twenty-five square feet. Homegrown Hydroponics, Lighting Systems: Use and Identification, at http://www.hydroponics.com/c-light.html (last visited June 2, 2002) (on file with DePaul Law Review). A one thousand-watt bulb of either variety is powerful enough to effectively provide artificial sunlight to a garden of roughly forty-nine square feet. Id. HID's "generally emit twice the amount of light (lumes) as an incandescent or fluorescent bulb." Gardener's Supply Company, Growing Under Lights; Grow Plants Even When the Sun Doesn't Shine, supra. These lights are so powerful they are often used to illuminate such areas as malls, sports fields, ballparks, and streets. Id.

Metal halide lights emit a bluish-white light, which is premium for growing plants. Homegrown Hydroponics, Lighting Systems: Use and Identification, supra. These lamps provide a spectrum of light, much like sunlight. Id. It helps to keep the leaves green, healthy, and vibrant:
irrigation, and hydroponics cultivation to make their plants vibrant, healthy, strong, and productive.\(^5\) Additionally, special fertilizers, plant hormones, steroids, insecticides, and genetic engineering all work to increase the rates of marijuana foliage and growth.\(^6\) The stringently controlled indoor growing environment is conducive to the growth of marijuana at the highest potencies.\(^7\) Without the harsh elements of mother nature to interfere, the plants can be cultivated year-round, even in someone’s home or garage.\(^8\)

C. Thermal Imaging and the Detection of Indoor Marijuana Growth

A thermal imager is a scanning device that identifies the heat emitted by an object into the surrounding air.\(^9\) From these infrared emissions, a virtual black and white photograph of the relative levels of heat in a given area is created by the scanner.\(^10\) The more heat an object or an area emanates, the lighter or whiter the object or area will appear on the scan.\(^11\) An object that appears darker on the scan, (typically, varying shades of gray or even black) is presumed to be relatively cool in comparison to its environment.\(^12\) The imager is a non-intrusive device that records tepidity; it does not trespass into the home with lasers, beams, or rays.\(^13\) The device “operates somewhat like a video camera showing heat images.”\(^14\) The thermal imaging device does not have the capacity to show people or activity within a building—only the heat being emitted therefrom.\(^15\)

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5. Drug Enforcement Administration, Marijuana, supra note 34.
6. Id.
7. Id.
8. Id.
9. Id. Indoor plants range from several plants grown in a closet, to thousands of plants grown in elaborate, specially constructed greenhouses. Id.
11. Jeffrey P. Campisi, The Fourth Amendment and New Technologies; The Constitutionality of Thermal Imaging, 46 VILL. L. REV. 241, 244 (2001) (stating that “the imager then converts the heat into a color image, usually in the form of a black and white two-dimensional picture.”).
12. Kyllo, 121 S. Ct. at 2041 (stating that “the imager converts radiation into images based on relative warmth—black is cool, white is hot, shades of gray connote relative differences.”).
13. Id.
15. Kyllo, 121 S. Ct. at 2041.
16. Id. at 2048.
For many years, this technology has been utilized by the military, but increasingly, law enforcement agencies are making use of the thermal imaging device to “supplement the probable cause necessary to obtain a search warrant and contribute to the discovery and eradication of indoor operations.”68 Ideally, if the device detects “hot spots” in the home of an individual, this will give credence to already existing suspicions that an indoor growing operation is actually underway behind closed doors.69 With the thermal imaging device to bolster probable cause, more frequently the law enforcement agents are able to obtain warrants to search for drugs and other contraband in suspicious homes.70

D. The Fourth Amendment and Searches of the Home

The Fourth Amendment of 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 seized.71

In layman’s terms, the Fourth Amendment prohibits unreasonable searches and seizures, and it also requires that probable cause exist before a search warrant is issued.72 The Fourth Amendment applies only to government searches and seizures; private parties are “shielded from Fourth Amendment scrutiny.”73

“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.”74 There is a firm line at the entrance to the home environment and without extenuating circumstances this line cannot be crossed without a warrant.75 Any physical invasion of

68. Lomas, supra note 65, at 800 (citing Mindy G. Wilson, The Prewarrant Use of Thermal Imagery: Has this Technological Advance in the War Against Drugs Come at the Expense of Fourth Amendment Protections Against Unreasonable Searches?, 83 Ky. L.J. 891, 893 (1994)).
70. See, e.g., Kyllo, 121 S. Ct. at 2041. A Federal Magistrate Judge issued a warrant that authorized a search of Danny Lee Kyllo’s home based on tips from informants, electric bills, and, most importantly, a thermal imaging scan that revealed high concentrations of heat over the garage of Kyllo’s house. Id. This search revealed over 100 marijuana plants. Id. For more information on the facts of Kyllo, see infra notes 196-238 and accompanying text.
71. U.S. CONST. amend. IV.
73. Id. at 884.
74. Kyllo, 121 S. Ct. at 2041 (citing Silverman v. United States, 365 U.S. 505, 511 (1961)).
the home, "by even a fraction of an inch," is too much. Therefore, this means before an officer can penetrate the home environment, he must obtain special permission from a magistrate. However, the "Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." An officer, just because he is in the area of the home, should not have to avert his eyes from seeing something that may be construed as private. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Therefore, if an officer can see something from a thoroughfare that is readily accessible to the public at large, there will be no violation of privacy because there was no expectation of privacy in the first place. The "mere fact that an individual has taken measures to restrict some views of his [or her] activities" does not preclude an officer's observations of clearly visible activities from a public vantage point where he has a right to be. Even if an individual goes to great pains to prevent an officer from finding out about clandestine and perhaps illegal activity, if the officer can find evidence of that activity from a public place, there will be no violation of privacy. The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy. This involves inquiries into: (1) whether the individual manifested a subjective expectation of privacy in the object of the challenged search; and (2) whether society is willing to recognize that expectation as reasonable.

E. A Discussion of Relevant Fourth Amendment Precedent Regarding Search and Seizure in and Around the Home

Although there are many cases involving search and seizure that extend outside the immediate area of the home, Kyllo involves a home search, and thus the cases below, which primarily address just this sort of activity, are most relevant to an analysis of Kyllo's departure from precedent.

76. Kyllo, 121 S. Ct. at 2045 (quoting Silverman, 365 U.S. at 512).
78. Id. (emphasis added).
79. Id. at 216.
81. Id.
1. Katz v. United States

Arriving before the Supreme Court in 1967, Katz v. United States is often considered the landmark case for search and seizure authority. Petitioner Katz was convicted under 18 U.S.C. § 1084, having been charged with eight counts of transmitting wagering information by telephone across state lines. His conviction rested largely on evidence put forth by FBI agents who, unbeknownst to Katz, attached a listening and recording device to the outside of the telephone booth from which Katz was placing his calls. The Court of Appeals for the Ninth Circuit affirmed the conviction and rejected Katz’s argument that the eavesdropping had occurred in violation of his Fourth Amendment protections against unreasonable search and seizure. The Supreme Court was called upon to address the Fourth Amendment implications in the case.

The majority opinion, written by Justice Potter Stewart, held that the legitimacy of a search and seizure should not be defined by the locale in which the search or seizure takes place. Instead, “[t]he Fourth Amendment protects people, not places.” This means that even in an area, which is both accessible and exposed to the public, if there are nonetheless bona fide privacy expectations, the Fourth Amendment will protect those expectations from violation. When Katz stepped into that phone booth and shut the door behind himself, he was trying to eliminate “the uninvited ear.” To this privacy he was entitled, and Katz did not forfeit this right to privacy by placing his phone calls from a place where he could be readily observed.

82. 389 U.S. 347 (1967).
83. Id. at 348.
84. Id.
85. Id.
86. Id. at 348-49. The court of appeals reasoned that without a physical penetration of the area occupied by Katz, there could be no Fourth Amendment violation. Id.
87. Katz, 389 U.S. at 349. The Supreme Court considered “whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.” Id.
88. Id. at 350 (stating that “the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase constitutionally protected area.”).
89. Id. at 351.
90. Id. (stating that “but what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).
91. Id. at 352.
92. Katz, 389 U.S. at 352 (stating that “[o]ne who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.”).
Justice John Harlan, in a concurring opinion, summarized the main holdings of *Katz*. *Katz* stands for the proposition that where a constitutionally protected area is invaded without a search warrant, such a search will be presumptively unreasonable. More importantly, however, Justice Harlan summarized the test that has emerged as a result of *Katz*. The test is two-pronged and requires that in order for an area to be considered constitutionally protected under the Fourth Amendment: “first . . . the person [must] have exhibited an actual (subjective) expectation of privacy and, second that . . . expectation [must be] one which society is prepared to recognize as ‘reasonable.’” Since its inception in 1967, the *Katz* test has been cited, in full or in part, in almost every Fourth Amendment case the Supreme Court has considered.

*Katz* had one dissenter, Justice Hugo Black, who felt the majority’s decision reached in the foregoing case was an effectual redrafting of the Fourth Amendment, designed “to bring it into harmony with the times” just to reach a result which comports with apparent contemporaneous public sentiment.

2. Smith v. Maryland

Almost twelve years after *Katz*, the Supreme Court was called upon to decide another Fourth Amendment case regarding the use of the telephone and the privacy implications involved therewith in *Smith v. Maryland*. A woman named Patricia McDonough was robbed on March 5, 1976. She was able to give the police a description of her intruder as well as the 1975 Monte Carlo he was driving at the time of the crime. Shortly thereafter, McDonough began to experience menacing and obscene phone calls from an individual claiming to be the robber. She also saw what she believed to be the same Monte Carlo driving by her house and was able to obtain the license number. In tracing the license plate, it was discovered by the police that

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93. *Id.* at 361 (Harlan, J., concurring).
94. *Id.*
98. *Id.* at 737.
99. *Id.*
100. *Id.* On March 16, 1976 the police actually saw a man fitting the defendant’s description driving through McDonough’s neighborhood. *Id.*
101. *Id.* at 737 (stating that “[o]n one occasion, the caller asked that she step out on her front porch; she did so, and saw the 1975 Monte Carlo she had earlier described to police moving slowly past her home.”).
the registered owner of the car was the petitioner, Michael Lee Smith. At the request of the police, the telephone company "installed a pen register at its central offices to record the numbers dialed from the telephone at [Smith's] home." The police had no warrant for the pen register. The policemen's suspicions were confirmed with the employment of the pen register, which showed that on March 17 a call was placed from Smith's residence to the home of Patricia McDonough. Evidence from the pen register was used to obtain a warrant of Smith's home where police discovered evidence incriminating him in the robbery of Patricia McDonough. Smith was subsequently arrested and charged with robbery.

At a pretrial motion, Smith sought to suppress evidence following from access to the pen register because no search warrant was obtained for its installation. The trial court denied the motion, and Smith was convicted of robbery, receiving a six-year prison sentence. The Supreme Court was ultimately called upon to answer the question of whether the installation and use of a pen register con-

102. Smith, 442 U.S. at 737.
103. Id. A pen register is a device which, when installed by the phone company, records all telephone numbers dialed from an individual's home. Id.
104. Id.
105. Id.
106. Id.
107. Smith, 442 U.S. at 737. When the search warrant of Smith's home was executed, the police discovered a page in his phone book was turned down. Id. This page contained the name and telephone number of Smith's alleged robbery victim, Patricia McDonough. Id. The phone book was seized and eventually used as evidence against Smith in the robbery trial. Id.
108. Id.
109. Id.
110. Smith, 442 U.S. at 737-38. The trial court held that the warrantless installation of the pen register device was not a violation of the Fourth Amendment. Id.
111. Id. at 737.
112. Id. at 738. Prior to his appeal to the Maryland Supreme Court, Smith appealed to the Maryland Court of Special Appeals. Id. However, "the Court of Appeals in Maryland issued a writ of certiorari to the intermediate court in advance of its decision in order to consider whether the pen register evidence had been properly admitted" at Smith's trial. Id. The court of appeals in Maryland upheld and confirmed Smith's conviction. Smith, 442 U.S. at 738. Its decision was based largely on the fact that there is no reasonable expectation of privacy with regard to telephone numbers dialed. Id. The court of appeals held that where there is no reasonable expectation of privacy, there can be no search in violation of the Fourth Amendment, and therefore a warrant is immaterial. Id. However, three judges vigorously dissented and argued that there is a legitimate expectation of privacy with regard to phone numbers. Therefore, absent a warrant, the installation of a pen register would be constitutionally impermissible. Id. The Maryland Supreme Court ultimately granted certiorari to resolve the conflict, which existed as to the constitutionality of the pen register device. Id.
stitutes a search within the meaning of the Fourth Amendment.\textsuperscript{113} The opinion, written by Justice Harold Blackmun, held that the installation and use of the pen register was not a search within the meaning of the Fourth Amendment.\textsuperscript{114}

[T]he application of the Fourth Amendment depends on whether the person invoking its protection can claim a "legitimate expectation of privacy" that has been invaded by government action. This inquiry normally embraces two questions: first, whether the individual . . . has exhibited an actual (subjective) expectation of privacy; and second, whether [his or her] expectation is one that society is prepared to recognize as "reasonable."\textsuperscript{115}

A pen register does not disclose the specifics of communication,\textsuperscript{116} but it reveals only the numbers that have been dialed.\textsuperscript{117} "Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers."\textsuperscript{118} The pen register is non-intrusive in nature, and it lacks disclosure of personal information.\textsuperscript{119}

The Court held there is no actual expectation of privacy with regard to telephone numbers dialed.\textsuperscript{120} It reasoned that the pertinent information is routed through the phone company, and all "telephone users . . . must convey phone numbers to the telephone company."\textsuperscript{121} Subscribers to the phone company realize "that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills."\textsuperscript{122} The Court seemed to admit it was presuming no expectation of privacy with regard to the telephone numbers dialed.\textsuperscript{123} The Court reasoned, however, that because the general public has knowledge concerning the operations of the phone company, it "is too much to

\begin{footnotes}
\item 113. \textit{id.} at 736. The literal question the Supreme Court addressed was "whether a particular form of government-initiated electronic surveillance is a 'search' within the meaning of the Fourth Amendment." \textit{Smith}, 442 U.S. at 736 (quoting \textit{Katz}, 389 U.S. at 351).
\item 114. \textit{id.} at 745-46 (holding "that petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not 'legitimate.' The installation and use of a pen register, consequently, was not a 'search,' and no warrant was required.").
\item 115. \textit{id.} at 740 (citing \textit{Katz}, 389 U.S. at 351, 361).
\item 116. \textit{id.} at 741.
\item 117. \textit{id.}
\item 118. \textit{id.}
\item 119. \textit{Smith}, 442 U.S. at 742 (stating that a pen register is limited in its capabilities).
\item 120. \textit{id.} (holding that "[it is doubtful] that people in general entertain any actual expectation of privacy in the numbers they dial.").
\item 121. \textit{id.}
\item 122. \textit{id.}
\item 123. \textit{id.} at 743 (stating that subjective expectations with regard to privacy in telephone numbers dialed cannot be "scientifically gauged.").
\end{footnotes}
believe that telephone subscribers... harbor any general expectation that the numbers they dial will remain secret.” Additionally, even though Smith placed the calls from within his home, seemingly a sacred area insofar as the Fourth Amendment is concerned, the Court nonetheless found this fact irrelevant. It held that “although [Smith's] conduct may have been calculated to keep the contents of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed.”

In the event Smith subjectively possessed an expectation of privacy, the Court did not find that expectation to be reasonable. The Court held that there is “no legitimate expectation of privacy in information voluntarily [turned] over to third parties.” By calling McDonough, Smith chose to transmit the information regarding the numbers he was dialing through the phone company. In using the phone, the Court held that he assumed the risk that the phone company would turn over the numbers he dialed at the request of the police. The Court ultimately concluded there was neither an actual expectation of privacy nor an objectively reasonable one with regard to the telephone numbers dialed. Therefore, use of the pen register, without a warrant, was not a violation of the Fourth Amendment.

One dissenting opinion, written by Justice Stewart, stated that the “numbers dialed from a private telephone are not without content;” they could easily reveal details or identity of people and places. Therefore, they should be afforded some privacy protections.

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124. Id.
125. Smith, 442 U.S. at 743 (holding that “the site of the call is immaterial for purposes of analysis in this case.”).
126. Id. (emphasis added). The Court went on: Regardless of his location, petitioner had to convey that number to the telephone company in precisely the same way if he wished to complete his call. The fact that he dialed the number on his home phone rather than on some other phone could make no conceivable difference, not could any subscriber rationally think that it would.
127. Id. (stating that “[e]ven if petitioner did harbor some subjective expectation that the phone number he dialed would remain private, this expectation is not ‘one that society is prepared to recognize as reasonable.’”)
128. Id.
129. Id. at 744 (stating that “[w]hen he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and ‘exposed’ that information to its equipment in the ordinary course of business.”).
130. Smith, 442 U.S. at 744.
131. Id. at 745.
132. Id. at 745-46.
133. This dissent was also joined by Justice Brennan. See id. at 748 (Stewart, J., dissenting).
134. Id.
135. Id.
The other dissenting opinion, written by Justice Thurgood Marshall, opined that because telephone numbers are private, a person need not assume that the numbers he or she dials from his home, even if turned over to third parties, will be used for anything other than a limited business purpose.\(^{136}\)

3. Florida v. Riley\(^{137}\)

Almost ten years after *Smith* was decided, the Court again examined the legitimacy of another area of questionable constitutional protections—the airspace above one’s home. Upon receiving an anonymous tip that respondent Riley was growing marijuana on his property in rural Florida, an officer of the Pasco County Sheriff’s Department was sent to investigate the area surrounding the home.\(^{138}\) The officer observed a greenhouse, located approximately ten to twenty feet behind the mobile home.\(^{139}\) The greenhouse was enclosed on two sides, making its interior invisible from the street.\(^{140}\) The other two sides, although not totally obscured, were concealed from view by trees, shrubbery, and the actual home itself.\(^{141}\) The roof of the greenhouse was observed to be made of corrugated panels, which were both translucent and opaque.\(^{142}\) Two of the large panels, however, were noted to be missing.\(^{143}\) Because of the obstructions, the officer was unable to view the contents of the greenhouse.\(^{144}\) Instead, he commandeered a helicopter to fly over Riley’s house at the height of four hundred feet where he was able to observe, through the openings in the roof and the open sides, that there appeared to be marijuana growing inside the greenhouse.\(^{145}\) A warrant was issued, based in large part upon the observations of Riley’s yard from the helicopter,

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Most private telephone subscribers may have their own number listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person’s life.

*Smith*, 442 U.S. at 748 (Stewart, J., dissenting).

136. *Id.* at 749.
138. *Id.* at 448.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. Riley, 488 U.S. at 448.
144. *Id.*
145. *Id.*
and when executed, marijuana was confirmed to be growing inside the greenhouse.\textsuperscript{146}

After being charged with possession of marijuana, Riley moved to suppress this evidence as the tainted fruits of an illegal search in violation of the Fourth Amendment.\textsuperscript{147} Although the trial court granted Riley's motion, the court of appeals reversed the decision.\textsuperscript{148} Subsequently, however, the Florida Supreme Court reversed the court of appeals.\textsuperscript{149} The United States Supreme Court was called upon to answer the question regarding "[w]hether surveillance of the interior of a partially covered greenhouse in a residential backyard from the vantage point of a helicopter located four hundred feet above the greenhouse constitutes a 'search' for which a warrant is required under the Fourth Amendment."\textsuperscript{150}

In the Court's opinion, written by Justice Byron White,\textsuperscript{151} the Supreme Court held that this case was controlled by the decision in \textit{California v. Ciraolo}.\textsuperscript{152} In accordance with \textit{Ciraolo}, the Fourth Amendment does not require police traveling in the public airways at an altitude of four hundred feet to obtain a warrant in order to observe what is already visible to the naked eye.\textsuperscript{153} Although historically

\begin{flushleft}
\textsuperscript{146.} \textit{Id.} at 449.
\textsuperscript{147.} \textit{Id.}
\textsuperscript{148.} \textit{Id.}
\textsuperscript{149.} \textit{Riley}, 488 U.S. at 449.
\textsuperscript{150.} \textit{Id.} at 447-48.
\textsuperscript{151.} Justice White's opinion was joined by Chief Justice Rehnquist, Justice Scalia and Justice Kennedy. \textit{Id.} at 447.
\textsuperscript{152.} 476 U.S. 207 (1986). \textit{Ciraolo} is very similar to \textit{Riley}. In \textit{Ciraolo}, after the police got a tip that a Santa Clara resident was growing marijuana in his backyard, the police performed an aerial surveillance of his house at an altitude of one thousand feet. \textit{Id.} at 209. A plant resembling marijuana was observed during the flight. \textit{Id.} A search warrant was issued based on an affidavit describing the aerial observations, and when the warrant was executed, seventy-three plants were recovered. \textit{Id.} The trial court refused to suppress the evidence, and the respondent subsequently pleaded guilty to a charge of cultivating marijuana. \textit{Id.} at 210. The California Court of Appeals, however, reversed Riley's conviction and held that such aerial inspection lacking a warrant violates the Fourth Amendment. \textit{Id.} The Supreme Court in turn reversed the California Court of Appeals and held that although a subjective expectation of privacy existed, (as evidenced by the fence Ciraolo had erected around his property), this expectation of privacy was not one that was recognized as objectively reasonable. \textit{Ciraolo}, 476 U.S. at 215. The Court reasoned that the "Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." \textit{Id.} at 213. Because the observations of the investigating officers "took place within public navigable airspace in a non-intrusive manner," with only the aid of the naked eye, this could not be considered a search within the meaning of the Fourth Amendment. \textit{Id.} at 214.
\end{flushleft}
the home and its curtilage have been substantially protected, the Court in Riley held that neither is automatically protected from public inspection that does not involve an actual physical intrusion. The Court held, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." The police, like the public, have the right to see what is readily visible from a public locale in which they have a legal right to be. Additionally, in this particular case, the police were complying with airspace laws and regulations, which the Court viewed to be "of obvious importance," bolstering the legitimacy of the search.

The Court found it to be of little or no consequence that Riley took steps to ensure that his marijuana would remain clandestine. Even if he had an actual expectation of privacy, it was not one recognized as reasonable by the general public. The Court reasoned that because private and commercial flight in the airspace above Riley's home and other similarly situated homes was so pervasive, it would be unreasonable for Riley to expect his marijuana plants were constitutionally protected from naked eye observation. The Court argued that anyone could legally have been flying over Riley's house in a helicopter at an altitude of four hundred feet and easily observed the greenhouse. The Court also found it to be of importance that no personal minutia of Riley's home was revealed by the helicopter flyby.

154. Ciraolo, 476 U.S. at 212 (stating "[a]t common law, the curtilage is the area to which extend the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'").
155. Id. at 212-13 (holding that "[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.").
156. Riley, 488 U.S. at 449.
157. Id. (citing Katz, 389 U.S. at 351).
158. Id. at 499 (citing Ciraolo, 476 U.S. at 213).
159. Id. at 452.
160. Id. at 448. Riley ensheathed his backyard with shrubs, trees, and other plants to obscure the view of the greenhouse from the street. Id. He purposefully enclosed the greenhouse as much as possible to obscure any observation of its contents. Riley, 488 U.S. at 448. Riley also erected a wire fence around his mobile home, as well as prominently displayed "DO NOT ENTER" signs. Id. See also Ciraolo, 476 U.S. at 215 (holding that it was immaterial that Ciraolo erected a fence shieldimg his home and its curtilage from public observation).
161. Riley, 488 U.S. at 450.
162. Id. (citing Ciraolo, 476 U.S. at 215) (stating that "[i]n an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye [from an altitude of 400 feet].").
163. Id. at 451.
164. Id. at 450 (citing Ciraolo, 476 U.S. at 215) (stating that "[a]s far as this record reveals, no intimate details connected with the use of the home or curtilage were observed . . . . In these circumstances, there was no violation of the Fourth Amendment."). The Court seems to imply
Justice Sandra Day O'Connor concurred with Justice White, but she cautioned against the proposition that the observation was legal simply because the helicopter was complying with Federal Aviation Administration (FAA) regulations.\(^{165}\) Justice O'Connor held that the proper question to ask was “whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley’s expectation of privacy from aerial observation was not ‘one that society [was] prepared to recognize as reasonable.’”\(^{166}\) In this case, Justice O’Connor felt that Riley’s expectation of privacy was unreasonable because there was no evidence contrary to the proposition that there was significant public utilization of the airspace at four hundred feet.\(^{167}\) Another dissent, written by Justice William Brennan,\(^{168}\) chastised the majority for ignoring the central holding of *Katz*.\(^{169}\) Justice Brennan argued that simply because a helicopter may occasionally or even frequently fly above an individual’s home does not necessarily imply that one is knowingly exposing an area to the public.\(^{170}\)

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\(^{165}\) Id. at 452 (O’Connor, J., concurring) (citing U.S. CONST. amend. IV) (stating that “[i]n [her] view, the plurality’s approach rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations whose purpose is to promote air safety, not to protect [t]he right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures.”).

\(^{166}\) *Riley,* 488 U.S. at 454 (citing *Katz,* 389 U.S. at 361). In some ways, the requirement of sufficient regularity of public exposure may be the basis for Justice Scalia’s rule in *Kyllo* regarding technology being in the general public use. *Id.*

\(^{167}\) *Id.* at 453 (O’Connor, J., concurring). Justice O’Connor applied the reasoning of *Ciraolo* to *Riley*:

*Ciraolo’s expectation of privacy was unreasonable not because the airplane was operating where it had a ‘right to be,’ but because public air travel at 1,000 feet is a sufficiently routine part of modern life that it is unreasonable for persons on the ground to expect that their curtilage will not be observed from the air at that altitude.*

*Id.* at 453.

\(^{168}\) *Id.* at 456 (Brennan, J., dissenting). Justice Brennan’s dissent in *Riley* was joined by Justice Marshall and Justice Stevens.

\(^{169}\) *Id.*

The opinion for a plurality of the Court reads almost as if *Katz v. United States* had never been decided. Notwithstanding the disclaimers of its final paragraph, the opinion relies almost exclusively on the fact that the police officer conducted his surveillance from a vantage point where, under applicable Federal Aviation Administration regulations, he had a legal right to be. *Katz* teaches, however, that the relevant inquiry is whether the police surveillance “violated the privacy upon which [the defendant] justifiably relied,”—or, as Justice Harlan put it, whether the police violated an “expectation of privacy . . . that society is prepared to recognize as ‘reasonable.’”

*Riley,* 488 U.S. at 456 (internal citations omitted).

\(^{170}\) *Id.* at 457.
Finally, Justice Blackmun also wrote a dissent in which he argued that the reasonableness of Riley's privacy expectations with regard to his curtilage depended on how customarily helicopters of a non-police affiliation fly at four hundred feet. It seemed, at least to Justice Blackmun, that because such helicopter trips are rare, a burden should have fallen upon the prosecution to prove that Riley did not harbor a reasonable expectation of privacy.

4. United States v. Place

Although both Smith and Riley dealt with expectations of privacy in and around the home, the Supreme Court has also examined issues of Fourth Amendment significance where the home is not involved. In United States v. Place, respondent Raymond J. Place was standing in line to board his flight at Miami International Airport destined for New York's LaGuardia airport. He was approached by two DEA agents, who requested and received Place's airline ticket identification. Because his flight was about to leave, the DEA agents decided not to pursue a search at that point. When Place remarked that he knew the agents were police officials, however, this prompted the agents to check the address tags on Place's luggage and discrepancies between the street addresses were noted. The agents in Miami notified other DEA officials at LaGuardia of the situation and the New York officers approached Place upon his arrival. They informed Place of their suspicions regarding narcotics in his luggage and asked to search his bags. Although he refused, Place's bags were nonetheless confiscated for roughly ninety minutes and subjected to a "sniff test" by a canine trained in narcotics detection. The dog reacted positively to the presence of drugs and upon the success of this

171. Id. at 467 (Blackmun, J., dissenting).
172. Although Justice Blackmun stated that helicopter trips are rare, he gives no basis for this conclusion other than his own opinion. Id. at 468.
173. Id.
175. Id. at 698.
176. Id.
177. Id.
178. Id.
179. Id.
180. Place, 462 U.S. at 698.
181. Id. at 699.
sniff test a warrant was obtained,\textsuperscript{182} and cocaine was discovered inside Place's luggage.\textsuperscript{183}

"Place was indicted for possession of cocaine with intent to distribute."\textsuperscript{184} At trial, he moved to suppress the evidence of the search, "claiming that the warrantless seizure of the luggage violated his Fourth Amendment rights," but his motion was denied by the district court.\textsuperscript{185} The United States Court of Appeals for the Second Circuit subsequently reversed the decision of the trial court's refusal to suppress the cocaine, saying that the prolonged seizure of Place's luggage, ninety minutes, was a violation of \textit{Terry v. Ohio}.\textsuperscript{186} Although the Supreme Court affirmed the decision of the court of appeals regarding the length of the search being a Fourth Amendment violation,\textsuperscript{187} it also reached the question of the constitutionality of canine sniff tests.\textsuperscript{188} In a majority opinion written by Justice O'Connor, the Court held that the particular course of investigation pursued in \textit{Place}, a canine sniff test, was not a "search" within the meaning of the Fourth Amendment.\textsuperscript{189}

The Court believed that undoubtedly, there is a privacy interest in personal luggage.\textsuperscript{190} A canine test, however, "does not require [the actual] opening of the luggage."\textsuperscript{191} The Court reasoned that such a test "does not expose non-contraband items that otherwise would remain hidden from the general public."\textsuperscript{192} Because it does not involve

\textsuperscript{182} Id. This situation took place late on a Friday afternoon. \textit{Id.} Although the successful canine sniff test occurred about ninety minutes after confiscation of the luggage, the agents did not pursue a search warrant of the luggage until Monday morning. \textit{Id.}

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{Place}, 462 U.S. at 699.

\textsuperscript{185} \textit{Id.} at 700. The district court applied the standard of \textit{Terry v. Ohio}, 392 U.S. 1 (1968), to the detention of personal property. \textit{Place}, 462 U.S. at 700. The court "concluded that the detention of the bags could be justified if based on reasonable suspicion to believe that the bags contained narcotics." \textit{Id.} Because the canine sniff test provided reasonable suspicion, there was no violation of Place's Fourth Amendment rights. \textit{Id.}

\textsuperscript{186} \textit{Id.} See also \textit{Terry}, 392 U.S. at 1.

\textsuperscript{187} \textit{Place}, 462 U.S. at 709 (noting that "the New York agents knew the time of Place's scheduled arrival at LaGuardia, had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on respondent's Fourth Amendment interest.").

\textsuperscript{188} \textit{Id.} at 707.

\textsuperscript{189} \textit{Id.} (concluding "that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment.").

\textsuperscript{190} \textit{Id.} (citing United States v. Chadwick, 433 U.S. 1, 7 (1977)).

\textsuperscript{191} \textit{Id.} A canine sniff is a non-intrusive procedure whereby a dog trained in narcotics detection smells the suspicious luggage while it is still sealed, and signals to its handler if narcotics are detected. \textit{Id.}

\textsuperscript{192} \textit{Place}, 462 U.S. at 707. Because luggage is not actually opened, there is no danger of finding other embarrassing items. \textit{Id.}
an agent actually rummaging through someone’s personal belongings, the Court found this sort of search to be much less intrusive than most searches.193 This is because the sniff test is very limited in scope; “it discloses only the presence or absence” of illegal contraband.194 The court found that because of the limited nature of the canine sniff test, there was no risk of embarrassment or inconvenience.195

The four cases discussed above represent the culmination of over three decades worth of search and seizure cases. From these precedents, the Supreme Court has created legal theory that is meant to govern all similar search and seizure cases. In the case that follows, however, this precedent was thrown by the wayside.

III. SUBJECT OPINION: KYLLO v. UNITED STATES196

A United States Department of the Interior Agent, William Elliott, suspected that petitioner, Danny Lee Kyllo, was operating an indoor marijuana cultivation facility at his home in Florence, Oregon.197 Since indoor marijuana growth generally requires the use of high-intensity lamps to emulate the bright summer sunlight, Agent Elliott and his partner Dan Haas conducted a thermal scan of Kyllo’s home.198 They employed an Agema Thermovision 210 thermal imager to scan the triplex from the street in front of Kyllo’s home.199 The particular imager that was used detects heat not visible to the naked eye.200 The scan201 revealed that the roof over the garage and the side of Kyllo’s home were emitting much greater amounts of relative heat than the rest of the structure and also the neighboring homes.202 The readings from the thermal imaging scan bolstered the agents’ suspicions that Kyllo had a marijuana factory in his home that was fueled by high intensity metal halide lights providing the plants with the artificial sunlight they needed to undergo photosynthesis.203

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193. Id.
194. Id.
195. Id. (stating that “this limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.”).
197. Id. at 2041.
198. Id. See supra notes 61-70 and accompanying text.
199. Kyllo, 121 S. Ct. at 2041.
200. Id.
201. Id. The scan took place from the passenger seat of Agent Elliott’s automobile situated across the street from Kyllo’s home, as well as from the street in back of the house. Id.
202. Id.
203. Id. For more information on metal halide lights, see supra note 56 and accompanying text.
Based in large part upon the thermal imaging scan, as well as utility bills from Kyllo’s home and tips from informants, a federal magistrate issued a warrant, which authorized a search of Kyllo’s home. Upon a search of the home, Haas and Elliott discovered more than one hundred marijuana plants.

Kyllo was indicted on one count of manufacturing marijuana. He moved to suppress the evidence that had been taken from his home, but this motion was denied by the trial court, and Kyllo subsequently entered a conditional guilty plea. The United States Court of Appeals for the Ninth Circuit remanded Kyllo’s case for an evidentiary hearing on the intrusiveness of the thermal imaging scan. Upon remand, the trial court upheld the validity of the warrant, which relied in part on the results of the thermal imaging scan. Initially, the Ninth Circuit reversed, but after a change in composition of the judge’s panel that reversal was withdrawn and the decision of the trial court was affirmed.

The Supreme Court was called upon to determine the question of “whether the use of a thermal imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a ‘search’ within the meaning of the Fourth Amendment.” In a 5-4 decision, the majority opinion, written by Justice Scalia, held that “[w]here . . . the Government uses a device that is not in general 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.”

Purporting to employ the rule from Katz v. United States, the Court held that a “Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society rec-

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204. Kyllo, 121 S. Ct. at 2041.
205. Id.
206. Kyllo was convicted under 21 U.S.C. § 841(a)(1), which states “[I]t shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance.” 21 U.S.C. § 841(a)(1) (1999).
207. Kyllo, 121 S. Ct. at 2041.
208. Id.
209. Id. The district court’s finding was supported by the facts that the thermal imager was non-intrusive in nature, it emitted neither rays nor beams, it did not show people or activity within the house, and it lacked the capacity to reveal either conversations or human activities. Id.
210. Id.
211. Id. at 2040-41.
212. Kyllo, 121 S. Ct. at 2046.
The majority found an actual and reasonable expectation of privacy in Kyllo's home had been violated when officers Elliott and Haas engaged in technological enhancement of ordinary perception. Obtaining information regarding the inside of a home that could not have been detected but for the presence of sense enhancing technology constitutes a search in violation of the Fourth Amendment, "at least where (as here) the technology in question is not in the general public use." The Court found it to be irrelevant that the imager only exhibited crude heat imagery; "the Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of the information obtained." Besides which, Justice Scalia pointed out, the imager could show details considered by many to be intimate, such as "what hour each night the lady of the house takes her daily sauna and bath." The Court found it troubling that there was no reasonable way to limit the information the Agema Thermovision retrieved. Therefore, taking all these things into consideration, the Court held that the use of the Agema Thermovision was an unlawful search violating the Fourth Amendment.

The dissent, written by Justice John Paul Stevens, contended that the majority was mistaken in not drawing a distinction between "through-the-wall" surveillance, which allows the observer direct access to private information, and the thought processes used by law enforcement agents to draw inferences from information that is well within the public domain. In this case, Agents Haas and Elliott were simply making "off-the-wall" deductions about what was going on in Kyllo's house behind closed doors, which Justice Stevens felt should not have been considered to be a search, nor a violation of the Fourth Amendment. The scan of Kyllo's home was taken from the public street in front of his house. The Court reiterated that when

214. Kyllo, 121 S. Ct. at 2042.
215. Id. at 2043.
216. Id.
217. Id. at 2045.
218. Id.
219. Id. (stating that "[i]n the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes.").
220. Justice Stevens's dissent was joined by Chief Justice Rehnquist, as well as Justices O'Connor and Kennedy. Kyllo, 121 S. Ct. at 2047 (Stevens, J., dissenting).
221. Id.
222. Id.
223. Id. at 2041.
IF IT AIN'T BROKE, DON'T FIX IT

observations are made of property in plain view, there is a presumption of reasonableness.224

No details regarding the intimates of Kyllo's home were obtained through the scan, just evidence of infrared radiation emanating therefrom.225 Therefore, the dissent felt that without a physical invasion of the structure this was not "an unauthorized physical penetration into the premises."226 The dissent pointed out that any individual, employing a number of the human senses, could have detected the extra heat emanating from Kyllo's home.227 Heat could have manifested itself by helping to evaporate rainwater more quickly or melting snow at different rates than in surrounding areas.228 If this sort of observation had been made by a neighbor or passerby, there would be no question as to the constitutionality of that observation.229 Therefore, the dissent felt it was irrelevant that the thermal imager was employed to obtain identical information.230

The dissent also pointed out that heat waves become part of the public domain once they leave their source of origin.231 Therefore, it argued that "[a] subjective expectation that [the heat waves] would remain private is not only implausible but also surely not 'one that society is prepared to recognize as reasonable.'"232 Because heat waste is technically part of the public domain, the dissent felt it would be unreasonable to require law enforcement agents to shield their senses or equipment from detecting emissions such as "smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions," because the public has a safety interest in allowing authorities to sense potentially noxious or dangerous fumes.233 Additionally, the

224. Id. at 2042 (citing Payton v. New York, 445 U.S. 573 (1980)). The dissent also draws on the holding of Ciraolo to support its contention "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Kyllo, 121 S. Ct. at 2047 (Stevens, J., dissenting).

225. Id.

226. Id. (citing Silverman, 365 U.S. at 509).

227. Id. at 2048. This is particularly true if a building is vented, as it was here.

228. Id.

229. Id.

230. Kyllo, 121 S. Ct. at 2048 (Stevens, J., dissenting) (stating that in his "view . . . such observations become an unreasonable search if made from a distance with the aid of a device that merely discloses that the exterior of one house, or one area of the house, is much warmer than another. Nothing more occurred in this case.").

231. Id. The Court analogizes heat waves to aromas that are generated in a kitchen, laboratory, or opium den. Id.

232. Id. (citing Katz, 389 U.S. 361).

233. Id. at 2049.
dissent pointed out that the countervailing privacy interest in heat emanations is "at best trivial."\textsuperscript{234} Finally, the dissent also criticized the majority as having gone too far in fashioning its decision.\textsuperscript{235} The dissent felt that the majority "unfortunately failed to heed the tried and true counsel of judicial restraint."\textsuperscript{236} Rather than focusing on the constitutionality of the Agema Thermovision 210, as it was employed in \textit{Kyllo}, the Court looked too far into the future, towards more sophisticated technology.\textsuperscript{237} The dissent held that it is for the legislature to "grapple with these emerging issues," not the Court.\textsuperscript{238}

\textbf{IV. Analysis}

This section will demonstrate, through a detailed comparison of \textit{Kyllo} with other pertinent Fourth Amendment cases, the Supreme Court's departure from precedent in deciding \textit{Kyllo}. Comparisons will be drawn with \textit{Smith v. Maryland}, \textit{Florida v. Riley}, and \textit{United States v. Place} to exemplify the argument.

\textbf{A. Breach of Stare Decisis}

\textit{Stare Decisis} is the means by which [the court] ensures that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contribute to the integrity of our constitutional system of government, both in appearance and in fact.\textsuperscript{239}

In other words, \textit{stare decisis} is the doctrine that binds the courts to the decisions that have been laid down in previous years. "It represents the general proposition that a precedent must be followed unless

\textsuperscript{234} \textit{Id.} The dissent reasoned that typically, homes are designed to retain heat, rather than to prevent the detection of its emanations. \textit{Kyllo}, 121 S. Ct. at 2049 (Stevens, J., dissenting). "[I]t does not seem . . . that society will suffer from a rule requiring the rare homeowner who both intends to engage in uncommon activities that produce extraordinary amounts of heat, and wishes to conceal that production from outsiders, to make sure that the surrounding area is well insulated." \textit{Id.}

\textsuperscript{235} \textit{Id.} at 2050 (stating that the "Court has fashioned a rule that is intended to provide essential guidance for the day when "more sophisticated systems" gain the "ability to "see" through walls and other opaque barriers.").

\textsuperscript{236} \textit{Id.} at 2052.

\textsuperscript{237} \textit{Id.}

\textsuperscript{238} \textit{Id.}

there is a compelling reason to overrule it." This doctrine should apply to the reasoning the Court employs, as well as the actual law or rules it chooses to use.

One commentator has suggested that *stare decisis* is crucial to the legal system because it embodies several important qualities. First, this doctrine is tied to certainty because it allows people take actions with assurance that the law as they know it will cease to change. Second, *stare decisis* promotes equality because it ensures that all cases will be treated alike. Third, the doctrine advances efficiency because it prevents judges from being forced to readdress many recurring issues. Finally, *stare decisis* legitimates the appearance of justice within the legal system by assuring participants that the Court is an impartial body of government.

The *Kyllo* decision represents a breach of *stare decisis*. The Court made a feeble attempt to mask its ugly departure from precedent by reciting the rule from *Katz*, but it failed to actually apply the rule in accordance with other controlling Fourth Amendment precedent. Reciting the law, but neglecting altogether the duty to apply it, is simply not enough to satisfy *stare decisis*. In *Kyllo*, instead of using decades of Fourth Amendment jurisprudence, which could have and should have been employed in this decision, the Court took it upon itself to

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241. *Id.* This commentator has listed four rationales for *stare decisis*: certainty, equality, efficiency, and the appearance of justice. *Id.* at 1689.

242. *Id.* at 1691. The certainty that has been promoted by the doctrine of *stare decisis* has been considered most crucial in contract and property cases. *Id.* This is because people in these areas of the law rely heavily on former decisions when they draft their documents. *Id.* Contrast this with evidentiary and procedural decisions, which are not relied on nearly as often. Padden, *supra* note 240, at 1691.

243. *Id.* at 1692. The commentator notes that in promoting equality and treating all cases alike, it is often difficult to determine which cases are actually legally similar for purposes of applying precedent. *Id.* The degree of similarity will generally depend on the context out of which the case arose. *Id.*

244. *Id.* Often times difficult policy questions can consume a great amount of judicial resources, especially time. *Id.* The courts, instead of reanalyzing those questions, can rely on the decisions of a previous court. Padden, *supra* note 240, at 1691. The commentator notes, however, that this rationale may be overstated. *Id.* She suggests this is because later courts must still determine what precedent exists and whether it applies to the present circumstance - tasks which also consume a great amount of time. *Id.*

245. *Id.* at 1693. The commentator suggests that the appearance of justice is the most important rationale for *stare decisis*. *Id.* It promotes the public ideal that a judge will decide cases based upon already existing law instead of injecting his own biases and morals into the decisions. *Id.*


247. *See supra* notes 81-195 and accompanying text.
create a new rule of law, seemingly out of thin air. This is problematic because it compromises the Court’s appearance of impartiality and makes it seem as if the judicial system is free to create new law on a whim. In *Kyllo*, the Court acknowledged that cases like *Riley* and *Smith* exist, but never addressed the apparent conflict of reasoning between them and *Kyllo*. The Court neglected to address the discrepancies because there is simply no explanation for it. The only way the Court could come to the decision in *Kyllo* was to pretend that the reasoning of cases like *Smith* and *Riley* did not exist. In doing so, the Court has departed from precedent. Not only did the Court inadvertently neglect to apply controlling precedent, as is required by *stare decisis*, it created a shadow of doubt over the predictability and propriety of Supreme Court decisions.

B. The *Kyllo* Decision Ignores All Pertinent Reasoning Formerly Employed in *Smith* v. *Maryland*.

In *Kyllo v. United States*, the Court neglected to recognize and apply the principles of *Smith v. Maryland*, which could have been controlling in this case. Specifically, the Court failed to realize that: (1) a thermal imager can be considered analogous to a pen register device; (2) there is a lack of expectation of privacy with respect to heat emissions for the same reasons there is a lack of expectation of privacy with regard to telephone numbers; and (3) because information involving electricity consumption, like telephone use, is turned over to a third party, the utility provider, any expectation of privacy with regard to such is presumptively unreasonable.

1. A Thermal Imager is Analogous in its Capabilities to a Pen Register

Recall that in *Smith* there was a question of whether the installation of a pen register, which revealed all phone numbers dialed from a residence, constituted a “search” within the meaning of the Fourth Amendment. The *Smith* Court properly began its evaluation of this issue by calling upon the rule enunciated in *Katz v. United States*. In determining that there was a lack of an actual expectation of pri-
vacancy in this case, the Court considered the nature of the intrusion of a pen register:

Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the telephone numbers that have been dialed—a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers.251

Particularly because of the limited nature of a pen register, the petitioner needed to make a persuasive showing of an actual expectation of privacy with regard to the telephone numbers he dialed.252

In Kyllo, Justice Scalia was quick to point out the dangers of more sophisticated technology whose inception appeared to be right around the corner,253 but he neglected to recognize that the Agema Thermovision 210 is actually quite analogous in its capabilities to a pen register. The Kyllo Court should have conceded that a thermal imager bears striking similarities to a pen register, which the Court already found to be a constitutionally acceptable weapon of police enforcement.254 A pen register does not disclose to police whether any illegal communication exists. A thermal imager also does not reveal whether there is any illegal activity inside the home.255 A pen register merely reports telephone numbers, which have been dialed from a residence—a means of establishing communication. A thermal imager reveals only the heat that emanates from the home and its surroundings—a means of establishing tepidity.256 With a pen register, there is no disclosure of the context of any supposed communication, the reason for the phone call, nor the identity of the caller or the

expectation of privacy" . . . . The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" Id.

251. Id. at 741 (citing United States v. N. Y. Tel. Co., 434 U.S. 159, 167 (1977)).

252. Id. at 742. "Given a pen register's limited capabilities, therefore, petitioner's argument that its installation and use constitutes a 'search' necessarily rests upon a claim that he had a 'legitimate expectation of privacy' regarding the numbers he dialed on his phone." Id.

253. Kyllo, 121 S. Ct. at 2044 n.3 (noting that "[t]he ability to 'see' through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development."). Justice Scalia mentioned a flashlight or handheld type ultrasound, which would enable police officials to see persons through the interior wall of a building. Id.

254. See supra notes 97-136 and accompanying text.

255. Kyllo, 121 S. Ct. at 2048 (Stevens, J., dissenting) (stating that "[a]s still images from the infrared scans show . . . no details regarding the interior of petitioner's home were revealed.").

256. Id. at 2048 (noting that "[a]ll that the infrared camera did in this case was passively measure heat emitted from the exterior surfaces of petitioner's home; all that those measurements showed were relative differences in emission levels, vaguely indicating that some areas of the roof and outside walls were warmer than others.").
recipient. With a thermal imager, there is no disclosure as to the context of the heat is being used, the reason for the greater amount of heat, nor the identity of the object emitting the heat.\textsuperscript{257}

When the two types of technology are compared side by side, their similarities are readily apparent. Both are limited in scope, information of details, and level of intrusion.\textsuperscript{258} Considering this analogy, why was the Court so quick to hold that the thermal imager is necessarily offensive technology, but the pen register is not? Justice Scalia would likely argue that the thermal imager poses a greater danger to society because it tracks heat inside the house, whereas a pen register only tracks a person’s phone calls. This would be an improper argument; the Agema Thermovision 210 “cannot penetrate walls or windows to reveal conversations or other human activities. The device record[s] only the heat being emitted from the home.”\textsuperscript{259} Considering this, it seems as if it is no more offensive to use a thermal imager than it is to use a pen register.

Justice Scalia appeared to have anticipated this hypothetical argument and stated that although the thermal imager did not reveal any specific details of the home, the Fourth Amendment’s protection will not be adjudged by the quality of information a search reveals.\textsuperscript{260} Whatever details the thermal imager did extract were intimate by nature because they came from the home.\textsuperscript{261} Considering Smith, however, this logic is flawed. It would only seem logical to follow that if reasoning the telephone numbers being dialed from within an individual’s home are not considered to be an intimate detail within the meaning of the Fourth Amendment, then the heat rays emanating

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\item \textsuperscript{257} Id at 2047 (stating that “the case before us merely involves indirect deductions from 'off-the-wall' surveillance, that is observations of the exterior of the home.”). Justice Stevens seems to be saying that the thermal imager provides some crude and primitive information to police officials, but it is up to police to use their training and intuition to apply that information and determine that something is amiss.
\item \textsuperscript{258} It should be noted that the actual capabilities of the thermal imaging device are widely debated. One commentator has noted this dispute and offered an alternative view of the thermal imaging device. Jonathan Todd Laba, If You Can’t Stand the Heat, Get Out of the Drug Business: Thermal Imagers, Emerging Technologies and the Fourth Amendment, 84 CAL. L. REV. 1437, 1466 (1996). In referencing the case of State v. Young, 867 P.2d 593 (Wash. 1994), the commentator states that the thermal imagers can “detect the presence of a person standing next to a curtained window or behind a wall made of a thin material such as plywood.” Id. In effect, this is like seeing through a wall. The devices can also be used to determine what rooms of a home are being heated and occupied at night, as well as which rooms contain appliances which produce heat. Id.
\item \textsuperscript{259} Kyllo, 121 S. Ct. at 2047 n.1.
\item \textsuperscript{260} Id. at 2045 (stating that “[t]he Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained.”).
\item \textsuperscript{261} Id. (stating that “[i]n the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes.”).
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from a home should also not be considered constitutionally significant. Whether the Court deliberately neglected to recognize this argument, or whether it negligently failed to do so is unknown. However, the crux of *stare decisis* is the duty of the Court to recognize and employ all pertinent precedent and properly dispose of that which is not controlling. This Note argues that the Court, in failing to recognize the similarities of a thermal imager and a pen register and to make concessions for those similarities in its opinion, has departed from and largely ignored controlling precedent. This severely curbs the Supreme Court’s reputation as a predictable, fair, and impartial arm of government.

2. The (Lack of a) Subjective Expectation of Privacy With Respect to Heat is Analogous to the (Lack of a) Subjective Expectation of Privacy With Respect to Telephone Numbers

The *Smith* Court held that no actual expectation of privacy exists in the telephone numbers people choose to dial from their homes. It reasoned that all people realize, when they place telephone calls, that the phone numbers dialed are conveyed back to the telephone company for completion of the call. Subscribers to a telephone service are aware that the phone company has the capacity to make records of all the numbers dialed, particularly because most users see a list of long distance phone calls on their monthly invoices. It is inherent in the use of the telephone system that callers are aware that they must convey numerical information to the phone company. Although the Court lacked empirical evidence to support this proposi-

262. It would seem to the author of this Note that the heat emanating from an individual’s home would be a much less obtrusive piece of information than what phone numbers a person is dialing. The author cannot recall the last time she gave a second thought to the amount of heat her home was giving off. Additionally, the phone numbers are coming *from within the home*, which should seem to make the information constitutionally significant, according to Justice Scalia. However, with a thermal imager, the pertinent information is *emanating from* the home, not being extracted from within. By nature, the source of the information should have made the scan less intrusive. If the Court is going to say that heat is an intimate detail by nature of its source in the home, it would be only proper that the phone numbers a person dials are also considered intimate.

263. See supra note 239 and accompanying text.

264. *Smith*, 422 U.S. at 742 (stating that “[w]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial.”).

265. *Id.* at 742 (stating that “[a]ll telephone users realize that they must ‘convey’ phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed.”).

266. *Id.*

267. *Id.*
tion, the Court relied on its own intuition to determine that there is not an actual expectation of privacy with regard to the phone numbers dialed.²⁶⁸

Electricity users (as in Kyllo) are similarly situated to telephone users (as in Smith). As anyone who utilizes electricity knows, (quite possibly the vast majority of Americans), at the end of the billing cycle, subscribers receive an invoice from the electric company reporting how much energy they have used and what the current charges are. As is the case with users of the telephone, all users of electricity realize that the amount of energy transferred is essentially conveyed back to the electric company for these billing and record keeping purposes.²⁶⁹ Like users of the telephone, users of electricity rely on the company to provide them with the pertinent services. All users also must innately realize that the electric company, like the phone company, has facilities for making records of the amount of electricity transferred, because they receive a bill at the end of every relevant cycle.²⁷⁰ It is true that there is no scientific evidence showing that users of electricity completely lack an expectation of privacy with regard to the amount of electricity they consume. However, the Court in Kyllo, like the Court in Smith, should have considered all the ways in which users of electricity are essentially forced to share their consumption with the electric company. “It would be too much to believe that” electricity subscribers, like phone subscribers, “under these circumstances, harbor any general expectation that the ‘amount of electricity they consume ‘will remain secret.’”²⁷¹ One commentator has even gone so far as to say a phone conversation is actually more private than the heat that is emitted from one’s home, leading to the conclusion that a phone conversation, rather than the heat emissions, should actually get more privacy protection.²⁷²

As this Note has done, one could virtually substitute the words “electric company,” for that of “phone company” in Smith, and come up with a very persuasive argument for why there was no actual expectation of privacy with regard to heat consumed in Kyllo. Yet the

²⁶⁸. Id. at 743 (stating that “[a]lthough subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.”).

²⁶⁹. Id.

²⁷⁰. Smith, 442 U.S. at 743.

²⁷¹. Id. The author of this Note has deliberately used the language of Smith to show how, when “electric company” is substituted for “phone company,” the reasoning employed in Smith should have been controlling in Kyllo.

Court failed to do so. Although Justice Scalia mentioned the test from *Katz*, he never actually stated that there was an actual expectation of privacy with regard to heat emanations or consumption. One could infer that he was implying an actual expectation of privacy when he talked about heat being a detail of the home, and accordingly, all details of the home being intimate. This Note, however, has already raised the question of whether, in light of *Smith*, heat really could be considered an intimate detail of the home. The issue of whether heat is indeed an intimate detail of the home, and if so, whether there is an actual expectation of privacy with regard to heat emitted, is at the crux of determining the first prong of the *Katz* test in this case. *Smith* is controlling, persuasive, and highly relevant precedent. It is unfortunate, as well as curious, that *Smith*’s reasoning was largely ignored in the employment of the *Katz* test in *Kyllo*. The Court’s inability to confront pertinent precedent significantly weakens the legitimacy of its authority, as well as the persuasiveness of its arguments.

3. Expectations of Privacy With Regard to Heat Consumption, Like Telephone Numbers, are Presumptively Unreasonable Because They are Voluntarily Turned Over to a Third Party

In *Smith*, the Court held, should it accept the proposition that the petitioner did indeed possess an actual subjective expectation of privacy with regard to the telephone numbers he dialed, this belief was still not “one that society is prepared to recognize as ‘reasonable.’” In the absence of an objectively reasonable expectation of privacy, the Court will not find a search within the meaning of the Fourth Amendment. The Court’s refusal to recognize a privacy interest in telephone numbers as objectively reasonable is deeply rooted in precedent.

273. *Kyllo*, 121 S. Ct. at 2043 (stating that “in the case of the search of the interior of homes . . . there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable.”).

274. See *Kyllo*, 121 S. Ct. at 2045.

275. See supra notes 249-253 and accompanying text.

276. This author believes that when the Court fails to address controlling precedent, it weakens the legitimacy of the Court because it creates the appearance that the Court is not actually bound by precedent. Rather, it makes the Court look as if, on a whim, it can change existing law. It undermines the appearance of the Court as a neutral and detached entity. If these sorts of departures from precedent continue on a frequent basis, the author believes American citizens will eventually lose their faith in the judicial system to be a reliable and predictable source of justice. See also *Padden*, supra note 240 at 1693 (stating that the appearance of justice is the most important rationale for *stare decisis*).


This is because “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” Smith made a choice, when he voluntarily used his telephone, that the information he was transmitting would be immediately conveyed back to the telephone company. He “assumed the risk that the company would reveal to police the numbers he dialed.” Because Smith voluntarily turned over the numbers he dialed to the phone company, even an actual expectation of privacy would be considered unreasonable.

The logic of Smith is, in theory and in application, relevant to Kyllo. Assume that Kyllo did harbor a subjective expectation of privacy with regard to the amounts of electricity he was consuming, and accordingly, how much heat his home was emanating. This expectation should not be one that is considered reasonable, because just like in Smith, he voluntarily turned over his consumption level to the electric company. Kyllo was fully aware that, by plugging in the metal halide lights, the information he was generating regarding heat and electricity would be conveyed back to the electric company. Kyllo, in doing, assumed there was a risk that the information being relayed back to the electric company would be handed over to the authorities. Where there is a voluntary conveyance of information to a third party, any actual expectation of privacy is not one which society is prepared to recognize as reasonable. Therefore, any privacy interests possessed by Kyllo are constitutionally irrelevant insofar as the Fourth Amendment is concerned because they are objectively unreasonable. One commentator has even suggested that the most intimate of details, if exposed to the public, will not be protected from search or seizure by the Fourth Amendment.

279. Smith, 442 U.S. at 743-44.
280. Id. at 744 (stating that “[w]hen he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and ‘exposed’ that information to its equipment in the ordinary course of business.”).
281. Id.
282. Id. at 744-45. The Court reasoned that “[t]he switching equipment that processes[s] [phone] numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber.” Id. A different result is not warranted simply because the process is now automated. Id. at 744.
283. Kyllo, 121 S. Ct. at 2041. In actuality, this information was relayed to the authorities. The warrant from the Federal Magistrate, which authorized the search of Kyllo’s home, (ultimately resulting in the discovery of over one hundred marijuana plants) was supported in part by his utility bills. Id. Although the Court does not specify the source of those bills, one may assume that the electric company probably turned over those bills voluntarily; it is highly unlikely Kyllo was handing them out.
284. Laba, supra note 258, at 1456. The commentator suggests Smith stands for a hard line rule that where any activity, statement, or object is exposed to the public, even in the most
One may argue that using electricity cannot be considered a voluntary relinquishment of information because users of electricity have no choice but to go through the utility company if they want electricity. In that sense, the transmission of information appears to be more forced than it does to be voluntary. The same argument, however, is true for telephone users. Anyone who wants to make a phone call has no choice but to go through the provider, and in the process, turn over all numbers dialed. Despite an attempt by Justice Marshall, dissenting in *Smith*, to raise such an argument in response to the voluntariness of relinquishment of telephone information, the majority nonetheless squarely held that use of a telephone constitutes a voluntary disclosure of information to a third party. It is only reasonable to assume that if making a phone call is a voluntary act of revealing information to the telephone company, the voluntary act of plugging in a lamp must also be considered the relinquishment of information to the electric company.

The Court in *Kyllo* completely failed to recognize the possibility that because Kyllo was effectively handing over information to the electric company any expectation of privacy he held was objectively unreasonable. This principle is firmly embedded in precedent, and has been employed in circumstances other than telephone calls. It was improper for the *Kyllo* Court to ignore controlling precedent and not to have addressed the third party issue.

Justice Scalia instead argued that the expectation of privacy was reasonable with regard to a thermal imaging scan of a home in *Kyllo*. Although the Agema Thermovision 210 is “relatively crude” imagery, the nature of the technology “might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider ‘intimate.’” However, consider a pen register that reveals a telephone user is calling a sex hotline every night at 2:00 a.m. Would this not be considered to reveal an intimate minimal way, there is a risk that the third party will report the exposed information to the public.

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285. *Smith*, 442 U.S. at 750 (Marshall, J., dissenting) (stating that “[u]nless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance[.] [i]t is idle to speak of ‘assuming’ risks in contexts where, as a practical matter, individuals have no realistic alternative.”).

286. *Id.* at 744 (stating that “[t]his analysis dictates that petitioner can claim no legitimate expectation of privacy here.”).

287. *See Riley*, 488 U.S. at 448.

288. *See*, e.g., *United States v. Miller*, 425 U.S. 435, 442-44 (1976) (holding that where a bank patron has no legitimate expectation of privacy in financial information which is voluntarily conveyed to a bank and its tellers during the ordinary course of a deposit).

detail of someone's private life? One may assume, through general knowledge and experience, that it would be more embarrassing for a third party to infer one is engaging in profane, perverse, or even obscene conversations late at night, than it would be for a third party to deduce one bathes every evening at 8:00 p.m. Bound by the doctrine of stare decisis, the Court should not ignore the fact that in Smith, the same dangers of embarrassment were present, but not prevalent enough to warrant excluding the fruits of the pen register search. In reading Smith, it would seem that simply because there is a risk of embarrassment, that does not necessarily imply that police officials should cease surveillance altogether. If he were bold enough, Justice Scalia could have probably taken his argument even one step further and posed the scenario of whether an intimate couple’s privacy in the bedroom was being compromised by a thermal imaging scan. This argument, however, is easily disposed of because the Agema Thermovision 210 cannot reveal human activities.290

C. The Kyllo Decision Ignores All Pertinent Reasoning Formerly Employed in Florida v. Riley

In Kyllo v. United States, the Court neglected to recognize and apply the principles of Florida v. Riley, which could have been controlling in this case. Specifically, the Court failed to recognize that: (1) anything exposed to the public renders it unprotected under the Fourth Amendment; (2) the police have a right to make observations from a public vantage point, as they did in Riley; and (3) the locale of the search was public domain, just as the airspace was in Riley.

1. Exposure to the Public Renders Privacy Interests Unprotected Under the Fourth Amendment

Recall that in Riley, a helicopter flyby resulting in the discovery of marijuana plants was not considered to be a search within the meaning of the Fourth Amendment.291 The Court’s reasoning rested most heavily on the proposition that “what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”292 It can be inferred that this is because, under the Katz test, one cannot claim a subjective expectation of privacy over something readily visible to the public.293 Because the marijuana plants were easily observable from the airspace above Riley’s

290. Id. at 2047 n.1.
291. Riley, 488 U.S. at 450.
292. Id. at 450 (citing Katz, 389 U.S. at 351).
293. Id. at 449.
home and yard, the Court considered them to be exposed to the public, and therefore not the subject of Fourth Amendment scrutiny.\textsuperscript{294}

Similarly, in Kyllo, the heat rays emanating from Kyllo's home should not have warranted special Fourth Amendment protection because they were knowingly exposed to the public. Although the infrared images were unavailable to the general public, ordinary use of the senses could have enabled a passerby or neighbor to notice the heat emanating from the home. The increased heat could manifest itself physically by melting snow on the warmer side of the home, or by evaporating rainwater more quickly, as the dissent pointed out.\textsuperscript{295} Such an exposure to the public renders any privacy interest that Kyllo may have had unreasonable.\textsuperscript{296}

The Court argued that it is irrelevant that an outsider could have eventually observed the discrepancies in temperature outside of Kyllo's home had he surveyed it for a long enough period of time.\textsuperscript{297} The fact is that police officers were aided by infrared technology, ca-

\textsuperscript{294} Ciraolo, 476 U.S. at 215 (stating that "the Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.").

\textsuperscript{295} Kyllo, 121 S. Ct. at 2048 (Stevens, J., dissenting).

\textsuperscript{296} It should be noted that not all commentators believe the plain-view type analogy is applicable in this circumstance. See Campisi, \textit{supra} note 62, at 268. This commentator has noted that the plain-view analogy is misguided, "because thermal heat emissions are invisible to the naked eye and can be detected only through the use of highly sophisticated technology." \textit{Id}. The plain view doctrine is based on the ability to observe something \textit{without} the aid of technological enhancements. \textit{Id}.

\textsuperscript{297} It is not controlling for this Note. First, the "plain-view" analogy being advanced here is one where a police officer could have observed physical manifestations of the heat around Kyllo's home. It is not being suggested that by merely standing outside the home, somehow that officer's vision would enable him or her to see heat rays. Rather, it is suggested that naked-eye observation would indeed be possible if one waited long enough for those manifestations to occur.

Additionally, Mr. Campisi's definition of plain-view is at odds with this note's interpretation of Riley. Indeed, the whole argument here is that the police technologically enhanced their vision by flying in the helicopter to view just that which could not be seen from the ground with the naked eye.

\textsuperscript{297} Kyllo, 121 S. Ct. 2044 n.2.

The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment. The police might, for example, learn how many people are in a particular house by setting up year-round surveillance; but that does not make breaking and entering to find out the same information lawful.
pable of seeing images of radiation otherwise invisible to the human eye.\textsuperscript{298} In light of \textit{Riley}, however, one cannot ignore the obvious question: how is this scenario different from the police officer who, after attempting and \textit{failing} to use his naked eye capabilities to see inside a greenhouse, uses a helicopter to \textit{enhance} his view?\textsuperscript{299} Or how does this differ from the situation where a police officer, unable to detect contraband with his own nose, employs a canine to sniff a suitcase for illicit substances, thus enhancing his ability to detect drugs?\textsuperscript{300} One commentator has suggested that the difference lies in the fact that thermal imaging does not correspond to any natural sense, where as something like a canine sniff does.\textsuperscript{301} But does this really dispose of the questions as to whether something be considered within naked-eye observations if one needs to fly in a helicopter to observe it? The Court in \textit{Riley} seemed to say yes. In accordance with \textit{Riley}, it would seem that because the heat emanating from Kyllo's home would feasibly have been able to manifest itself such that any member of the public could have seen it, it would be subsequently irrelevant, as was the case in \textit{Riley}, that an officer may have had to enhance his eyesight a bit to actually see the pertinent evidence.

\textsuperscript{298} \textit{Id.} at 2043 (stating that "[t]he present case involves officers on a public street engaged in more than naked-eye surveillance of a home.").

\textsuperscript{299} \textit{Riley}, 488 U.S. at 448. In \textit{Riley}, when an investigating officer discovered that he could not observe from ground level the contents of a greenhouse, enclosed on two sides and obscured by tress and shrubbery on the others, he commandeered a helicopter to fly over the property so he could peer in the backyard. \textit{Id.}

\textsuperscript{300} \textit{See} United States v. Place, 462 U.S. 696 (1983). At LaGuardia airport, police officers subjected respondent Place's suitcase to a sniff test by a narcotics trained detection dog. \textit{Id.} The Court held that a canine sniff does not violate the Fourth Amendment because a canine sniff does not require opening the luggage. \textit{Id.} at 707. Additionally, the manner by which pertinent information is obtained is much less intrusive than a typical search. \textit{Id.} at 707.

\textsuperscript{301} \textit{See} Laba, \textit{supra} note 258, at 1472. The commentator states that "[u]like a telescope or camera, which enhances our eyesight, or a dog sniff, which augments our sense of smell, devices such as thermal imagers do not correspond to our natural senses." \textit{Id.} Instead, he suggests, the technology only gives a means to discover and interpret data, which without the technology we would be unable to do. \textit{Id.} But how much sense does this argument really make? Does a canine sniff really augment our senses? Not really. It is not a tool by which we enhance our senses, rather we are substituting the dog's more advanced smell for our own. Human senses are not developed enough to allow detection of contraband. No matter how hard we try, humans will never replace the canine in sniff tests. The purpose of the canine sniff, it can be said, is to allow police to discover and interpret data, which, without technology, police would be unable to do. But this is exactly what Mr. Laba says is the evil behind thermal imaging. Again, it has to be asked, how much sense does the commentator's argument really make? Under Mr. Laba's own reasoning, it seems that thermal imaging would be just as allowable as a canine sniff for the reasons delineated above.
2. The Police May See What May Legally be Seen From a Public Vantage Point

The Court in Riley went to great pains to emphasize the importance of the fact that when the police were flying over Riley’s home, they had a right to be there. But for the obstruction of the trees and shrubbery, the police could have peered into Riley’s backyard garden and seen the plants. Therefore, it follows logically that the police also have a right to look into Riley’s yard from the airspace above his home. The Court also emphasized the importance of the fact that when the helicopter was surveying Riley’s home, it was complying with FAA regulations. It even goes so far as to imply that if the helicopter had been flying in illegal airspace, the constitutionality of the search may have been compromised. The legitimacy of the search was additionally bolstered, in the Court’s eyes, by the fact that there was no interference with Riley’s normal use of his property. Under the aforementioned circumstances, in which there were no intimate details of the home revealed, no undue noise, and no wind, dust, or threat of injury, the Court held there would be no violation of the Fourth Amendment.

When they performed the thermal imaging scan, Agents Haas and Elliott were across the street from Kyllo’s home. The street is in the public domain. The agents were not on Kyllo’s front lawn, nor were they physically touching the triplex. The rays of the thermal imaging device did not even penetrate the walls of the building. As the

302. Riley, 488 U.S. at 449 (quoting Ciraolo, 476 U.S. at 351) (stating that “[a]s a general proposition, the police may see what may be seen ‘from a public vantage point where [they have] a right to be.’”).
303. Id. at 449-50 (stating that “[t]he police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed.”).
304. Id. at 450 (stating that “[t]hey were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace as this plane was.”).
305. Id. at 451.
306. Id. (stating that “it is of obvious importance that the helicopter in this case was not violating the law. . . .”) (emphasis added). The use of the phrase “obvious importance” implies that the Court would have taken greater issue with the helicopter flyby had it occurred in airspace not designated public by the law.
307. Id. at 452 (stating that “there is no . . . ] intimation here that the helicopter interfered with respondent’s normal use of the greenhouse or of the other parts of the curtilage.”).
308. Pertinent circumstances include, for example, seeing from a public vantage point where the police have a right to be and compliance with FAA regulations.
309. Riley, 488 U.S. at 452.
310. Kyllo, 121 S. Ct. at 2041 (stating that “[t]he scan of Kyllo’s home . . . was performed from the passenger seat of Agent Elliott’s vehicle across the street.”).
311. Lomas, supra note 65, at 800 (citing United States v. Kyllo, 190 F.3d 1041, 1044 (9th Cir. 1999)). Lomas states “a thermal imager passively records thermal emissions, acting much like a camera, rather than emitting intrusive beams or rays.” Id.
Court held in Riley, these agents should have had a right to see what may be seen from the public vantage point of the street in front of Kyllo’s home.\textsuperscript{312} Recall that in Riley, because the police could have inspected the yard from the street but for the obstruction, it followed that they had a right to make a helicopter-enhanced inspection from the public airspace. This same principle should have been applied in Kyllo. Because Agents Elliott and Haas could have inspected the physical manifestations of the increased heat emanating from Kyllo’s home,\textsuperscript{313} they should have the right to make a thermally enhanced inspection from the public street.\textsuperscript{314} The Kyllo Court improperly ignored this pertinent analysis from Riley, which should have been controlling precedent.

The two agents were complying with the law by not trespassing on Kyllo’s property. In Riley, compliance with FAA regulations played a decisive role in the Court’s decision to legitimize the helicopter surveillance.\textsuperscript{315} In Kyllo, however, the Court did not recognize, or even give any credence to the fact that the officers were following the law at the time the scan was taken. Why was adherence to the law a controlling factor in Riley, but blatantly ignored in Kyllo? This fact should have been taken under consideration by Justice Scalia and the majority. Failure to do so constitutes another departure from precedent, thus compromising the legitimacy that necessarily must accompany all Supreme Court decisions.

Finally, in Kyllo, as in Riley, there were no intimate details of the home or its curtilage revealed by the scan.\textsuperscript{316} The thermal imaging device did not exude any sound or noise.\textsuperscript{317} It did not create any nuisance to Kyllo, nor did it present a threat of injury. The Court in Riley found these to be relevant factors as to why the helicopter surveillance was legal—it did not in any way burden the respondent.\textsuperscript{318} If anything, one could infer that a thermal imaging device—an innocuous piece of stealthy machinery—would be considerably less burdensome than a helicopter—a multi-ton whirling piece of iron and metal. Why does the Court in Riley allow a lack of nuisance to the respondent

\textsuperscript{312} See Smith, 442 U.S. at 742.
\textsuperscript{313} See Riley, 488 U.S. at 451.
\textsuperscript{314} One commentator has suggested it is significant that “we cannot walk up to a home, touch the wall, and form a conclusion as to whether there is a hydroponics operation inside.” Laba, supra note 258, at 1472. Rather, it is technology and technology alone with even allows to us draw these inferences of hydroponics in the first place. \textit{Id}.
\textsuperscript{315} Riley, 488 U.S. at 450.
\textsuperscript{316} Kyllo, 121 S. Ct. at 2048 (Stevens, J., dissenting).
\textsuperscript{317} \textit{Id}.
\textsuperscript{318} Riley, 488 U.S. at 450.
determine the legitimacy of the helicopter surveillance, but the Court in Kyllo did not even consider such a thing? In accordance with Riley, the Kyllo Court should have considered such an argument in deciding the case. Failure to adhere to the pertinent analysis from Riley represents a total disregard for relevant precedent and forces outsiders to question the strength of stare decisis and the legitimacy of the decision.

3. The Street in Front of Kyllo’s Home Where the Search Took Place is Prone to Public Traffic, Just Like the Airspace Above Riley’s Home

The Riley Court held that “[i]n an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye.” It said that any desirous member of the public could have legally flown over Riley’s yard and discovered the marijuana in the greenhouse. Therefore, even though Riley took precautions to protect his marijuana from being seen, such an expectation of privacy is not one which society would be willing to recognize as reasonable where the contraband is visible to the public from a helicopter.

Consider for a moment how often the average American actually flies in a helicopter. The author of this Note has never been in a helicopter, nor even seen one up close. The author cannot recall the last time she flew from any altitude, much less four hundred feet, (as was the case in Riley) and observed something as specific as what type of foliage a citizen was cultivating. It is true that there may be select members of the public who fly in helicopters regularly (e.g. news reporters, traffic reporters), but by and large the general public seems to enjoy no similar experience. The Riley Court, however, was nonethe-

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319. Id. (citing Ciraolo, 476 U.S. at 215).
320. Id. at 451.
321. Id. at 448.
322. Id. at 450 (noting “Riley no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observations.”).
323. Riley, 488 U.S. at 448.
less persuaded that the general public flies in helicopters at such a high frequency as to warrant the airspace above Riley's home public domain, despite the fact that in reality, it is likely that the vast majority of Americans have never been in a helicopter.\textsuperscript{324} This logic was essential to the Court's reasoning in \textit{Riley}, which served to legitimize the helicopter flyby.

Applying the same logic to the situation in \textit{Kyllo}, it is reasonable to assume that most Americans, with some element of regularity, stroll down a street and take note of the particularities of a house: what color the shutters are, how many garages a house has, and so on. It can also be assumed that public observation of streets and homes in neighborhoods is readily accessible by foot, car, or bike on a daily basis. It is fair to say that such ground-level observations occur with considerably more regularity than observations of foliage made from a helicopter. This being noted, the Court in \textit{Kyllo}, bound by the rule of \textit{Riley}, should not have ignored that fact that any member of the public could have walked by Kyllo's home and noticed, for example, that snow was melting more rapidly on the right side of the building.\textsuperscript{325} Justice Scalia felt that this argument was frivolous and irrelevant.\textsuperscript{326} But it is no more far-fetched to say that any interested citizen could have observed the physical manifestations of heat emanating from the home than it is to say that any member of the public would have been free to commandeering a helicopter to fly over Riley's home. To reiterate: even if Kyllo subjectively believed he had a right to privacy with regard to heat emanations, it is objectively unreasonable to expect a right to privacy where physical manifestations of those emanations could have feasibly been observed by any member of the public. This analytical aspect of \textit{Riley} is not only relevant to \textit{Kyllo}, it should have been persuasive in determining that Kyllo did not possess an expectation of privacy that society would be willing to recognize as reasonable. Once again, the Court has inappropriately ignored other congruous Fourth Amendment precedent.

It could be argued that merely witnessing snow melting is not the same thing as determining that a special lamp was being used to grow marijuana. Although this is a valid argument, it is misplaced. Whether one sees snow melt and \textit{infers} that there must be a large

\textsuperscript{324} \textit{Id.} at 467 (Blackmun, J., dissenting).

\textsuperscript{325} \textit{See Kyllo.} 121 S. Ct. at 2047 (Stevens, J., dissenting) (stating that particularly where a home is vented, as was the case with Kyllo, physical manifestations of heat would be readily visible to any passerby).

\textsuperscript{326} \textit{See id.} at 2043 n.2 (stating that the ability to observe snowmelt on the roof is "quite irrelevant.").
concentration of heat, or whether one performs a thermal imaging scan and actually sees the heat on a screen, is irrelevant; in either case, one still must deduce the source of the heat as a metal halide light. Because neither seeing snow melting nor performing a thermal imaging scan would actually tell one that a metal halide light was being used to grow marijuana, the most significant difference in the two types of observations is simply how much time the surveillance occupies.

D. The Legitimacy of the Kyllo Decision is Compromised by Previous Fourth Amendment Precedent

The crux of Justice Scalia's holding in Kyllo rests on the proposition that the constitutionality of a device used for surveillance will depend upon whether the device is in the "general public use." The new requirement that something be generally available to the public prior to police employment of that device is undermined by the authority of the Fourth Amendment precedent discussed in the background section of this Note.

In Smith v. Maryland, the police employed a pen register to determine what telephone numbers had been dialed from an individual's home. The Supreme Court considered the constitutionality of such a search and held that it did not violate the Fourth Amendment. But under Kyllo, it seems as if before the police could use such a device, one would have to ask how readily available this technology is to the general public. A pen register, in fact, is a device geared specifically for law enforcement purposes, and not for individual use. It would seem then, that under the reasoning of Kyllo, because a pen register is arguably not considered to be commonly available to the general public, the employment of a pen register should be unconstitutional. But the Court already held in Smith that use of a pen register is not a violation of the Fourth Amendment. How should Smith be regarded in light of Kyllo?

327. Id. at 2046.
328. See supra notes 81-195 and accompanying text.
329. Smith, 442 U.S. at 736.
330. Id. at 746.
331. A corporation called Pen-Link, which manufactures and sells pen register devices, states that the "product is aimed specifically to law enforcement agencies." They do sell to some small investigative firms and law offices, but not to individuals. Email from Pen-Link to Carrie Groskopf (Dec. 10, 2001) (on file with DePaul Law Review).
332. Smith, 442 U.S. at 736.
In *Florida v. Riley*, a helicopter was used to perform aerial surveillance of the backyard of a resident's home. After careful consideration, the Court held that it is not a violation of Fourth Amendment rights to use a helicopter to peer into a yard. Under *Kyllo*, the proper inquiry as to the constitutionality of this search would seem to be whether a helicopter is in the general public use. It is common knowledge that helicopters are used largely for military and police powers, news organizations, and occasionally by the extremely wealthy. But by and large, helicopters are not something readily available to a member of the public—at least one who does not have a lot of money. A helicopter is neither practical nor affordable. Under *Kyllo*, then, it would seem that a helicopter search would have to be considered unconstitutional because the device is not in the general public use. Yet it has already been established that such surveillance is not a Fourth Amendment violation. Once again, how is one to reconcile *Riley* with *Kyllo*?

In *United States v. Place*, the police employed a canine to sniff the luggage of the defendant in search of narcotics or other contraband. When called upon to decide the constitutionality of the canine sniff, the Court held that it did not violate the Fourth Amendment. Again, the question to ask in light of *Kyllo* is whether a narcotics trained dog is generally available to the public. The author of this Note once had a dog, but it did not possess the capability to sniff out drugs. The author also knows many families which have dogs, but these dogs are not narcotics trained. Training a dog for such a task is likely expensive and time consuming. It can be assumed that dogs trained to sniff out illicit drugs are not commonly available to every desiring member of the public. It seems that such dogs are used almost exclusively by law enforcement officers—not the general public. Therefore, under *Kyllo*, using a canine to sniff for drugs would be an unconstitutional search in violation of the Fourth Amendment. But the Supreme Court has held exactly the opposite. How legitimate does *Kyllo* look in light of *Place*? Many commentators support the analogy of the canine sniff to the thermal imaging scan, because they both utilize a form of sense enhancing technology. It should be

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334. *Id.*
335. *Id.* at 457 (Brennan, J., dissenting) (implying that sufficient means are necessary to procure a helicopter).
337. *Id.* at 707.
338. Sarilyn E. Hardee, *Why the United States Supreme Court's Ruling in Kyllo v. United States is Not the Final Word on the Constitutionality of Thermal Imaging*, 24 *CAMPBELL L. REV.*
noted, however, that other authors warn against the extension of the canine sniff analogy outside the home. Still, it has been suggested that a dog sniff is actually more precise than a thermal imaging scan because of the training the dogs receive, indicating that those sorts of searches should be subject to even a more rigid Fourth Amendment scrutiny than a thermal imaging scan.

Although expressed with a bit of sarcasm, this Note argues how vastly *Kyllo* departs from controlling Fourth Amendment precedent. If Justice Scalia, in fashioning his “general public use” test, had even remotely considered any of the aforementioned precedent, he would have realized how problematic his new rule actually is. To say that a sense-enhancing device will be unconstitutional because it is not in the general public use is completely at odds with all the pertinent cases previously discussed. For Justice Scalia to simply ignore such arguments and fashion a contradictory new rule constitutes a breach of *stare decisis*.

The consequence of the Supreme Court’s decision in *Kyllo* is that the legitimacy of the Supreme Court has been compromised. As has been demonstrated by this Note, there were many pertinent and controlling aspects of precedent that should have dictated the outcome of the case. The Court, however, wholly neglected to apply that precedent, instead fashioning a new rule. This decision will leave many Americans wondering just what really drives Supreme Court decisions. Is the Court truly bound by the decisions of the cases before it, or are the decisions actually driven by the morals and biases of the individual Justices?

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53. 60 (2001). The commentator quotes the court in *United States v. Pinson*, 24 F.3d 1056, 1058 (8th Cir. 1994), which said that “[j]ust as odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine sniff, so also does heat escape a home and is detected by the sense-enhancing thermal imager.” *Id.*

339. Laba, *supra* note 258, at 1468-69. The commentator points the language of *United States v. Thomas*, 757 F.2d 1359, 1355 (2d Cir. 1985), when he warns that “a dog sniff ‘that is not intrusive in a public airport may be intrusive when employed at a person’s home.” *Id.*

340. L. Matthew Springer, *A Far Cry From Katz: Deciding the Constitutionality of Prewarrant Thermal Imaging*, 25 Ottono N.U. L. Rev. 593, 609 (1999). The commentator argues that because of the training received by a drug-sniffing canine, when used properly the results of the dog sniff will actually be more precise than a thermal imaging scan. *Id.* This is because the dog will only alert to contraband. *Id.* A thermal imager, on the contrary, will visualize all heat, regardless of the source. *Id.*
V. IMPACT

A. **Kyllo Leaves Many Open-Ended Questions**

It appears as if the *Kyllo* majority largely ignored the *Katz* test as it had been previously applied, and instead formulated a new rule.\(^{341}\) This new rule says that where there is warrantless use of technology that is not available to the general public, this search will be constitutionally unreasonable under the Fourth Amendment.\(^{342}\) In so creating this rule, however, the Court did not give any guidelines as to what this term of art, "general public use," actually means.\(^{343}\) This could feasibly create a problem for law enforcement officers who are left with no realistic interpretation as to what types of technology are constitutionally acceptable and what types are constitutionally forbidden. It begs the question as to the definitional boundaries of general public use.\(^{344}\) Is general public use to be defined nationally or locally? If, for example, the courts decide that in Chicago, a thermal imager is in the general public use, does that mean law enforcement officers are forbidden from using these devices in rural Kentucky, where such technology is not in the general public use? Or, can an officer employ such technology *anywhere* in the country, so long as in some areas or states it is considered generally available? If the thermal imaging device becomes a part of the general public use, does that mean that *Kyllo* will be effectively overruled, and thermal imaging will be an acceptable search under the Fourth Amendment?\(^{345}\) Or, does Justice

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\(^{341}\) One commentator has noted that it appears as if the Supreme Court may have relied on the holding of *California v. Ciraolo*, 476 U.S. 207 (1986), to support its hard line rule about "general public use." Hardee, *supra* note 338, at 62. The Court in *Ciraolo* held that there was no reasonable expectation of privacy from naked-eye aerial observation, because such flights were routine. However, as the commentator notes, the focus in *Ciraolo* was on air travel and its frequency. *Id.* There was no focus on the actual tool of technology, as was the case in *Kyllo*. Therefore, the *Kyllo* Court's reliance on this decision may have been misplaced. *Id.*

\(^{342}\) *Kyllo*, 121 S. Ct. at 2043.

\(^{343}\) See *id.* at 2046.

\(^{344}\) At least one other commentator has battled with what general public use actually means: What exactly is the definition of "general public use"? How does one go about identifying whether a device meets this definition? Does general public use imply that commercial availability is enough? Does it mean that one in ten people must own a thermal imager, or does it mean one out of ten thousand must own? Does general public use imply that one must be able to go to the local discount store to pick up a thermal imager? Does general public use mean one is able to obtain access to a thermal imager over the Internet?


\(^{345}\) It should be noted that at least one commentator believes these thermal imaging devices are already widely available, a finding which, if true, would render Justice Scalia's decision moot. Michael E. Raabe, *After September 11, Where Will the U.S. Supreme Court Go?*, 44 Orange County Law., Mar. 2002.
Scalia mean that if something is at one point out of the general public use, it will always be out of the general public use? Justice Scalia's failure to define the term may create a whole slew of lawsuits in which the general public use of an item will be at the center of debate.346

B. Kyllo Could Affect the War the United States Wages Against Terrorism

Aside from the practical considerations Kyllo raises, it is likely that this decision will also have an impact on the contemporaneous events of our nation. Undoubtedly, many Americans were shaken and disheartened as our nation was rocked by an unprecedented terrorist attack on September 11, 2001. As fear about the tragedy of the terrorist attacks has turned to anger, more than anything we want justice for those who have maimed our friends, our families, our neighbors, and most of all, the soul of our nation. President George W. Bush has committed himself and America's resources to the cause.347 However, the problem faced by President Bush and American intelligence is that these terrorists are not using conventional methods of communication.348 How are we to find those responsible? If the methods of communication used by the terrorists are unorthodox, is it reasonable to expect American intelligence to prevent future attacks by employing only the most traditional methods of surveillance? Obviously, the clandestine attacks of September 11 were well planned and highly guarded. This means future attacks will likely be executed in a similar fashion. The greatest technology and intelligence will need to be employed to intercept covert correspondence to ensure that the events of September 11 will never be repeated.

The failure of the United States to have advanced warning of the September 11 terrorist attacks has been called a "massive intelligence

346. Not all commentators believe the Kyllo Court's failure to define general public use renders the decision a complete loss. In his article, Jonathan Todd Laba states that there are four criteria that the Court should apply when evaluating new search technologies under the holding of Kyllo. Laba, supra note 258, at 1476. The Court should consider: 1) the area subject to surveillance; 2) the type of information revealed by the technology; 3) the level of public awareness of the technology; and 4) the nature and degree of intrusion of the device. Id. The commentator believes that by using these criteria to consider the constitutionality of a new device, the Court can advance police power while simultaneously preserve the values of the Fourth Amendment. Id.

347. President Bush, in his response speech to the terrorist attacks on September 11 stated: "The search is underway for those who are behind these evil acts. I've directed full resources for our intelligence and law enforcement communities to find those responsible and bring them to justice." Lines Ended by Evil: President Bush's Passionate Response to Terrorist Attacks, AM. AT WAR. Issue 02, 2001, at 60.

348. The Pearl Harbor of Terrorism, supra note 18, at 19.
In order to prevent a second intelligence failure, it is possible that certain forms of technology, not available for general public use, may become a necessary and vital tool in the war on terrorism.

This nation is angry and wants an end to all terrorist threats. President Bush and Congressional leaders have the support of not only American citizens, but American allies as well to take the necessary measures to ensure September 11 will never be repeated. However, the search and seizure laws of the United States appear to be at odds with public sentiment. On the one hand, consider the desire, the need, and the hunger to find those responsible for the attacks and bring them to justice, at whatever cost. On the other hand, we have a Constitution by which we are bound that protects against unreasonable search and seizure, even in the quest for justice. Will our nation's leaders be able to fulfill the need for justice while not severely compromising the authority of the Fourth Amendment of the Constitution? Will the Supreme Court stand up and tell President Bush and the rest of the world that they are denying permission to implement what could very well be life-saving technology to prevent another terrorist attack, simply because it is not in the general public use? It is true that these problems of general public use become obsolete when a warrant is obtained from a magistrate prior to the search. However, due to the imminent nature of the terrorist threat in this country in which an attack could occur at any minute of the day, the immediacy of a situation could necessitate use of such technology prior to an opportunity to procure a warrant. It will be interesting to see how the Supreme Court will reconcile Kyllo when that point in time comes.

C. The Court Should Have Considered Public Policy When Deciding Kyllo

The Supreme Court has never held that any right of the Constitution is utterly and completely absolute. Throughout history, the Court has consistently held that where there is a compelling governmental

349. Retired ambassador Morton Abramowitz, former head of intelligence and research at the State Department, We Will Ever Know: The Search is on for Leaders of Terrorists Attacks, AM. AT WAR, ISSUE 02, 2001, at 67.

350. In his response speech to the terrorist attacks, President Bush stated: “America and our friends and allies join with all those who want peace and security in the world and we will stand together to win the war against terrorism.” Lines Ended by Evil: President Bush’s Passionate Response to Terrorist Attacks, supra note 347, at 61.

351. At least one commentator believes that September 11 will have little or no impact on Fourth Amendment jurisprudence. Raabe, supra note 345. He suggests that the conservative judicial theory of “strict construction” will continue to effectuate the intent of our Founding Fathers while simultaneously curbing “a substantial loss of civil liberties” in the wake of September 11. Id.
interest at stake, the authorities may take appropriate, narrowly tailored action to help remedy that problem, even at the cost of an individual’s Constitutional rights.\textsuperscript{352} By and large, the trend seems to be that where there has been an overwhelming safety or health concern involved, the government has been allowed to step in and take action, even at the cost of undermining a fundamental right.

As was previously discussed in Part II, America is plagued with a very serious drug problem.\textsuperscript{353} The seriousness of this problem was noted by at least one commentator.\textsuperscript{354} Those who are being hit the worst are children.\textsuperscript{355} For many young users, the drug of choice is consistently marijuana.\textsuperscript{356} Marijuana has the tendency to be addictive, and it causes dependency.\textsuperscript{357} Not only does it lead to very serious health problems, but it also lessens the ability of abusers to function normally.\textsuperscript{358} A link has been found between those who commit crimes and those who use drugs; the two are inextricably intertwined.\textsuperscript{359}

\textsuperscript{352} See, e.g., Gitlow v. New York, 268 U.S. 652 (1925) (holding that when speech has a tendency to danger the citizenry of a country, the government can take measures to regulate speech, despite the freedoms guaranteed in the First Amendment); Roe v. Wade, 410 U.S. 113 (1973) (holding that concerns for health risks to a mother and her unborn child are sufficient justification for governmental regulation of abortion, even though procreation and privacy are said to be fundamental rights); Troxel v. Granville, 120 S. Ct. 2054 (2000) (holding that where a child is not adequately cared for, the court may intervene, even though there is a fundamental right of parents to make decisions about the care and control of their kids); Kelley v. Johnson, 425 U.S. 238 (1976) (holding that a state’s interest in making police appear uniform and easily recognizable overrides a person’s fundamental interest to control your own appearance); and New York v. Ferber, 458 U.S. 747 (1982) (holding that a state’s interest in protecting the sexual exploitation and abuse of child actors, in avoiding a permanent scarring record, and the desire to do away with an economic incentive to create pornography were sufficient interests to classify child pornography outside the protection of the First Amendment).

\textsuperscript{353} See supra notes 33-54 and accompanying text.

\textsuperscript{354} Mindy G. Wilson, The Prewarrant Use of Thermal Imagery: Has This Technological Advance In the War Against Drugs Come at the Expense of Fourth Amendment Protections Against Unreasonable Searches?, 83 Ky. L.J. 891 (1994-1995). The commentator states: “To say the manufacture, production and distribution of marijuana has become a problem in the United States would understate and belittle the significance of the issue.” Id.

\textsuperscript{355} Id.

\textsuperscript{356} Drug Enforcement Agency. Marijuana, supra note 34.

\textsuperscript{357} National Institute on Drug Abuse, Commonly Abused Drugs, supra note 33.

\textsuperscript{358} Marijuana causes frequent respiratory infections, impaired memory and learning, increased heart rate, anxiety, panic attacks, confusion, slowed thinking and reaction time, and impaired balance and coordination. Id.

\textsuperscript{359} Drug Enforcement Agency: Law Enforcement Drug Statistics, supra note 45. In major cities from all over the country, the DEA researched the percentage of adult males testing positive for any drug at the time of arrest. The national average was sixty-four percent testing positive at the time of arrest. Id. The lowest percentage was just below fifty percent in San Antonio, Texas. Id. The highest percentage topped out at 76.7% in Atlanta, Georgia. Id. On average, 39.9% of males arrested in the cities observed by the DEA tested positively for marijuana specifically. Id. This percentage was higher than those who tested positively for any other drug studied, including cocaine, opiates, meth, and PCP. Id.
Therefore, one could infer that addictive cravings are driving drug abusers to commit crimes to ensure they have enough money to get their "fix." Consequently, the crime rate is escalating. One could take the extrapolation a step further, and presume that as the craze of drug withdrawal becomes increasingly more serious as the user's habits increase, hard-core abusers will turn to violent acts such as armed robbery and burglary to get money required to pay a dealer.

The obvious question must be confronted. Considering the foregoing information, could anyone possibly say that drug abuse in America does not pose a serious safety and health concern for the country? On the contrary. It poses not only health and safety concerns for those who choose to consume drugs but also for those who may be victimized by a drug fiend on a quest for cash.

Perhaps it is time for the Supreme Court to act as it has done in the past, and put the public interest ahead of individual rights when it comes to Fourth Amendment drug cases. Because of the serious health and safety concerns closely associated with the drug trade, it would not be inappropriate for the Court to take a more proactive role when it comes to the war on drugs. The Fourth Amendment is supposed to protect against unreasonable search and seizure, but it says nothing about protection for illegal activities. This is, however, exactly what the Court is doing when it invalidates a search like the one in Kyllo. But how many more drug manufacturers is the Court going to continue to protect in spite of the serious health and safety concerns involved? At what point will the Court step up and say that there is too great an interest in combating America's drug problem to allow someone producing that much marijuana to escape on a Fourth Amendment technicality? How serious does America's drug problem have to get before the Court will say that something has to give, and that for some illegal and dangerous activities, there will be no Fourth Amendment protections? There is at least one commentator who believes that no matter how great the problem becomes, eradication efforts must never interfere with Fourth Amendment protections, because every time we do so, we erode the freedom of individual privacy interests. It must be asked, however, whether we are actually eroding our freedoms when we try to rid the nation of drug dealers, smugglers, and manufacturers. Instead of usurping freedom, this au-

360. See supra notes 43-44 and accompanying text.
361. See supra notes 32-48 and accompanying text.
362. U.S. CONST. amend. IV.
363. See Wilson, supra note 354, at 910 (stating that if limitations are not placed on the use of technological weapons, our right to privacy may be eroded).
thor suggests, we are actually creating it by ridding the nation of many of those people who are at the root of many violent and personal crimes in this country. Making the nation a safer place will, at the end of the day, give us all the security to enjoy the freedoms we are invested with, instead of walking the streets in fear.

Danny Lee Kyllo had one hundred marijuana plants growing in his house. Was he planning on smoking all one hundred plants by himself? It is doubtful; the presumption is that he was preparing them for distribution. By arresting Kyllo and taking him out of the drug manufacture or distribution scene, police authorities were protecting the public from further harm and exploitation. In deciding this case, the Supreme Court effectively thrust Kyllo back into that drug scene and essentially gave him the green light to go ahead with his operations. With one hundred marijuana plants, Kyllo could have single-handedly impacted the drug market in his area. Agents Haas and Elliott had anonymous tips as well as utility bills to support their suspicions about Kyllo’s marijuana activities. They did not pick him at random and take an arbitrary scan of his home. The Court effectively validated Kyllo’s right to engage in illegal activities so long as they are in an area with a high expectation of privacy. The Court, however, should have upheld the validity of the search on the grounds of public policy alone. The Fourth Amendment is supposed to protect against unreasonable search and seizure. It was not created by the Founding Fathers as a loophole for those who get caught engaging in illegal activities. It is high time the Court stops applying it in such a fashion.

VI. Conclusion

On September 11, 2001, the nation was rocked by an unprecedented terrorist attack. Although we are all driven by a plethora of emotions in the aftermath, almost all of us share the feeling of anger. We want justice for those who have maimed our friends, families, neighbors, and the soul of our nation. Obviously the attacks of September 11 were highly planned and well guarded, and any future attacks will likely be executed in a similar fashion. Therefore, the greatest of technology and intelligence will be needed to intercept covert correspondence to ensure the events of September 11 will never be repeated.

The events of the day have drawn a new attention to the search and seizure laws in the United States, which are currently at odds with public sentiment regarding the contemporary events. Traditionally,

364. Kyllo, 121 S. Ct. at 2041.
365. Id.
the Court has allowed many forms of warrantless searches and seizures to proceed uninhibited by the judicial system. In *Smith v. Maryland*, the Court upheld the warrantless installation of a pen register device. Several years later, in *Florida v. Riley*, the Court upheld the search of a backyard from a helicopter. Finally, in *United States v. Place*, the Court upheld the validity of a canine sniff test at an airport. In reaching these decisions, the Court has relied almost religiously on the rule laid forth in *Katz v. United States*, which says a search will be unreasonable if: (1) there is an actual expectation of privacy in the area searched; and (2) that expectation is objectively reasonable.

The Supreme Court has traditionally deferred to the actions of the law enforcement officers. That is, until it heard the case of *Kyllo v. United States*. In deciding *Kyllo*, Justice Scalia, writing for the majority, largely ignored the central holding of *Katz* and the manner in which it has been applied in previous Fourth Amendment cases. Instead, a new rule was fashioned; if technology is not within the general public use, a warrantless search involving that technology is presumptively unreasonable. This rule seems to have arrived out of thin air. The Court failed to reconcile *Kyllo* with *Smith, Riley, and Place*, and it neglected to apply any of the controlling precedent from these cases. By failing to adhere to precedent, the Supreme Court has undermined its own legitimacy, its appearance of fairness, and its predictability. It leaves participants of the judicial system wondering about the source of the law and the fairness of any proceedings. How impartial is a system driven by private biases and individual morals?

At this point, the damage has been done. To that end, in the interest of preventing further erosion of the confidence in the judicial system, I have but one piece of advice for the Supreme Court as it decides future cases: if it ain't broke, don't fix it.

*Carrie L. Groskopf*