SUPREME COURT'S NEW LINE IN THE SAND – MEASURING HEAT EMANATING FROM A HOUSE IS A FOURTH AMENDMENT SEARCH

Kyllo v. United States[1]

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In January of 1992, a federal agent who suspected Danny Kyllo of growing marijuana in his home used a thermal imager to measure the heat radiating from Kyllo's house. These imagers detect thermal radiation, which virtually all objects emit, and can distinguish between degrees of warmth being emitted. In this case, the agent positioned the imager across the street from Kyllo's home (well off the curtilage) and the results showed that the roof and side walls were both hotter than the rest of the house, and warmer than neighboring homes. Armed with this and other information, the agent believed that Kyllo was growing marijuana using halide lights and applied for, and was granted, a search warrant.

The subsequent search of Kyllo's residence revealed an indoor marijuana growing operation involving 100 plants. Kyllo was indicted on one count of manufacturing marijuana, in violation of Title 21 U.S.C. § 841(a)(1), and before trial moved to suppress the evidence. The motion was denied, and nine years after the heat was measured, the United States Supreme Court agreed to decide whether detecting heat emanating from a home is a reasonable search within the meaning of the Fourth Amendment.

The Fourth Amendment provides, in part, that the right of the people to be secure in their houses against unreasonable searches shall not be violated. Not until 1967, in the case of *Katz v. United States*, did the Supreme Court first set out the principal that a Fourth Amendment search occurs when the governments violates a subjective expectation of privacy that society recognizes as reasonable. Since *Katz*, the Supreme Court has given guidance on what reasonable expectation of privacy (REP) in a house really means on issues ranging from how high does REP reach (400 – 1000 feet up) to where does it end (off the curtilage). With this as a backdrop, the *Kyllo* case presented a unique issue, in that the emanating heat was being measured from off the curtilage, yet the heat itself was clearly being produced in the house. It is also clear that Kyllo expected privacy and that society, led by the Supreme Court, has always recognized that the most important area of REP is a person's home. However, starting with *Katz*, the Courts have also said that anything exposed to the public, or to law enforcement officers who are lawfully present, even if in an area of REP, has lost its Fourth Amendment protections (the Plain View Doctrine).

On June 11, 2001, the Supreme Court announced (in a narrow 5-4 decision with the very unusual grouping of Justices Scalia, Souter, Thomas, Ginsburg, and Breyer joining together in the opinion) that this thermal imaging constituted a violation of the Fourth Amendment. In the opinion, the Justices concluded that the use by the government of a device that is not in general public use to explore the details of the inside of a home, that would

[1] 533 U.S. 27 (2001)

have been previously unknowable without physical intrusion, violates one's REP and is an unreasonable search within the meaning of the Fourth Amendment.

What does this mean for law enforcement? It clearly means we can't use thermal imagers to measure heat coming from a house. More significantly, the Court's opinion seems to imply that any intrusion by law enforcement into an area of high REP (a house) by use of a device not in general public use could present a Fourth Amendment problem. In the opinion, the Justices reiterated that the Fourth Amendment draws a firm line at the entrance to the house (whether we are walking in or measuring heat coming out) and that to do any intrusive type of surveillance requires a warrant based upon probable cause. With recent and projected rapid advances in surveillance technology, it is reasonable to suspect that the Supreme Court will be dealing with more of these types of cases in the future, particularly when dealing with REP areas (not homes) where the Court has indicated that people have a little less expectation of privacy.

When the States ratified the Fourth Amendment in 1791, who amongst America's founders could have imagined what we would be dealing with in the area of search and seizure 210 years later. Yet, maybe they did have a clue, and maybe that's why they artfully used the word "unreasonable" in the Fourth Amendment, a word that has been the subject of more interpretation by the Supreme Court than just about all the other words in the Constitution put together. Stay tuned!