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## ***KYLLO V. UNITED STATES AND THE PARTIAL ASCENDANCE OF JUSTICE SCALIA'S FOURTH AMENDMENT***

**RICHARD H. SEAMON\***

*Ways may some day be developed by which the Government . . . will be enabled to expose to a jury the most intimate occurrences of the home.—Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).*

### INTRODUCTION

The recent terrorist attacks on the United States will inspire a call for intrusive, new surveillance technology.<sup>1</sup> When used by the government, this technology strains the Fourth Amendment.<sup>2</sup> That is because the technology

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\* Visiting Professor of Law, Washington & Lee University; Associate Professor of Law, University of South Carolina; J.D., Duke University. In the interest of full disclosure, I note that, as an Assistant to the Solicitor General of the United States from 1990-1996, I was involved in several lower court cases involving the issue that was before the Court in *Kyllo v. United States*, 121 S. Ct. 2038 (2001), and represented the United States before the Court in two of the cases discussed in this Article, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), and *Minnesota v. Dickerson*, 508 U.S. 366 (1993). The views expressed in this Article are, of course, mine alone.

1. See, e.g., Ariana Eunjung Cha & Jonathan Krim, *Privacy, Security Trade-Offs Reassessed: Objections to Surveillance Technology Face New Test After Attack*, WASH. POST, Sept. 13, 2001, at E1 ("Just two days after the worst terrorist attack on U.S. soil, some people are reassessing the trade-offs between privacy and security.").

2. The Fourth Amendment says:

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.

U.S. CONST. amend. IV. Although the Fourth Amendment itself governs only searches and seizures by the federal government, it applies to the States because it is incorporated into the Due Process Clause

often can enable the government to gather information in ways that are hard to analyze under a provision that seems to address physical interferences with tangible things (i.e., “searches” and “seizures” of “persons, houses, papers, and effects”).<sup>3</sup> Illustrating the strain, the government’s use of an electronic listening device prompted the United States Supreme Court to modify the definition of a Fourth Amendment “search” in the landmark case of *Katz v. United States*.<sup>4</sup> Recently, the Court again confronted the question of whether government surveillance technology constituted a “search” in *Kyllo v. United States*.<sup>5</sup> The thesis of this Article is that *Kyllo* reflects a significant, though subtle, departure from *Katz*, for which Justice Scalia is primarily responsible.

The facts of *Kyllo* provide a good metaphor for the Court’s decision in that case. In *Kyllo*, a federal law enforcement agent aimed a thermal imager at the outside of Danny Kyllo’s house.<sup>6</sup> On the surface, Kyllo’s house was probably as unremarkable as his neighbors’ houses. By comparing the heat radiating from the surface of his house to that radiating from his neighbors’ houses, however, the agent determined that something unusual—indeed illegal—was going on inside.<sup>7</sup>

The Court’s decision in *Kyllo*, like Kyllo’s house, appears unremarkable on the surface. The Court in *Kyllo* held by a 5-to-4 vote that the thermal imaging of Kyllo’s house constituted a “search” within the meaning of the Fourth Amendment.<sup>8</sup> Although the vote was close, and the voting alignment was unusual, the majority as well as the dissent claimed merely to be applying the well-established test announced in *Katz*, under which government conduct constitutes a search when it interferes with an individual’s reasonable expectation of privacy.<sup>9</sup> The *Kyllo* majority and dissent seemed to disagree primarily on how to apply the *Katz* test to surveillance technology that makes measurements “off the wall” but does not penetrate “through the wall,” of a house.<sup>10</sup> This point of dispute centered on a

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of the Fourteenth Amendment as one of the “libert[ies]” protected by that Clause. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

3. See, e.g., Shawn C. Helms, *Translating Privacy Values with Technology*, 7 B.U. J. SCI. & TECH. L. 288, 291-300 (2001) (describing a variety of sophisticated surveillance technology).

4. 389 U.S. 347 (1967). See also 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1 (3d ed. 1996) (calling *Katz* a “landmark” case).

5. 121 S. Ct. 2038 (2001).

6. *Id.* at 2041.

7. *Id.*

8. *Id.* at 2046.

9. 389 U.S. at 360 (Harlan, J., concurring). See also, e.g., *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (stating that the “*Katz* test . . . has come to mean the test enunciated by Justice Harlan’s separate concurrence in *Katz*”); *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (applying “two-part inquiry” of Justice Harlan’s concurrence in *Katz*).

10. See *Kyllo*, 121 S. Ct. at 2044 (discussing dissent’s argument that “off the wall” technology

narrow distinction that the Court's post-*Katz* case law did not unequivocally resolve.

Despite superficial appearances, when you compare the doctrinal emanations from the *Kyllo* decision with those from the Court's other recent Fourth Amendment decisions, you can see two significant shifts. First, *Kyllo* shows that a majority of the Court shares Justice Scalia's doubt about the usefulness of the *Katz* test. Second, *Kyllo* reinforces the Court's tendency in the last ten years to narrow the class of cases in which warrantless searches are treated as presumptively unconstitutional. In these two ways, *Kyllo* reflects an ascendance of Justice Scalia's view of the Fourth Amendment.

This ascendance is only partial, however. Although the *Kyllo* majority avoided the *Katz* test because the application of that test would undermine home privacy, the Court did not expressly repudiate *Katz*. Moreover, the *Kyllo* majority did not replace the *Katz* test with the original-understanding approach that Justice Scalia advocates. Furthermore, although *Kyllo* reinforces the narrow warrant presumption that Justice Scalia favors, the Court does not seem ready to adopt Justice Scalia's view that the common law is the primary determinant of when the Fourth Amendment requires search warrants.

This Article examines *Kyllo* in four steps. Part I briefly describes the facts and procedural history of the case. Part II examines the facets of the majority and dissenting opinions that will receive the most attention from lower courts and practitioners. Part III examines *Kyllo* beneath the surface to demonstrate its doctrinal importance.

## I. THE FACTS AND PROCEDURAL HISTORY OF *KYLLO*

Just as the government's war on alcohol fueled new methods of surveillance during Prohibition,<sup>11</sup> so has the government's war on drugs since the 1980s.<sup>12</sup> *Kyllo* reflects a small skirmish in the latter war, in which the government attempted to achieve victory by using one form of technology to

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should be treated differently from "through the wall" technology). See also *infra* notes 39-51 and accompanying text (contrasting the approaches of the dissent and majority to the technology in question).

11. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 455-57 (1928) (wiretaps used to gather evidence of violations of the National Prohibition Act).

12. See, e.g., *Florida v. Riley*, 488 U.S. 445, 447-48 (1989) (plurality opinion) (police used helicopters hovering at 400-foot altitude to see marijuana growing in backyard); *United States v. Karo*, 468 U.S. 705, 708-10 (1984) (law-enforcement agents attached electronic beepers to cans of ether to track suspected drug traffickers). See also Peter Joseph Bober, *The "Chemical Signature" of the Fourth Amendment: Gas Chromatography/Mass Spectrometry and the War on Drugs*, 8 SETON HALL CONST. L.J. 75, 76-82 (1997) (describing use of chemical testing in war on drugs).

detect another form.<sup>13</sup>

Some people use high-intensity lamps to grow African violets; Danny Kylo used them to grow marijuana.<sup>14</sup> Suspecting as much, a federal agent parked across the street from Kylo's home in Florence, Oregon, late one night in 1992 and scanned it with a thermal imager.<sup>15</sup> As described by the Court, a thermal imager "detect[s] infrared radiation [and] . . . converts the radiation into [visual] images based on relative warmth."<sup>16</sup> The thermal imager used on Kylo's house indicated that the roof over his garage and a side wall of his house were hot compared to the surfaces of the neighboring homes.<sup>17</sup> Based on this information and other evidence, including Kylo's utility bills, federal agents obtained a warrant to search Kylo's house.<sup>18</sup> The search revealed an indoor marijuana-growing operation with more than 100 plants.<sup>19</sup>

Kylo was prosecuted for the federal crime of manufacturing marijuana.<sup>20</sup> He moved to suppress from his prosecution the evidence found in the search of his home.<sup>21</sup> He argued that the evidence was seized under a warrant that rested on information gathered in an unconstitutional search—namely, the warrantless thermal imaging of his house.<sup>22</sup> This argument posed the question whether the use of the thermal imager was a "search" within the meaning of the Fourth Amendment.<sup>23</sup>

The Court of Appeals for the Ninth Circuit held that the government's use of a thermal imager on Kylo's house was not a search.<sup>24</sup> The United States Supreme Court granted certiorari to review this holding,<sup>25</sup> even though the

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13. The government was victorious in the sense that it discovered Kylo committing a crime. By the time the U.S. Supreme Court decided that the government had unreasonably searched Kylo's house in the process of discovering his crime, Kylo had served one month in jail. Linda Greenhouse, *Justices Rule out High-Tech Probe*, PITTSBURGH GAZETTE, June 12, 2001, at A8 (reporting that Kylo had spent one month in jail as of time of Court's decision).

14. *Kylo*, 121 S. Ct. at 2041.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* (stating that Kylo was indicted on one count of violating 21 U.S.C. § 841(a)(1)).

21. *Kylo*, 121 S. Ct. at 2041.

22. *See id.*

23. *See id.* After the trial court denied Kylo's suppression motion, he entered a conditional guilty plea, preserving the Fourth Amendment issue for appeal.

24. *Id.* *See also* *Kylo v. United States*, 140 F.3d 1249 (9th Cir. 1998) (original panel opinion, later withdrawn); *Kylo v. United States*, 190 F.3d 1041 (9th Cir. 1999) (later panel opinion approving the search).

25. 530 U.S. 1305 (2000) (order granting certiorari).

Ninth Circuit's decision did not conflict with that of any other federal courts of appeals.<sup>26</sup>

## II. KYLLO ON THE SURFACE

On the surface, *Kyllo* does not break much new ground or reflect any deep division on the Court. In holding that the government's thermal imaging of a private home constituted a search subject to the Fourth Amendment, a five-member majority announced a rule that, they claimed, was derived from the well-settled *Katz* test and that indeed accords with the result in *Katz*.<sup>27</sup> The four-member dissent ostensibly disagreed with the majority only on how to apply the *Katz* test to surveillance technology that operates by taking measurements "off the walls" of a house, rather than penetrating "through the walls."<sup>28</sup> The disagreement thus seemed to center on a particular feature of the technology at issue, with the majority favoring a result that better protected home privacy.

The voting alignment was odd, as many commentators observed.<sup>29</sup> Justice Scalia wrote for a majority—consisting also of Justices Souter, Thomas, Ginsburg, and Breyer—that reached a result favoring a criminal defendant.<sup>30</sup> Justice Stevens wrote a dissent that endorsed the government's position and that was joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy.<sup>31</sup> Contrary to the impression conveyed by the popular press, this alignment was not unprecedented.<sup>32</sup> Justice Scalia had voted to uphold

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26. See *Kyllo*, 121 S. Ct. at 2049 n.4 (Stevens, J., dissenting) (noting that all federal courts of appeals to decide the issue had held that thermal imaging of a home is not a search, except for one Tenth Circuit decision that had been vacated and decided on other grounds); Brief in Opposition at 7-8, *Kyllo v. United States*, 121 S. Ct. 2038 (2001) (No. 99-8508).

27. 121 S. Ct. at 2046.

28. *Id.* at 2052.

29. See, e.g., David Cole, *Scalia's Kind of Privacy*, THE NATION, July 23, 2001, at 6, available at 2001 WL 2132778 (characterizing *Kyllo* as "[o]ne of the most surprising decisions" of the Term with Justice Scalia "ruling in favor of a criminal defendant . . . . In the most unlikely collaboration of the year."); Linda Greenhouse, *Privacy Is Winner Against Technology in Court's Ruling*, MILWAUKEE J. SENTINEL, June 18, 2001, at 6A, available at 2001 WL 9362604 (noting that *Kyllo* "was not the usual 5-4, conservative-liberal split"); Jennifer Liebman & Anne Stopper, *Supreme Court Review: The Biggest Cases of the Term*, LEGAL TIMES, July 2, 2001, at 12 (noting the "odd alliance" composing the majority in *Kyllo*); Jeffrey Rosen, *A Victory for Privacy*, WALL ST. J., June 18, 2001, at A18 (observing that Justice Scalia "is not ordinarily celebrated by liberals for his devotion to the right to privacy," which made his decision for majority in *Kyllo* notable); Eric J. Sinrod, *Supreme Court Looks at a Hot Privacy Issue*, N.Y. L.J., June 26, 2001, at 5 (stating that *Kyllo* surprisingly pits Justice Antonin Scalia on the side of individual privacy rights and Justice John Paul Stevens on the side of law enforcement" and that "[t]he grouping of the dissenting justices reveals some strange bedfellows").

30. See *Kyllo*, 121 S. Ct. at 2046-47.

31. See *id.* at 2047.

32. See *supra* note 29 (citing press commentary on *Kyllo*).

individual privacy interests over government interests in prior Fourth Amendment cases,<sup>33</sup> and Justice Stevens had voted in favor of the government in prior Fourth Amendment cases.<sup>34</sup> Even so, the unusual voting alignment in *Kyllo* suggested that something unusual was taking place.

Perhaps partly to counteract suggestions that the Court was breaking significant new ground, the majority's opinion depicted the case as requiring only a "refinement" of precedent in light of new technology.<sup>35</sup> The majority admitted that the Court has had trouble identifying "searches" under the *Katz* test.<sup>36</sup> The majority assured us, however, that, "[w]hile it may be difficult to refine *Katz*" for use in contexts outside of the home, no such difficulty existed "in the case of the search of the interior of a home."<sup>37</sup> In that setting, the Court explained: "[T]here 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*."<sup>38</sup> To preserve this "individual" expectation, the majority announced a rule: "[O]btaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search—at least where (as here) the technology in question is not in general public use."<sup>39</sup> This rule, the majority promised,

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33. See, e.g., *Chandler v. Miller*, 520 U.S. 305, 307, 313-23 (1997) (opinion joined by Justice Scalia holding that Georgia drug-testing program for certain candidates for public office violated the Fourth Amendment); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680-87 (1989) (Justice Scalia dissenting, in opinion joined by Justice Stevens, from decision upholding warrantless drug-testing of certain railroad employees); *Arizona v. Hicks*, 480 U.S. 321, 323-29 (1987) (majority opinion by Justice Scalia holding that police's cursory inspection of stereo equipment suspected to be stolen violated the Fourth Amendment).

34. See, e.g., *Richards v. Wisconsin*, 520 U.S. 385, 387-95 (1997) (holding, in opinion written for majority by Justice Stevens, that police officer's "no knock" entry into hotel room did not violate the Fourth Amendment); *Horton v. California*, 496 U.S. 128, 130-41 (1990) (holding, in opinion written for majority by Justice Stevens, that "plain view" doctrine did not require police to come across seized evidence inadvertently); *Maryland v. Garrison*, 480 U.S. 79, 80-89 (1987) (holding, in opinion written for majority by Justice Stevens, that police did not violate Fourth Amendment when they searched apartment separate from the one for which warrant authorized a search).

35. See *Kyllo*, 121 S. Ct. at 2043 (purporting to "refine" *Katz* test for use in cases involving "the search of interior of homes"). But see *infra* Part III.A (arguing that, instead of refining *Katz* test, *Kyllo* actually departs from *Katz* test).

36. See *id.* ("The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable.").

37. *Id.*

38. *Id.* (emphasis in the original).

39. *Id.* (internal quotation marks and citations omitted). See also *id.* at 2046 ("Where, as here, the Government uses a device that is not in general public 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."); *id.* at 2050 (Stevens, J., dissenting) (describing sentence quoted in text accompanying this note as "a rule that is intended to provide essential

would ensure “preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”<sup>40</sup> Couched as a “refine[ment]” of *Katz* with “roots deep in the common law,” the majority’s rule sounds familiar and reassuring.

The majority cited *Katz* not only in framing its rule of decision, but also in refuting the dissent’s “leading point.”<sup>41</sup> The dissent’s leading point was that thermal imaging detects “only heat radiating from the external surface of the house.”<sup>42</sup> The dissent reasoned that, because the heat is exposed to the public, its measurement cannot interfere with any reasonable expectation of privacy under the *Katz* test.<sup>43</sup> The majority countered that, under this reasoning, the result in *Katz* was wrong. *Katz* held that a search occurred when the government used an “eavesdropping device [that] picked up only sound waves that reached the exterior of the phone booth.”<sup>44</sup> The thermal imager likewise measured only heat waves that reached the exterior of *Kyllo*’s house. The *Kyllo* majority admitted that the thermal imager “was relatively crude,” but the majority explained, “[T]he rule we adopt must take account of more sophisticated systems that are already in use or in development.”<sup>45</sup> This explanation suggests the majority is not just abiding by *Katz*, but extending it.

The dissent in *Kyllo*, like the majority, depicted the difference between it and the majority as a narrow dispute about the proper application of the *Katz* test. The dissent relied primarily on *Katz*’s statement that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”<sup>46</sup> The dissent observed that, in cases after *Katz*, the Court had relied on this principle to hold that no Fourth Amendment search occurred when the government rummaged through a bag of trash that a homeowner left on the sidewalk; when the government conducted aerial surveillance of someone’s backyard; or when the government observed smoke emanating from a chimney.<sup>47</sup> In these cases, the

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guidance” for future, more sophisticated forms of surveillance technology).

40. *Id.* at 2043.

41. *Id.* at 2044.

42. *Id.* at 2044 (quoting Brief for the United States at 26).

43. *See id.* at 2048 (Stevens, J., dissenting) (“Heat waves, like aromas that are generated in a kitchen, or a laboratory or opium den, enter the public domain if and when they leave a building. A subjective expectation that they would remain private is not only implausible but also surely not ‘one that society is prepared to recognize as ‘reasonable.’”) (quoting *Katz*, 389 U.S. at 361).

44. *Id.* at 2044.

45. *Id.*

46. *Id.* at 2047 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (quoting *Katz*, 389 U.S. at 351)).

47. *See id.* at 2047 n.2 (Stevens, J., dissenting).



dissent discerned “a distinction of constitutional magnitude between ‘through-the-wall surveillance’ that gives the observer or listener direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand.”<sup>48</sup> The dissent accordingly would not treat surveillance technology as a search “unless it provide[d] its user with the functional equivalent of actual presence in the area being searched.”<sup>49</sup> Under this standard, the dissent considered thermal imaging to be outside the Fourth Amendment because it operated in a passive way and the information it gathered was too crude.<sup>50</sup> Other than excluding thermal imaging from Fourth Amendment protection, however, the dissent’s test did not seem much different from that of the majority.<sup>51</sup>

To judges and practitioners who will confront *Kyllo* in the future, the decision will likely appear to involve only legal line-drawing about which reasonable minds differed.<sup>52</sup> The majority and dissent each apparently and plausibly understood the *Katz* test to require Fourth Amendment scrutiny of government surveillance methods that are comparable to physical intrusions into the home. The majority and dissent differed only on whether thermal imaging was enough like a physical intrusion to trigger the Fourth Amendment. The difference between the majority and the dissent seems to matter mainly for passive detection devices like thermal imagers. Future litigation in lower courts will probably focus on the meaning, rather than the derivation, of the majority’s rule.<sup>53</sup>

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48. *Id.* at 2047 (Stevens, J., dissenting).

49. *Id.* at 2050 (Stevens, J., dissenting).

50. *See id.* at 2048 (Stevens, J., dissenting) (“As still images from the infrared scans show . . . no details regarding the interior of petitioner’s home were revealed. Unlike an x-ray scan, or other possible ‘through the wall’ techniques, the detection of infrared radiation emanating from the home did not accomplish ‘an unauthorized physical penetration into the premises’ . . .”) (quoting *Silverman v. United States*, 365 U.S. 505, 509 (1961)); *id.* at 2049 (“Since what was involved in this case was nothing more than drawing inferences from off-the-wall surveillance, rather than any ‘through-the-wall’ surveillance, the officers’ conduct did not amount to a search and was perfectly reasonable.”).

51. *See id.* at 2046 (“The dissent’s proposed standard—whether the technology offers the ‘functional equivalent of actual presence in the area being searched’—would seem quite similar to our own at first blush.”) (citation omitted); *id.* at 2050 (Stevens, J., dissenting) (stating that majority’s “rule” is “intended to provide essential guidance for the day when more sophisticated systems gain the ability to see through walls and other opaque barriers”) (internal quotation marks omitted).

52. *See, e.g.*, David Cole, *supra* note 29, at 6 (calling *Kyllo* “a close case, as Justice John Paul Stevens’s quite reasonable dissent shows”).

53. As the *Kyllo* dissent observed, the majority’s rule can be broken down into four elements, each of which will no doubt raise future questions. *See* 121 S. Ct. at 2050 (Stevens, J., dissenting).

### III. KYLLO BENEATH THE SURFACE

Beneath its surface, *Kyllo* is important because it vindicates Justice Scalia's view of the Fourth Amendment in two ways. First, *Kyllo* endorses Justice Scalia's criticism of the *Katz* test. Second, *Kyllo* continues the Court's trend of narrowing the class of cases in which warrantless searches are presumptively invalid. Although these developments do not totally vindicate Justice Scalia's view of the Fourth Amendment, they produce a Fourth Amendment that differs dramatically from the one that existed when he joined the Court.

#### A. *Kyllo and Katz*

Although the *Kyllo* majority purported to "refine" the *Katz* test, the majority actually departed from that test.<sup>54</sup> The majority did so to avoid a problem with the test that Justice Scalia identified in prior opinions which did not command a majority. The departure does not, however, reflect a complete victory for Justice Scalia. For one thing, this departure only occurs in a limited context (i.e., when use of the *Katz* test would undermine privacy). Moreover, the *Kyllo* majority did not adopt the analysis that Justice Scalia would use instead of the *Katz* test.

##### 1. *The Extent to Which Kyllo Endorses Justice Scalia's Fourth Amendment*

The *Katz* test "has come to mean the test enunciated by Justice Harlan's separate concurrence in *Katz*."<sup>55</sup> In his concurrence, Justice Harlan said that government conduct is a search when it interferes with an individual's reasonable expectation of privacy.<sup>56</sup> Under that test, the government conducted a search when it used a microphone attached to the outside of a phone booth to hear *Katz*'s end of a telephone conversation; it did not matter that this surveillance method did not require physical invasion of any private space.<sup>57</sup> Thus in *Katz*, the "reasonable expectation of privacy" standard

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54. See *Kyllo*, 121 S. Ct. at 2043 (remarking on the difficulty of "refin[ing]" *Katz* for use in other contexts, but finding no such difficulty in context of search of interior of home).

55. *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring). See, e.g., *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (applying "two-part inquiry" of Justice Harlan's concurrence in *Katz*).

56. 389 U.S. at 360 (Harlan, J., concurring) (reading the majority's opinion, as well as Court's precedent, to establish that "a person has a constitutionally protected reasonable expectation of privacy").

57. See *id.* at 353 ("The fact that the electronic device employed . . . did not happen to penetrate

replaced a standard that initially “was tied to common-law trespass”<sup>58</sup> and that, at the time of *Katz*, still seemed to require physical penetration into a constitutionally protected area.<sup>59</sup>

Justice Scalia criticized the *Katz* test for three reasons in a concurring opinion, which was joined only by Justice Thomas, in *Minnesota v. Carter*.<sup>60</sup> First, he said, the test “has no plausible foundation in the text of the Fourth Amendment.”<sup>61</sup> Second, he charged that the test is “notoriously unhelpful” in identifying what government conduct constitutes a search.<sup>62</sup> Third, he labeled the test “self-indulgent” because it allows judges, and especially the Justices, to decide what privacy expectations are “reasonable.”<sup>63</sup>

Speaking for the majority in *Kyllo*, Justice Scalia acknowledged his prior criticism of the *Katz* test. The *Kyllo* majority observed, “The *Katz* test . . . has often been criticized as circular, and hence subjective and unpredictable.”<sup>64</sup> The majority cited, among other published criticism, Justice Scalia’s concurrence in *Carter*.<sup>65</sup> Of course, the *Kyllo* majority’s acknowledgment of the criticism is not the same as endorsement of it. Immediately after this acknowledgment, however, the majority admitted, “[I]t may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences are [sic] at issue . . . .”<sup>66</sup> Thus, far from refuting the criticism of *Katz*, the majority at least weakly endorsed it outside the context of the case before it.

More importantly, the *Kyllo* majority did not apply the *Katz* test to the case before it. Under the *Katz* test, the sole inquiry should have been whether *Kyllo* reasonably expected the relative warmth of his roof and a side of his house to remain private.<sup>67</sup> The reasonableness of any such expectation

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the wall of the booth can have no constitutional significance.”).

58. *Kyllo*, 121 S. Ct. at 2042.

59. See *Silverman v. United States*, 365 U.S. 505, 509-11 (1961) (holding that government’s electronic eavesdropping constituted a search because it involved “unauthorized physical penetration into the premises”; finding it unnecessary to determine “whether or not there was a technical trespass under the local property rules relating to party walls”).

60. 525 U.S. 83, 91 (1998) (Scalia, J., concurring).

61. *Id.* at 97 (Scalia, J., concurring).

62. *Id.* See also *O’Connor v. Ortega*, 480 U.S. 709, 729-30 (1987) (Scalia, J., concurring in the judgment) (criticizing majority’s approach to determining whether government employees have reasonable expectations of privacy in their offices because majority’s ad hoc, “case-by-case” approach created difficulties for lower courts, the police, and citizens).

63. *Carter*, 525 U.S. at 97 (Scalia, J., concurring).

64. *Kyllo*, 121 S. Ct. at 2043.

65. See *id.*

66. *Id.*

67. See, e.g., *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990) (criticizing lower court for using multi-factor test to determine whether defendant could claim Fourth Amendment protection; sole factor was whether he reasonably expected privacy in place searched); *California v. Ciraolo*, 476 U.S.

depended partly on whether thermal imagers were in general public use in 1992, when *Kyllo*'s house was scanned.<sup>68</sup> The *Kyllo* majority mentioned this factor but did not treat it as essential to the analysis.<sup>69</sup> To the contrary, the majority said that whether a type of surveillance technology is in general public use only "may be a factor."<sup>70</sup> Furthermore, the majority implied that it mentioned the factor only because it was forced to do so by precedent.<sup>71</sup> More fundamentally, the majority could not have meant its ruling to last only until thermal imagers come into general use. Such a ruling would hardly serve the majority's objective of "tak[ing] the long view" by deciding the case in a way that would "assure" preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.<sup>72</sup>

I believe that the *Kyllo* majority avoided the *Katz* test to avoid the problem that is so well illustrated by its application to the facts of *Kyllo*. The problem with the *Katz* test, as the *Kyllo* majority recognized, is that the test is "circular."<sup>73</sup> Under the test, the less privacy we have—because of technology such as thermal imaging, for example—the less we can reasonably expect. As our reasonable expectations of privacy decrease, the types of government intrusions that will be found to fall outside of the Fourth Amendment (as not constituting searches) increases. Thus, when courts apply the *Katz* test in this "reverse" mode—*i.e.*, to conclude that government conduct is not a search for Fourth Amendment purposes—the test is not just circular; it causes a

207, 211 (1986) ("The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy.") (internal quotation marks omitted).

68. See *Ciraolo*, 476 U.S. at 213-214 (emphasizing that government aerial observation of defendant took place from publicly navigable airspace).

69. See *id.* at 2046 n.6 (internal cross-reference omitted).

The dissent argues that we have injected potential uncertainty into the constitutional analysis by noting that whether or not the technology is in general public use may be a factor . . . . That quarrel, however, is not with us but with this Court's precedent. See [*California v.*] *Ciraolo*, [476 U.S. 207, 215 (1986)] ("In 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 1000 feet"). Given that we can quite confidently say that thermal imaging is not "routine," we decline in this case to reexamine that factor.

*Id.*

70. *Id.* (emphasis added).

71. See *id.* (stating that dissent's criticism of majority's reliance on "general public use" factor is a quarrel "not with us but with this Court's precedent").

72. *Id.* at 2043. See also *id.* at 2050 (Stevens, J., dissenting) (observing that "general public use" factor is "somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available.").

73. *Id.* at 2043. Cf. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("[I]t would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases.").

downward spiral in Fourth Amendment protection.<sup>74</sup>

The reverse *Katz* test undermines the purpose of the Fourth Amendment's guarantee against unreasonable searches, as Justice Scalia has described that purpose. Speaking only for himself in *Minnesota v. Dickerson*, Justice Scalia said: "The purpose of the provision . . . is to preserve that degree of respect for the privacy of persons . . . that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'"<sup>75</sup> The first part of the statement in *Dickerson* is echoed in Justice Scalia's expression, in the *Kyllo* majority opinion, of a desire to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."<sup>76</sup> The second part of his statement in *Dickerson*, concerning our "less virtuous age," presages the *Kyllo* majority's concern with the "power of technology to shrink the realm of guaranteed privacy."<sup>77</sup>

In short, *Kyllo* recognizes the problem with the reverse *Katz* test that Justice Scalia previously had identified and avoids the test to avoid undermining what Justice Scalia previously had identified as the purpose of the Fourth Amendment's guarantee against unreasonable searches. Justice Scalia had identified the problem with reverse *Katz* and the purpose of the Fourth Amendment in opinions in which he spoke for less than a majority, and sometimes only for himself. In *Kyllo*, in contrast, he spoke for the majority. In this respect, *Kyllo* reflects an ascendance of Justice Scalia's view of the Fourth Amendment.

## 2. *The Extent to Which Kyllo Does Not Endorse Justice Scalia's View of the Fourth Amendment*

The ascendance described above is only partial. While the *Kyllo* majority departed from the reverse *Katz* test, the majority did not adopt Justice Scalia's approach to identifying a Fourth Amendment "search." Nor does *Kyllo* signal a rejection of "positive" uses of the *Katz* test.

Justice Scalia's approach to Fourth Amendment interpretation relies on its text as it was originally understood. He said in *Dickerson* that the words of

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74. See *id.* at 2042 (explaining that, although the Court in *Katz* concluded that electronic eavesdropping of a conversation in telephone booth constituted a search, the Court in later cases used *Katz* "somewhat in reverse" to conclude that certain government actions did not constitute a search).

75. 508 U.S. 366, 380 (1993) (Scalia, J., concurring).

76. 121 S. Ct. at 2043. See also *id.* at 2046 ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted . . .") (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

77. *Id.* at 2043.

the Fourth Amendment “must be given the meaning ascribed to them at the time of their ratification.”<sup>78</sup> Thus, to determine whether government conduct constitutes a Fourth Amendment “search,” Justice Scalia would rely primarily on the original understanding of the word “search.”<sup>79</sup> Justice Scalia might also treat as a “search” conduct that is substantially equivalent to conduct traditionally understood as a search.<sup>80</sup>

The *Kyllo* majority did not entirely follow Justice Scalia’s approach. Rather, the majority used an amalgam of Justice Scalia’s approach and the *Katz* test. The majority adopted a “criterion” that, consistent with *Katz*, reflects the current expectations of privacy—“the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*.”<sup>81</sup> Yet the majority also claims that this criterion had “roots deep in the common law” and would “assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”<sup>82</sup> It might make sense to link modern privacy expectations to framing-era privacy expectations if there were not much difference between them. There is obviously a big difference, however, and the majority knew it.<sup>83</sup>

In leavening Justice Scalia’s approach with the *Katz* test, *Kyllo* may show concern by some Justices in the *Kyllo* majority that Justice Scalia’s approach does not always protect privacy better than the *Katz* test. In his concurrence in *Carter*, for example, Justice Scalia used his original-understanding approach to conclude that temporary visitors to a home could not challenge a search of the home that occurred during their visit.<sup>84</sup> Despite that conclusion, five Justices in *Carter* relied on the *Katz* test to conclude that a temporary social visitor usually can contest such searches.<sup>85</sup> Among those five were two

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78. *Dickerson*, 508 U.S. at 379 (Scalia, J., concurring).

79. *See Kyllo*, 121 S. Ct. at 2042 & n.1 (observing that visual observation of the outside of a house would be a “search” as that term was originally understood). *Cf. California v. Hodari D.*, 499 U.S. 621, 624-27 (1991) (in opinion for majority by Scalia, J., construing the term “seizure” in the Fourth Amendment based on original understanding of that term).

80. *Cf. Dickerson*, 508 U.S. at 382 (stating that judgment of reasonableness of a search might be affected by technological developments post-dating adoption of Fourth and Fourteenth Amendment).

81. *See Kyllo*, 121 S. Ct. at 2043.

82. *Id.*

83. *See id.* (“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology . . . .”) *See also Bartnicki v. Vopper*, 121 S. Ct. 1753, 1764 (2001) (recognizing privacy interests implicated by electronic eavesdropping but striking down provision in federal wire-tap statute that criminalized disclosure of illegally intercepted communication on ground that, as applied to case before it, provision violated First Amendment).

84. *See Carter*, 525 U.S. at 97 (Scalia, J., concurring) (“Respondents here were not searched in ‘their . . . hous[e]’ under any interpretation of the phrase that bears the remotest relationship to the well-understood meaning of the Fourth Amendment.”).

85. *See id.* at 99 (Kennedy, J., concurring) (“[M]y view [is] that almost all social guests have a

Members who joined Justice Scalia's opinion for the majority in *Kyllo*—Justices Souter and Ginsburg.<sup>86</sup>

*Kyllo* thus avoided using the reverse *Katz* test because its use would have undermined the privacy traditionally expected in the home. Accordingly, *Kyllo* does not signal that the Court would repudiate a “positive” use of the *Katz* test—as occurred in *Katz* itself—to extend Fourth Amendment protection beyond that afforded under a common-law approach to defining a “search.” Even so, this limited departure from the “settled rule” of *Katz*<sup>87</sup>—occurring as it did in “the prototypical and hence most common litigated area of protected privacy,” a search involving the interior of a home<sup>88</sup>—represents a significant change in Fourth Amendment law. Justice Scalia is chiefly responsible for that change.

## B. *Kyllo and the Warrant Requirement*

### 1. *Kyllo's Reinforcement of a Narrow Warrant Presumption*

*Kyllo* not only avoided the reverse *Katz* test, but also suggested that the test was developed “to preserve somewhat more intact [the Court's] doctrine that warrantless searches are presumptively unconstitutional.”<sup>89</sup> In the last decade, the Court has abandoned the broad principle that all warrantless searches are presumptively unconstitutional.<sup>90</sup> Justice Scalia has played a major role in that trend.<sup>91</sup> *Kyllo* reinforces that trend by departing from the reverse *Katz* test, thereby discouraging its use to shore up a broad warrant presumption, and by articulating a narrow version of the presumption.

Until about 1990, the Court often said that all warrantless searches were presumptively unconstitutional, even while the Court recognized many situations in which the presumption was overcome.<sup>92</sup> A classic statement of

legitimate expectation of privacy, and hence protection against unreasonable searches, in their host's home.”); *id.* at 109 n.2 (Ginsburg, J., dissenting) (“I think it noteworthy that five Members of the Court would place under the Fourth Amendment's shield, at least, ‘almost all social guests . . . .’”) (quoting Justice Kennedy's concurrence in *Carter*).

86. *See id.* at 106.

87. *Id.* at 101 (Kennedy, J., concurring) (“The settled rule is that the requisite connection is an expectation of privacy that society recognizes as reasonable.”).

88. *Kyllo*, 121 S. Ct. at 2043.

89. *Id.* at 2042.

90. *See infra* notes 111-19 and accompanying text.

91. *See infra* notes 111-19 and accompanying text.

92. *See, e.g.,* *California v. Carney*, 471 U.S. 386, 390 (1985) (referring to the “requirement that searches be conducted pursuant to a warrant issued by an independent judicial officer”); *United States v. Karo*, 468 U.S. 705, 717 (1984) (“Warrantless searches are presumptively unreasonable though the Court has recognized a few limited exceptions to this general rule.”); *Payton v. New York*, 445 U.S. 573, 585 (1979) (“Unreasonable searches or seizures conducted without any warrant at all are

the presumption comes from *Katz*, in which the Court said: “[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”<sup>93</sup> The Court quoted that statement in many later opinions.<sup>94</sup> At the same time, the Court expanded the number and scope of what had begun as “a few specifically established and well-delineated exceptions.”<sup>95</sup>

Justice Scalia called the Court on this inconsistency in his concurring opinion in *California v. Acevedo*.<sup>96</sup> In that opinion, he contended that the Court had “lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone.”<sup>97</sup> Because of the Court’s erratic path, he charged, “the ‘warrant requirement’ had become so riddled with exceptions that it was basically unrecognizable.”<sup>98</sup>

Justice Scalia’s criticism apparently hit home. The majority’s 1991 opinion in *Acevedo* appears to be the last one stating the warrant presumption in the broad form that he criticized.<sup>99</sup> In the last ten years, the broad version of this presumption seems to appear only in dissents.<sup>100</sup> Apparently thanks to Justice Scalia’s criticism in *Acevedo*, the broad version of the presumption seems to have died from embarrassment.

condemned by the plain language of the first clause of the [Fourth] Amendment.”); *Franks v. Delaware*, 438 U.S. 154, 164 (1978) (“The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search.”); *United States v. Watson*, 423 U.S. 411, 427 (1976) (Powell, J., concurring) (“There is no more basic constitutional rule in the Fourth Amendment area than that which makes a warrantless search unreasonable except in a few ‘jealously and carefully drawn’ exceptional circumstances.”) (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958)).

93. *Katz*, 389 U.S. at 357.

94. See, e.g., *Horton v. California*, 496 U.S. 128, 133 (1990); *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984); *United States v. Ross*, 456 U.S. 798, 824-25 (1982); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Colorado v. Bannister*, 449 U.S. 1, 2-3 (1980). See also *Florida v. White*, 526 U.S. 559, 568-69 & n.2 (1999) (Stevens, J., dissenting) (citing precedent from 1972 and earlier supporting “our longstanding warrant presumption”).

95. 389 U.S. 347, 357. See, e.g., Scott E. Sundby, “*Everyman’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*,” 94 COLUM. L. REV. 1751, 1752 (1994) (noting the abundance of academic commentary criticizing Court for “riddling” the Warrant Clause with exceptions).

96. 500 U.S. 565, 581 (1991) (Scalia, J., concurring in the judgment). Prior to criticizing the broad warrant presumption in *Acevedo*, Justice Scalia had himself articulated it, without criticism, in *Ortega*, 480 U.S. at 732 (Scalia, J., concurring in the judgment) (stating that “as a general rule warrantless searches are *per se* unreasonable”) (emphasis in original). Perhaps this prior acquiescence reflected that *Ortega* was one of the earliest Fourth Amendment cases in which Justice Scalia participated after joining the Court.

97. 500 U.S. at 582 (Scalia, J., concurring in the judgment).

98. *Id.*

99. *Id.* at 580.

100. See, e.g., *White*, 526 U.S. at 567 (Stevens, J., dissenting).



In *Acevedo*, Justice Scalia not only criticized the broad warrant presumption, but also blamed it for the reverse *Katz* test. He said, "Our intricate body of law regarding 'reasonable expectation of privacy' has been developed largely as a means of creating these [warrant] exceptions, enabling a search to be denominated not a Fourth Amendment 'search' and therefore not subject to the general warrant requirement."<sup>101</sup> Justice Scalia repeated this view, speaking for the majority in *Kyllo*, when he suggested that the Court had applied the *Katz* test "somewhat in reverse," "perhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional."<sup>102</sup> In Justice Scalia's view, the reverse *Katz* test enabled the Court to uphold warrantless government investigative methods without having to recognize new warrant exceptions that would destroy the illusion of a broad warrant presumption.<sup>103</sup>

If this view is correct, *Kyllo* should help prevent a resuscitation of the broad warrant presumption. As discussed in the last section, *Kyllo* avoided the reverse *Katz* test. By doing so, it furnishes precedent discouraging a use of that test to shore up the illusion that a broad warrant presumption exists. To put it in Machiavellian terms, Justice Scalia's opinion for the majority in *Kyllo* prevents the Court from using the reverse *Katz* test as an "out" (i.e., as a way to uphold warrantless government surveillance methods of which the Court approves without recognizing new warrant exceptions in order to uphold them).

Justice Scalia also participated in articulating a new, narrow version of the presumption in his opinion for the majority in *Vernonia School District 47J v. Acton*.<sup>104</sup> In upholding warrantless drug testing of public school athletes, Justice Scalia wrote for the *Vernonia* Court: "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant."<sup>105</sup> He emphasized, however, that "a warrant is not required to establish the reasonableness of *all* government searches."<sup>106</sup> *Vernonia* almost creates a reverse warrant presumption; the Fourth Amendment generally does not require a search warrant except for searches conducted by law-enforcement officials for evidence of crime.

Since *Vernonia*, the Court has usually invoked the warrant presumption

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101. *Acevedo*, 500 U.S. at 583 (Scalia, J., concurring in the judgment).

102. *Kyllo*, 121 S. Ct. at 2042.

103. *See id.* at 2042-43.

104. 515 U.S. 646 (1995).

105. *Id.* at 653 (citations omitted).

106. *Id.*

only in cases involving searches of the home, as it did in *Kyllo*, in which the Court said that searches of *homes* are “presumptively unreasonable without a warrant.”<sup>107</sup> Such statements do not deny the existence of the presumption in all other settings. For example, the Court presumably would continue to apply at least a weak warrant presumption to government searches of ordinary businesses for evidence of crime.<sup>108</sup> Nonetheless, *Kyllo* suggests that the current Court applies the warrant presumption especially vigorously to searches of the home, which the Court considers “the prototypical . . . area of protected privacy.”<sup>109</sup> In this respect, *Kyllo* may also signal a balkanization of the Fourth Amendment.<sup>110</sup>

In short, when *Kyllo* is examined closely and in the context of the Court’s jurisprudence, it is an important case not only because it departs from the reverse *Katz* test, but also because it reinforces the narrowing of the once broad warrant presumption in two ways. First, by departing from the reverse *Katz* test, *Kyllo* may block future resort to that test as a means of shoring up the illusion of a broad warrant presumption. Second, *Kyllo* articulates the new, narrow version of the presumption, under which the warrant requirement applies most stringently to searches of the home.

## 2. *The Partial Ascendance of Justice Scalia’s View on When Reasonableness Requires a Warrant*

*Kyllo* shows that a majority of the Court shares Justice Scalia’s solicitude for the home and his resulting insistence that warrants are usually required for the government to search homes. Read together with other precedent, *Kyllo* also suggests that a majority of the Court would apply the warrant presumption less strongly, or not at all, in other settings. *Kyllo* does not, however, signal majority support for Justice Scalia’s approach to determining when the Fourth Amendment requires a warrant. *Kyllo* thus reflects only a partial ascendance of Justice Scalia’s view of the warrant requirement.

Just as Justice Scalia would rely primarily on original understanding to

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107. *Kyllo*, 121 S. Ct. at 2046. *See also id.* at 2042 (“With few exceptions, the question whether a warrantless search of a home is reasonable must be answered no.”).

108. *See Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312, 325 (1978) (holding that statute authorizing warrantless searches of ordinary businesses violated Fourth Amendment; stating that the “rule” that “warrantless searches are generally unreasonable . . . applies to commercial premises as well as homes”).

109. *Id.* at 2043. *Cf. White*, 526 U.S. at 565 (“[A] warrant resumptively is required for a felony arrest in a suspect’s home.”).

110. *See id.* at 2051 (Stevens, J., dissenting) (criticizing majority’s rule as too narrow because “a rule that is designed to protect individuals from the overly intrusive use of sense-enhancing equipment should not be limited to a home”).

identify “searches” subject to the Fourth Amendment, he would consult the common-law extant when the Fourth Amendment was adopted to determine whether a search without a warrant is “unreasonable” under the Amendment.<sup>111</sup> For him, in other words, the common law establishes a strong presumption of whether or not a warrant is required in the situation under analysis. He has also suggested, however, that this presumption can be overcome. In *Acevedo*, he said that “changes in the surrounding legal rules (for example, elimination of the common-law rule that reasonable, good-faith belief was no defense to absolute liability for [a government official’s] trespass) may make a warrant indispensable to reasonableness where it once was not.”<sup>112</sup> In addition to suggesting that warrants may be required today in situations where they were not required at common law, Justice Scalia has suggested the converse is also true. In *Dickerson*, he said that technological changes may justify dispensing with any common-law tradition that would have required a warrant for a pat down search of the sort authorized in *Terry v. Ohio*.<sup>113</sup> Thus, Justice Scalia might allow specific legal or factual changes to overcome the common-law presumption; however, he would not allow it to be overcome by more generalized changes in society’s notions of reasonableness.<sup>114</sup>

Justice Scalia’s common-law approach to determining reasonableness—including the determination of when reasonableness requires a warrant—produces a Fourth Amendment that is tall but narrow compared to the Fourth Amendment that has been produced by the combination of a broad warrant presumption and the *Katz* test.<sup>115</sup> In *Arizona v. Hicks*, for example, Justice Scalia would not tolerate even minor warrantless searches of a home unless they fell within a traditional exception, such as the exception for exigent

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111. See *Acevedo*, 500 U.S. at 583 (Scalia, J., concurring) (describing “the first principle that the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded”); *id.* (“I have no difficulty with the proposition that [Fourth Amendment’s reasonableness Clause] includes the requirement of a warrant, where the common law required a warrant . . .”).

112. *Id.* (Scalia, J., concurring in the judgment) (citations omitted).

113. *Terry v. Ohio* 392 U.S. 1, 30 (1968). See also *Dickerson*, 508 U.S. at 382 (Scalia, J., concurring) (“[E]ven if a ‘frisk’ prior to arrest would have been considered impermissible in 1791 [when the Fourteenth Amendment was adopted], . . . perhaps it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm’s reach have become common—which might alter the judgment of what is ‘reasonable’ under the original standard.”).

114. See *id.* at 380 (Scalia, J., concurring) (stating that interpretation of Fourth Amendment should not change merely because “a later, less virtuous age should become accustomed to considering all sorts of intrusion ‘reasonable’”). *But cf. Von Raab*, 489 U.S. at 687 (referring to the “coarsening of our national manners that ultimately gives the Fourth Amendment its content”).

115. For the insight that Justice Scalia’s Fourth Amendment is “tall but narrow,” I thank William C. Bryson, former Deputy Solicitor General and current Judge of the United States Court of Appeals for the Federal Circuit.

circumstances.<sup>116</sup> In *Minnesota v. Carter*, on the other hand, Justice Scalia refused to extend Fourth Amendment protection to a social visitor to a home because the common law did not do so.<sup>117</sup> Justice Scalia takes a similarly “tall but narrow” approach to searches of persons. In *Minnesota v. Dickerson*, Justice Scalia doubted the constitutionality of *Terry* frisks without common-law evidence of their validity.<sup>118</sup> In *Ferguson v. City of Charleston*, however, Justice Scalia distinguished the government’s collection of urine samples from the plaintiffs—which he thought “could conceivably be regarded as a search” of their persons—from the government’s testing of those samples, which he did not think could “realistically” be treated as a search of the plaintiffs’ “effects” as that term was originally understood.<sup>119</sup>

A majority of the Court, unlike Justice Scalia, does not seem ready to follow the common law wherever it goes.<sup>120</sup> Justice Scalia wrote for the majority in only one of the four cases cited in the last paragraph—*Hicks*.<sup>121</sup> In the three other cases cited, *Carter*, *Dickerson*, and *Ferguson*, Justice Scalia wrote for less than a majority.<sup>122</sup> Under pressure from Justice Scalia, and consistent with precedent, the Court will no doubt consider the original

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116. See *Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (holding, in opinion written for majority by Scalia, J., that warrantless, cursory inspection of the bottom of stereo equipment violated Fourth Amendment; and stating: “A search is a search, even if it happens to disclose nothing but the bottom of a turntable”).

117. See *Carter*, 525 U.S. at 92-97 (Scalia, J., concurring) (concluding that, as originally understood, Fourth Amendment’s protection of people in “*their . . . houses*” protected people only in their respective houses, not in other people’s houses) (emphasis in original).

118. See *Dickerson*, 508 U.S. at 380-82 (Scalia, J., concurring) (considering absence of common-law evidence supporting the permissibility of *Terry* frisks). See also *Von Raab*, 489 U.S. at 680-81 (Scalia, J., dissenting, joined by Stevens, J.) (observing that Court had in prior cases upheld warrantless bodily searches of individuals in the absence of individualized suspicion only for prison inmates and dissenting from decision upholding warrantless urine testing of certain railroad employees).

119. *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1296 (2001) (Scalia, J., dissenting). See also *Wyoming v. Houghton*, 526 U.S. 295, 302-03 (1999) (holding, in opinion written for the Court by Justice Scalia, that warrantless search of passenger’s purse found in car did not violate Fourth Amendment, given historical evidence supporting the practice, while distinguishing “body searches,” which implicate “the unique, significantly heightened protection afforded against searches of one’s person”).

120. *But cf. Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1543-53 (2001) (holding, in opinion written for majority by Justice Souter, that Fourth Amendment did not prohibit warrantless arrest for minor criminal offenses, considering common-law tradition permitting such arrests).

121. In *Hicks*, as in *Kyllo*, Justice Scalia was in unusual company. The majority for which he wrote in *Hicks* included Justices Brennan, White, Marshall, Blackmun, and Stevens; the dissent consisted of Chief Justice Rehnquist and Justices Powell, O’Connor, and Kennedy. See *Hicks*, 480 U.S. at 322 (reporting voting alignment).

122. *Carter*, 525 U.S. at 91 (Scalia, J., concurring, joined by Thomas, J.); *Dickerson*, 508 U.S. at 379 (Scalia, J., concurring alone); *Ferguson*, 121 S. Ct. at 1296 (Scalia, J., dissenting alone with respect to part of dissenting opinion analyzing search of plaintiffs’ “persons” and “effects”).

understanding of the Fourth Amendment in interpreting it.<sup>123</sup> The majority does not seem prepared, however, to give original understanding as much weight as Justice Scalia would give it.<sup>124</sup>

*Kyllo* indicates that this situation continues. The *Kyllo* majority purported to decide the case using a criterion with “roots deep in the common law.”<sup>125</sup> It also quoted *Carroll v. United States*,<sup>126</sup> as Justice Scalia did in his *Dickerson* concurrence,<sup>127</sup> for the proposition that “[t]he Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted.”<sup>128</sup> The *Kyllo* majority, however, also included words from the *Carroll* opinion that were omitted from Justice Scalia’s *Dickerson* concurrence and that require the Fourth Amendment to be construed, not only in light of its original understanding, but also “in a manner which will conserve public interests as well as the interests and rights of individual citizens.”<sup>129</sup> Consistently with these additional words from *Carroll*, the *Kyllo* Court considered the expectation of privacy “that exists, and that is acknowledged to be reasonable.”<sup>130</sup>

The Court in *Kyllo* claimed that it took “the long view, from the original

123. See, e.g., *Carroll v. United States*, 267 U.S. 132, 149 (1925) (“The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted . . .”). See also, e.g., *Ortega*, 480 U.S. at 715 (plurality opinion) (stating that Fourth Amendment analysis includes consideration of, among other things, “the intention of the Framers”).

124. Of particular importance, if one is counting votes, Justice Scalia has not persuaded Justices O’Connor and Kennedy, who often provide the “swing votes” in close cases, that his common-law approach should always control Fourth Amendment questions. See *Carter*, 525 U.S. at 100 (Kennedy, J., concurring separately from Justice Scalia’s concurrence) (arguing that common-law tradition of home privacy “has acquired over time a power and an independent significance justifying a more general assurance of personal security in one’s home, an assurance which has become part of our constitutional tradition”); *Hicks*, 480 U.S. at 337-39 (O’Connor, J., dissenting from majority opinion written by Justice Scalia) (using a balancing approach to analyze validity of police’s warrantless, cursory inspection of item suspected to be stolen). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 579-80 (1992) (Kennedy, J., concurring in part and concurring in judgment in case in which Justice Scalia wrote for the majority) (expressing reservations about majority’s broad rejection of plaintiffs’ “nexus theory” of standing and, unlike majority, recognizing congressional power to “articulate chains of causation that will give rise to a case or controversy where none existed before”); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring in judgment in case in which Justice Scalia wrote for majority) (stating, in apparent disagreement with majority, that “[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society”). See generally Marcia Coyle, *Whose Court Is It, Anyway?*, NAT’L L.J., June 21, 1999, at A1 (discussing significance of Justices O’Connor and Kennedy in close cases).

125. *Kyllo*, 121 S. Ct. at 2043.

126. 267 U.S. 132 (1925).

127. 508 U.S. at 379-80 (Scalia, J., concurring).

128. See 121 S. Ct. at 2046 (quoting *Carroll*, 267 U.S. at 149).

129. *Id.*

130. *Id.*

meaning of the Fourth Amendment forward.”<sup>131</sup> This is not just rhetoric; it accurately describes the amalgam of common law and modern privacy concerns that produced the result in *Kyllo*. The Court’s reasoning is an amalgam, however, rather than a synthesis. The “neither fish nor fowl” quality reflects that the ascendance of Justice Scalia’s Fourth Amendment is not yet complete.

#### CONCLUSION

This Article is written at the beginning of the twenty-first Century and in the opening days of what the President of the United States has called the “first war” of the new century.<sup>132</sup> This is a precarious point from which to make predictions. One must avoid overestimating the importance of events that may seem momentous only because of their timing. On the other hand, one must avoid underestimating the importance of events that would fall into insignificance, but for their timing.

To avoid these dangers, it is important to recognize that, at the very least, the Supreme Court’s decision in *Kyllo v. United States* has much more importance than first meets the eye. On its surface, the case merely presents the age-old problem of applying settled legal principles in a new context. Consistent with that appearance, the Court purports to resolve the case by “refin[ing]”<sup>133</sup> the well-established *Katz* test and reaching a result that is plausible under the precedent developing that test. Beneath the surface of *Kyllo*, however, one can see important changes in the Court’s Fourth Amendment analysis, including a departure from the thirty-five-year-old *Katz* test and a reinforcement of a newly narrow warrant presumption.

Although we cannot clearly envision the Fourth Amendment that these changes will produce, it is safe to say that this future Fourth Amendment will differ significantly from the one that Justice Scalia found on joining the Court, and that he will deserve much of the credit (or blame) for those differences. Perhaps, regardless of our individual fears or hopes about these changes, we can all take comfort in recognizing that a single person still has the power to bring them about.

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131. *Id.* at 2046.

132. David Von Drehle, *Reagan National Closed for Now: Other Airports Open, on Edge*, WASH. POST, Sept. 14, 2001, at A1.

133. *Kyllo*, 121 S. Ct. at 2043.