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Dimmer switch for high-tech eyes

High-tech crime fighting through thermal imaging devices was checked by the United States Supreme Court last week in Kyllo vs. United States (June 11, 2001). A 5-4 majority, speaking through Justice Antonin Scalia, held that the Fourth Amendment prohibited their freewheeling use to detect homegrown marijuana, whose signature is high-intensity lamps.

The constitutional issue was simply new wine in old bottles. Order and liberty are perpetual rivals.

Order without liberty is tyranny. Liberty without order is anarchy, a state of nature where life is poor, brutish, nasty, and short, as Thomas Hobbes warned.

The rivalry between order and liberty finds constitutional expression in the Fourth Amendment prohibition of "unreasonable" police searches and seizures of "persons, houses, papers, and effects."

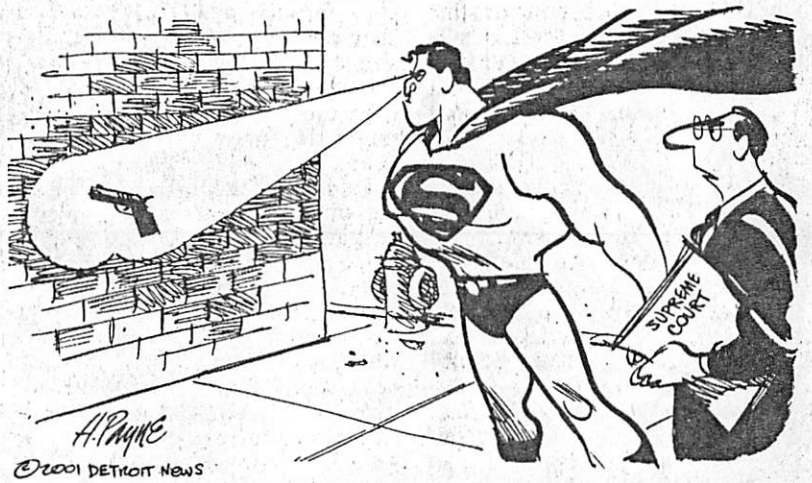
That injunction — which necessarily arrests the ability of the police to detect crime — is more a mood than a command. Its application is inescapably subjective, pivoting on the prevailing incidence of crime, the seriousness of the crime under investigation, and our cultural devotion to citizen privacy free from government snooping. Without the latter, the joys and creativity of spontaneity wither, healthy nonconformity shrinks, and feistiness in opposing government overreaching recedes into docility. An ounce of community revolutionary fervor is indispensable to a pound of democracy, but 15 ounces would be dangerous.

In sum, drawing a constitutional balance between order and liberty is more the art of chiaroscuro than the science of prime colors. And the development of high-tech law enforcement tools neither heightens nor lessens the artistic challenge. The Kyllo precedent is emblematic.

An agent of the U.S. Interior Department suspected Danny Kyllo of growing marijuana in his home. Such indoor cultivation characteristically requires high-intensity lamps. The associated heat emitted, if detected, gives the game away.

The agent and a colleague thus employed a thermal imaging device to scan Mr. Kyllo's home from a parked vehicle on a public street. The imager converts invisible infrared radiation into images based on temperature differentials. Black is cool, white is hot, and shades of gray connote relative differences.

The scan showed that the roof over the garage and a side wall of Mr. Kyllo's home were hot compared to the remainder of the residence, and substantially warmer than adjacent homes. That information and related evidence triggered a magistrate's search warrant, which lead to the discovery of home marijuana cultivation and Mr. Kyllo's federal indictment for illegal manufacture.



"(AHEM) GOT A SEARCH WARRANT FOR THAT X-RAY VISION, BUDDY?"

During pretrial skirmishing, Mr. Kyllo moved to suppress the evidence found pursuant to the warrant. The Fourth Amendment generally prohibits the prosecution from relying on information derived from an unconstitutional search or seizure. According to Mr. Kyllo, the warrantless use of the thermal imaging device violated the reasonableness standard of the Amendment; and, the constitutional transgression voided the magistrate's search warrant.

The Supreme Court agreed, at least as to the first proposition.

Justice Antonin Scalia noted that as interpreted in Katz vs. United States (1967) and its progeny, the Fourth Amendment safeguards privacy expectations that society is

willing to accept as reasonable. But that axiom smacks of tautological blather, i.e., saying no more than that individual privacy enjoys constitutional protection only to the extent society — speaking through its police and legislatures — is willing to concede.

The whole purpose of the Constitution with judicial review conducted by independent judges, however, is to restrain, not to surrender to, majority will.

The Katz test creates the illusion of Fourth Amendment certitude where ambiguity is an enlightened necessity and has been applied in practice to fashion a patchwork of case law.

Thus, aerial surveillance of private homes and surrounding areas does not constitute a search subject to the Amendment, whereas police monitoring of a beeper in a private home is.

Justice Scalia and Justice John Paul Stevens writing for the Kyllo dissenters exchanged thunderbolts of Aristotelian logic over whether the thermal imaging observations were the functional equivalence of police presence in the home, and whether a Fourth Amendment demarcation line should be drawn between "off-the-wall" as opposed to "through-the-wall" technologies. Justice Stevens, for instance, insisted that imaging was constitutionally innocuous because the infrared camera did no more than detect "off-the-wall" heat that had been emitted into the public domain.

But that begs the point. The imaging invaded Mr. Kyllo's privacy by generating information about the interior of his home and home activities that he wished to conceal and thus inhibited his behavior. That is why the Fourth Amendment was concerned. And its enclaves of private space are not impregnable, but can be overcome by a warrant resting on probable cause of illegal activity.

What was decisive for Justice Scalia was that the government employed an investigatory device that was not in general public use to unearth information about the details of Mr. Kyllo's home which would have been otherwise unknowable without physical intrusion. A tacit subtheme was the nature of the crime. If he had been building high-tech missile devices for North Korea or Iran, the decision would probably have been different.

The Fourth Amendment is intellectually messy, but to pretend it could be otherwise yet retain its vitality would be a flight into fantasyland.

Bruce Fein is general counsel for the Center for Law and Accountability, a public-interest law group headquartered in Virginia.