What Government Activity Is a Fourth Amendment “Search”

Presented By
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What’s the Mystery?
We All Know What A Search Is

Webster’s (1828):
“To look over or through for the purpose of finding something; to examine by inspection.”

J. Scalia, Kyllo (2001)

• “With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no…”

• “On the other hand, the antecedent question of whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent.”

J. Scalia, Kyllo (2001)
Definition of “Search”
“Defining a search is a two-sided inquiry: governmental actions must…”

The Fourth Amendment
It's History and Interpretation
Professor Thomas K. Clancy (2008)

- “Must invade a protected interest of the individual.”
  If no protected interest then, “actions that might otherwise be labeled a search will not implicate the Amendment.”

- “If the person has a protected interest, then the focus turns to the government techniques used to obtain tangible things or information”
  i.e. eyes, ears or invasive technology?

Olmstead v U.S. (1928)

Is an outside tap on a phone line a “search” or “seizure” under the Fourth Amendment?
• Fourth Amendment only protects “material things - the person, the house, his papers and effects”

• No physical invasion/trespass in placing tap on phone line outside of the constitutionally protected "house"

**U.S. v Katz (1967)**

FBI attached listening device and recorder to outside of phone booth that Katz used to call in bets

J. Stewart:
• “…the Fourth Amendment protects people, not places”

• “…electronically listening to and recording (Katz) violated the privacy upon which he justifiably relied…and thus constitutes a ‘search and seizure’ within the meaning of the Fourth Amendment”
“The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.”

“…there is a two fold requirement, an actual expectation of privacy (and) one that society is prepared to recognize as ‘reasonable’.

Physical Manipulation by Police

When is it a “Search”

Arizona v Hicks (1987)

- Bullet fired through floor of apartment
- Struck and injured a man in apartment below
- Police enter Hick’s apartment to “search for shooter, for other victims, and for weapons.”
• Officers seize three weapons and a mask which were in “plain view”
• Officers notice unusually expensive stereo equipment
• Components moved to check for serial numbers
• Check w/data base positive for stolen items. Items seized.

Plain View or 4th A. “Search”? 

“Merely looking at those parts of the turntable that came into view would not have constituted an independent ‘search,’ because it would have produced no additional invasion of respondent’s privacy interest”

“Moving of the equipment... did constitute a ‘search’ separate and apart from the search for the shooter, victims, or weapons that was a lawful objective of his entry into the apartment”

“Even though the item was moved only a few inches it is more than trivial for purposes of the Fourth Amendment”
**Minnesota v. Dickerson (1993)**  
'Plain feel’, or five finger search

While a passenger expects luggage will be handled by others, “[h]e does not expect (others) to feel bag in an exploratory manner.”

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**Plain Feel or “Search”?**

- Was item “immediately apparent”?
- Training/experience of officer
- Where was item? Sock, crotch, etc.
- Totality of Circumstances:
  - Demeanor of suspect
  - Time of day
  - High crime area

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**Plain Feel or “Search”?**

Some states reject altogether as “inherently less reliable and more intrusive than sight”  
People v Diaz (N.Y. 1993)
Terry Frisk for Weapons, or “Search” for Contraband?

Canine Sniff Not a “Search”
U.S. v Place (1983)
Detention of Luggage – Dog Sniff for Drugs

“exposure of the defendant’s luggage located in a public place, to a trained canine- did not constitute a ‘search’ within the meaning of the Fourth Amendment.”

“(dog search) does not expose non-contraband items that otherwise would remain hidden from public view (like) an officer rummaging through contents of the luggage.”

Indianapolis v. Edmund (2001)
Using dogs at checkpoint for deterring drug trafficking
“Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics.”

(Evidence was suppressed due to unjustified “seizure”; checkpoint for possession of illegal drugs distinguished from sobriety checkpoint)

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**Illinois v Caballes (2005)**

- Defendant stopped for speeding
- While trooper writing warning, drug interdiction team has dog check car
- Dog hits on trunk
- Search yields marijuana

- Official conduct that does not “compromise any legitimate interest in privacy” is not a search subject to the Fourth Amendment”

- “…any interest in possessing contraband cannot be deemed ‘legitimate’…”

- Therefore, “governmental conduct that only reveals possession of contraband compromises no legitimate privacy interest.”
**Additional Uses of Dog Sniff With No "Search" Finding**

- School: lockers, parking lot
- Luggage: plane, train, bus
- Commercial storage facility
- Private autos in public parking

**Field Testing-Detection**


- Private freight carrier opens package
- Sees packets of cocaine, calls D.E.A.
- D.E.A. agents field test for cocaine
- Controlled delivery leads to arrest


“A chemical test that merely discloses whether a particular substance is cocaine does not compromise any legitimate privacy interest.”
Court Compares to Police Contact in Place

“...the likelihood that official conduct will compromise any legitimate interest in privacy seems too remote to characterize the testing as a ‘search’ subject to the Fourth Amendment.”

Technology Enhanced Surveillance

Flashlight / Searchlight

“[U]se of a searchlight is comparable to the use of a marine glass or field glass. It is not prohibited by the Constitution.”

*U.S. v. Lee* (1927)
Officer shining flashlight in car:
“shining his flashlight to illuminate the interior of Brown’s car…does not constitute a ‘search’…. (It) triggers no Fourth Amendment protection”

Electronic Tracking Device
- Person on public roadway has no reasonable expectation of privacy
- Police may augment “their sensory faculties with such enhancements as science and technology afforded them.”

“Scientific enhancements of this sort raise no constitutional issues which visual surveillance would not also raise.”
Knotts

- Tracking device didn’t reveal “movement of the container within cabin”
- Curtilage?


- Tracking device applied to 50 gallon vat of ether
- Police obtained search warrant based on vat/device being inside a home rented by co-defendant


“There is no reason in this case to deviate from the general rule that a search of a house should be conducted pursuant to a warrant”
**People v. Oates (1985 Colo.)**

Under Colorado Constitution search warrant required *prior* to installation of tracking device.

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**Cell Phone “Call Location” Technology**

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**How Does Cell Tracking Work?**

Cell phones are radio transmitters. They repeatedly “ping” to the nearest or most powerful tower.

When someone calls that number the home network is then advised of the phone’s location and routes calls to that tower for broadcast.
Physical access to the Target line is gained by installing an intercept device on the local loop. Such devices include remote pen registers or Dialed Number Recorders.
Collecting Intercepted Data

The intercept device sends its data to a computer running Pen-Link. The collected data is typically stored in a database for later analysis.

Pen Register / Phone Records

Smith v Maryland (1979)

- Robbery victim received a series of threatening/intimidating phone calls
- At police request phone company installed pen register at central office to record numbers dialed from suspect’s home phone

- When defendant voluntarily conveyed numerical information to phone co., he assumed risk that co. would reveal the information to the police.

- “The installation and use of a pen register, consequently, was not a ‘search’.”
Thermal Imagery
Ground or Aerial Platforms

DEA agents used thermal imaging to determine if heat emanating from home consistent with high-intensity lamps typically used for indoor grow operation.

J. Scalia
Souter Thomas Ginsberg Breyer

“At the very core ... the right of a man to retreat to his own home and there be free from governmental intrusion”
“The Fourth Amendment draws a firm line at the entrance to the house…. that line…must not only be firm but also bright....”

Rejects “off the wall v. through the wall” analysis. The rule adopted “must take into account more sophisticated systems already in use.”

“While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development”

A *Kyllo* Search:

“Where...the Government uses a device, that is not in general use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment ‘search’.”
Newer Technologies

- Drug Residue Scan
- Voice Analysis
- Search Drone

Biometric Facial Recognition Systems

Iris Identification Scan
What Police Activities Constitute A ‘Search’?

“The right of the people to be secure in their person, houses, papers, and effects against unreasonable searches and seizures shall not be violated…”

Fourth Amendment

I. Dictionary Definitions of ‘Search’

A. Webster

“To look over or through for the purpose of finding something; to examine by inspection”

“When the Fourth Amendment was adopted, as now, search meant to ‘look over or through for the purpose of finding something…”” Id.

B. Black’s Law Dictionary

“Examination of a man’s house or other buildings or premises, or of his person, or of his vehicle…with a view to the discovery of contraband or illicit or stolen property, or some evidence…to be used in the prosecution of a criminal action…”

II. Olmstead to Katz: A Change In Focus From Physical Intrusion (Trespass) To Whether Reasonable Expectation of Privacy Violated

A. Olmstead v. United States, 277 US 438 (1928)

Issue was whether wiretapping telephone lines constituted a ‘search’ or ‘seizure’ protected by Fourth Amendment. The Court focused on language or Fourth Amendment, which protected “material things – the person, the house, his papers and effects.” Id at 464. It did not limit law enforcement “hearing or sight” to detect criminal activity. Id. Moreover, the taps were applied on the telephone line without trespassing onto Olmstead’s property, so no violation of searching his physical property.

(See discussion re: ‘Limitations on Amendment’ in material below)

Court rejected the trespass doctrine from Olmstead, and focused on the extent to which the Fourth Amendment protected ‘privacy’. Ultimately, Court ruled that even a recording device placed on outside of a public telephone booth constituted a Fourth Amendment ‘search’, because it violated a ‘reasonable expectation of privacy’. *Id* at 361 (Harlan, J., concurring).


Facts:

A lawful border search of a large container shipped from Calcutta to Chicago revealed a large quantity of marijuana concealed in a wooden table. Local police were notified. They allowed the package to be delivered to Andreas, and arrested him when he tried to leave his apartment with the package. They reopened package and searched table before a warrant could be produced.

“No protected privacy interest remains in contraband in a container once government officers lawfully have opened that container” and discovered the contraband. *Id* at 771.

The Court affirmed the Katz definition of a ‘search’ for Fourth Amendment purposes: “If the inspection by police does not intrude upon a legitimate expectation of privacy there is no ‘search’ subject to the Warrant Clause.” *Id*.

II. **Physical Manipulation**


*Plain View or Product of Search?*

Facts:

Bullet fired through the floor of Hick’s apartment. It struck and injured a man in apartment below.

Police entered Hick’s apartment to “search for the shooter, for other victims, and for weapons.” *Id* at 323. One of the officers “noticed two sets of expensive
stereo components, which seemed out of place in the squalid and otherwise ill-appointed four-room apartment.”  Id.

The officer picked up components to read serial numbers, which allowed them to confirm they were stolen in an armed robbery.

Holding:

The officers “moving of the equipment…did constitute a ‘search’ separate and apart from the search for the shooter, victims, or weapons that was the lawful objective of his entry into the apartment.”  Id at 324.

“Merely inspecting (the components) that came into view during the (lawful) search would not have constituted an independent search, because it would have produced no additional invasion of (his) privacy interest.”  Id, citing, Illinois v. Andreas, supra. “Looking at what is already exposed to view, without disturbing it – is not a ‘search’ for Fourth Amendment purposes”.  Id at 328. Even though item moved “only a few inches” it is “more than trivial for purposes of the Fourth Amendment”.  Id.

“A search is a search, even if it happens to disclose nothing but the bottom of a turntable.”


Plain Feel or Five Finger Search?

Facts:

Minneapolis police observe Dickerson leave known ‘crack house’, and walk toward squad car. Upon seeing squad, Dickerson “abruptly halted and began walking in opposite direction” and into an alley. Officers pulled into alley and stopped Dickerson. Officers conducted pat-down for weapons:

“As I pat-searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and felt to be a lump of crack cocaine in cellophane.”  Id at 368 (quoting motion hearing transcript). The officer then reached in and seized small plastic bag containing a rock of cocaine.

Holding:  J. White

1.  If incriminating character of object in plain view is ‘immediately apparent’ Plain View Doctrine applies.

   “If contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of
privacy and thus no ‘search’ within meaning of Fourth Amendment – or at least no search independent of the initial intrusion that gave officers their vantage point.” Id citing Andreas, supra.

2. Same rationale applies to ‘plain touch’.

“If a police officer lawfully pats-down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons.” Id.

3. Manipulation of object was a new ‘search’.

“Although the officer was lawfully in a position to feel the lump in Dickerson’s pocket…the incriminating character of the object was not immediately apparent to him.” Id at 380. Manipulating object in pocket compared to moving stereo equipment in Hicks.


Physical manipulation of luggage without consent is a ‘search’.

Facts:

Bond was a passenger on bus from California to Little Rock, Arkansas. Bus stopped, as required, at border patrol checkpoint in Sierra, Texas. After checking passengers’ immigration status, agent began walking from back to front of bus. Along the way, he squeezed soft luggage in overhead storage space. Agent squeezed a green canvas bag and felt a ‘brick-like’ object. When asked, Bond admitted it was his, and gave permission to have it opened. Agent then discovered a ‘brick’ of methamphetamine wrapped in duct tape until it was oval-shaped and rolled in a pair of pants.

Holding: J. Rhenquist

While a passenger may expect that a carry-on bag will be moved or handled by others, “He does not expect that other passengers or bus employees will…feel the bag in an exploratory manner.” Id at 338. “[T]he agent’s physical manipulation of petitioner’s bag violated the Fourth Amendment.” Id.

D. Some Refinements to the ‘Immediately Apparent’ Standard in Plain Feel Searches.

1. Where is item felt? Socks, Crotch, Pocket, Waistband
2. Training, Experience of Officer

3. Totality of Circumstances – drug trafficking area, time of day, proximity to crack house, etc.


IV ‘Canine Sniff’ Not a ‘Search’


Place’s luggage seized and exposed to drug dog inspection. After a ‘hit’ on one piece of the luggage by the dog, a warrant obtained to search. Supreme Court, ultimately, ruled that the seizure violated the Fourth Amendment. However, in dicta, Court took some pains to explain that the ‘canine sniff’ was sufficiently unique and unobtrusive that it was not a ‘search’:

“A ‘canine sniff’ by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose non-contraband items that otherwise would remain hidden from public view, as does, for example, an officer’s rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence of absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subject to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods. In these respects, the canine sniff is sui generic. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude 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.” (emphasis added) Id. At 673.
B. **City of Indianapolis v. Edmund, 531 US 32 (2001)**

Court, again, ruled that the checkpoint implemented by the Indianapolis Police Department constituted an unreasonable ‘seizure’ of motorist under the Fourth Amendment. However, it again went out of its way to endorse the dicta in *Place* that a canine sniff was not a Fourth Amendment ‘search’:

“The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. See United States v. Place, 462 US 696, 707 (1983). Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence of absence of narcotics. Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is much less intrusive than a typical search.” (emphasis added) Id. At 42.


While one trooper had Defendant in his squad car to issue a warning for speeding, another trooper arrived and had his dog circle Defendant’s car for the presence of illegal drugs. The dog made a hit on the trunk. The officers searched trunk, found marijuana and arrested the Defendant. The entire process took less than ten minutes.

J. Stevens distinguished the privacy interest, here, from the Kyllo decision:

“The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from the respondent’s hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.”

D. **Additional Places Where Dog Sniff Have Been Found Not To Be A ‘Search’**:  

- school lockers, parking lots  
- luggage on plane, trains  
- commercial storage facilities (garages, warehouses)  
- private autos in parking lots open to the public
Generally, reasoning is:

There is no privacy interest in odor that emanates from even a closed container, because that odor is accessible to the public. Additionally, drug sniffs do not require the opening of, or identify the contents of, containers; they merely indicate the presence of drugs.

V. Field Testing For Illegal Substances Not A “Search”


Defendants were waiting to receive a package containing cocaine that was being shipped using a private freight carrier. The package was damaged in transit, and the carrier opened the package. The carrier called federal agents, who took a sample of the contents for testing without a warrant. Reversing the judgment, the Court found that the search and seizure of the cocaine was reasonable and did not violate the Fourth Amendment because the package had already been opened by a private party to whom the Fourth Amendment did not apply and because the federal agents merely set aside some newspaper covering the contents and reopened a tube to view the contents. The Court stated that the federal agents did not infringe any constitutionally protected privacy interest that had not already been frustrated as the result of private conduct by the carrier. The Court further found that the seizure of a trace amount of the cocaine for testing without a warrant was a deminimis violation of any protected possessory interest and, thus, it was constitutionally reasonable:

“A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy…governmental conduct that can reveal whether a substance is cocaine, and no other arguably ‘private’ fact, compromises no legitimate privacy interest.” Id at 124.

“Here, as in Place, the likelihood that official conduct…will actually compromise any legitimate interest in privacy seems too remote to characterize the testing as a ‘search’ subject to the Fourth Amendment.” Id at 125.

VI. Use of Technology To Enhance Surveillance

A. Use of Flashlight or Searchlight Doesn’t Constitute ‘Search”

U.S. Coast Guard used a spotlight to assist in seeing a boat suspected of running alcohol.

Justice Brandeis:

“The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches. For aught that appears, the cases of liquor were on deck and, like the defendants, were discovered before the motorboat was boarded. Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution.” Id at 360.


Facts:

An officer, assisting at a routine nighttime driver’s license checkpoint in Forth Worth, Texas, asked a driver for his driver’s [***12] license. At the same time, the officer shined his flashlight into the car and saw the driver drop a knotted balloon onto the seat beside his leg. When the driver opened the glove compartment to get his license, the officer noticed several plastic vials, quantities of white powder, and an open bag of party balloons.

Holding:

“It is beyond dispute that Maples’ action in shining his flashlight to illuminate the interior of Brown’s car trenched upon no right secured to the latter by the Fourth Amendment. The use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection.” Id. at 739-40.

3. **State Courts Which Have Considered The Issue Agree That Use Of Artificial Illumination Doesn’t Constitute ‘Search’**.


d. Minnesota – **State v. Vohnoutka**, 292 N.W.2d 756 (Minn. 1980)


g. Florida – Albo v. State, 379 So. 2d 648 (Fla. 1980)


B. Electronic Tracking Device


   Monitoring beeper attached to container of chloroform as it is transported in vehicle on public streets to outside of private cabin not a ‘search’ under Fourth Amendment.

   **Facts:**

   Having reason to believe that one Armstrong was purchasing chloroform to be used in the manufacture of illicit drugs, Minnesota law enforcement officers arranged with the seller to place a beeper (a radio transmitter) inside a chloroform container that was sold to Armstrong. Officers then followed the car in which the chloroform was placed, maintaining contact by using both visual surveillance and a monitor, which received the beeper signals, and ultimately tracing the chloroform, by beeper monitoring alone, to respondent’s secluded cabin in Wisconsin. Following three days of intermittent visual surveillance of the cabin, officers secured a search warrant and discovered the chloroform container, and a drug laboratory in the cabin, including chemicals and formulas for producing amphetamine.

   **Holding:**

   Monitoring the beeper signals did not invade any legitimate expectation of privacy on respondent’s part, and thus there was neither a “search” nor a “seizure” within the contemplation of the Fourth Amendment. The beeper surveillance amounted principally to following an automobile on public streets and highways. A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements. While respondent had the traditional expectation of privacy within a dwelling place insofar as his cabin was concerned, such expectation of privacy would not have extended to the visual observation from public places of the automobile arriving on his premises after leaving a public highway, or to movements of objects such as the chloroform container outside the cabin. The fact that the officers relied not only of visual surveillance, but also on the use of the beeper, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting their sensory faculties with such enhancement as science and technology afforded them in this case. There is no indication that the beeper was used in any way to reveal information.
as to the movement of the chloroform container within the cabin, or in any way 
that would not have been visible to the naked eye from outside the cabin. 460 US 
at 285.

“Scientific enhancement of this sort raised no constitutional issues which 
visual surveillance would not also raise.” Id. (J. Rhenquist)


However, use of electronic beeper to determine that an ether can 
was inside a house constituted a search within meaning of Fourth Amendment.

Facts:

After a Drug Enforcement Administration (DEA) agent learned that respondents 
Karo, Horton, and Harley had ordered 50 gallons of ether from a Government informant, 
who had told the agent that the ether was to be used to extract cocaine from clothing that 
had been imported into the United States, the Government obtained a court order 
authorizing the installation and monitoring of a beeper in one of the cans of ether. With 
the informant’s consent, DEA agents substituted their own can containing a beeper for 
one of the cans in the shipment. Thereafter, agents saw Karo pick up the ether from the 
informant, followed Karo to his house, and determined by using the beeper that the ether 
was inside the house where it was then monitored. The ether then moved in succession to 
two other houses, including Horton’s, before it was moved first to a locker in one 
commercial storage facility and then to a locker in another such facility. Both lockers 
were rented jointly by Horton and Harley. Finally, the ether was removed from the 
second storage facility by respondent Rhodes and an unidentified woman and transported 
in Horton’s truck, first to Rhodes’ house and then to a house rented by Horton, Harley, 
and respondent Steele. Using the beeper monitor, agents determined that the beeper can 
was inside the house, and obtained a warrant to search the house based in part on 
information derived through use of the beeper. The warrant was executed and Horton, 
Harley, Steele, and respondent Roth were arrested, and cocaine was seized. Respondents 
were indicted for various offenses relating to the cocaine.

Holding:

1. No Fourth Amendment interest of Karo or of any other respondent was 
infringed by the installation of the beeper. The informant’s consent was sufficient 
to validate the installation. And the transfer of the beeper-laden can to Karo was 
neither a search nor a seizure, since it conveyed no information that Karo wished 
to keep private and did not interfere with anyone’s possessory interest in a 
meaningful way. Id at 711-713.

2. The monitoring of a beeper in a private residence, a location not opened to 
visual surveillance, violates the Fourth Amendment rights of those who have a
justifiable interest in the privacy of the residence. Here, if a DEA agent had entered the house in question without a warrant to verify that the ether was in the house, he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. The result is the same where, without a warrant, the Government surreptitiously uses a beeper to obtain information that it could not have obtained from outside the curtilage of the house. There is no reason in this case to deviate from the general rule that a search of a house should be conducted pursuant to a warrant. Id at 713-718.

“(I)niscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.” Id at 716. (J. White)

However, based on ‘standing’ analysis evidence not suppressed. (See discussion re: ‘standing’ below)

3. **People v. Oates, 698 P. 2d 811 (1985 Colo.)**

Colorado Supreme Court held that the Colorado Constitution requires that a warrant be obtained before law enforcement may install electronic tracking devices.

“A beeper may reach into places concealed from public view – for example, the interiors of homes or the trunks of automobiles – and reveal to the government that a particular item may be found there, just as if a government agent had entered the premises in person. Equally important, a beeper permits the government to monitor the movements of both the item to which the beeper is attached and the person or persons having possession of the item, since “items of personal property seldom travel on their own accord …. United States v. Karo, 710 F. 2d 1433, 1438 (10th Cir. 1983), rev’d, 468 US 705 (1984). Knowing the movements of an item and its possessor may permit the government to reconstruct a virtual mosaic of a person’s life, including one’s habits, habitats and associates.” Id. at 816.

…”

“We therefore hold that the legitimate privacy expectation of one with a proprietary or possessory interest in a commercially-purchased item is violated under article II, section 7 of the Colorado Constitution whenever the item contains a government-installed beeper. Before the item is purchased, or before anyone otherwise acquires a legitimate expectation of privacy in the beeper-laden item, the government must secure a search warrant authorizing the installation of the beeper.” Id at 818, 819.

Some estimate that there will be over one billion cell phones in use in the United States by 2005. Obviously, this has had a commensurate increase in the use of cell phones to make emergency 911 calls. The FCC has required that cell phones have GPS or similar ‘cell location’ capability.

How will the courts view requests by law enforcement to disclose the information in the context of a criminal investigation?

C. ‘Pen Register’ Installation Not a ‘Search’

Smith v. Maryland, 442 US 735 (1979)

Facts:

Robbery victim gave the police a description of the robber and of a 1975 Monte Carlo automobile she had observed near the scene of the crime. After the robbery, the victim began receiving threatening and obscene phone calls from a man identifying himself as the robber. On 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. Later, police spotted a man who met victim’s description driving a 1975 Monte Carlo in her neighborhood. By tracing the license plate number, police learned that the car was registered in the name of petitioner, Michael Lee Smith.

The next day, the telephone company, at police request, installed a pen register at its central offices to record the numbers dialed from the telephone at petitioner’s home. The police did not get a warrant or court order before having the pen register installed. The register revealed that on March 17 a call was placed from petitioner’s home to victim’s phone. On the basis of this and other evidence, the police obtained a warrant to search petitioner’s residence. The search revealed that a page in petitioner’s phone book was turned down to the name and number of victim; the phone book was seized. Petitioner was arrested, and a six-man lineup was held. Victim identified petitioner as the man who had robbed her.

Holding:

Petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and even if he did, his expectation was not “legitimate.” First, it is doubtful that telephone users in general have any expectation of privacy regarding the numbers they dial, since they typically know that they must convey phone numbers to the telephone company and that the company has facilities for recording this information and does in fact record it for various legitimate business purposes. And petitioner did not demonstrate an expectation of privacy
merely by using his home phone rather than some other phone, since his conduct, although perhaps calculated to keep the contents of his conversation private, was not calculated to preserve the privacy of the number he dialed. Second, even if petitioner did harbor some subjective expectation of privacy, this expectation was not one that society is prepared to recognize as “reasonable.” When petitioner voluntarily conveyed numerical information to the phone company and “exposed” that information to its equipment in the normal course of business, he assumed the risk that the company would reveal the information to the police:

The installation and use of a pen register, consequently, was not a ‘search’.”  

D. Thermal Imaging Of Private Residence Constitutes ‘Search’


**Facts:**

Suspicious that marijuana was being grown in petitioner Kyllo’s home in a triplex, agents used a thermal imaging device to scan the triplex to determine if the amount of heat emanating from it was consistent with the high-intensity lamps typically used for indoor marijuana growth. The scan showed that Kyllo’s garage roof and a sidewall were relatively not compared to the rest of his home and substantially warmer than the neighboring units. Based in part on the thermal imaging, a Federal Magistrate Judge issued a warrant to search Kyllo’s home, where the agents found marijuana growing.

5-4 (Scalia, Souter, Thomas, Ginsberg and Breyer)

**Holding:**

J. Scalia:

1. “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.”  

2. “While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.”

3. “We have said that the Fourth Amendment draws a firm line at the entrance to the house…That line, we think, must not only be firm but also bright—which requires clear specifications of those methods of surveillance that require a warrant.”
4. “Where, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment ‘search’, and is presumptively unreasonable without a warrant.” Id at 37.

E. Section 216 Of The Patriot Act May Blur The ‘Bright Lines’ Of Kyllo.

Under section 216 of the Act, upon application by a government attorney, a court is required to enter an order authorizing the installation and use of a pen register or trap and trace device to track telephone and internet dialing, routing and addressing information anywhere within the United States when “The attorney for the government has certified to the court that the information likely to be obtained…is relevant to an ongoing criminal investigation.” Section 216 also states that orders issued under this section do not extend to “the contents of any wire or electronic communications.” However, in the case of email messages, the Act does not address the question of where the line should be drawn between “dialing, routing and addressing information” and “content.”

The trap and trace provisions do not require a probable cause showing and make no distinction between the use of these devices inside or outside of a private dwelling. These provisions will be used to collect information such as: website addresses, Internet protocol addresses, port numbers, and similar computer addresses.

F. Developing Technologies Subject To Future Fourth Amendment Analysis.

1. Gas Chromatography and “EGIS”/*Sentor”

Using well-developed gas chromatography based technology and prompted by the loss of Pam Am Flight 103 over Lockerbie, Scotland in 1988 ‘EGIS’ was developed to ‘sniff out’ explosives in the air around persons or luggage. Similar technology was used to develop ‘sentor’ which is employed to identify the presence of certain illegal drugs. See, Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, at 76 (3d ed. supp. 2001)

2. Heartbeat or ‘Enclosed Space Detection System

This technology can be used to detect the presence of a person who may hide in an automobile, building or other confined space. George M. Dery III, “The Loss
of Privacy is Just a Heartbeat Away”, 72 Wm & Mary Bill of Rights. J. 401 (1999)

3. Biometric Facial Recognition Systems


VIII. Government, Not Private Party, Searches Controlled by Fourth Amendment


Facts:

When an interstate shipment of several securely sealed packages containing 8-millimeter films depicting homosexual activities was mistakenly delivered by a private carrier to a third party rather than to the consignee, employees of the third-party opened each of the packages, finding individual film boxes, on one side of which were suggestive drawings, and on the other were explicit descriptions of the contents. One employee opened one or two of the boxes and attempted without success to view portions of the film by holding it up to the light. After the Federal Bureau of investigation was notified and picked up the packages, agents viewed the films with a projector without first making any effort to obtain a warrant or to communicate with the consignor or the consignee of the shipment. Thereafter, petitioners were indicted on federal obscenity charges relating to the interstate transportation of certain of the films in the shipment, a motion to suppress and return the films was denied, and petitioners were convicted.

Holding:

(a) The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents. An officer’s authority to possess a package is distinct from his authority to examine its contents, and when the contents of the package are books or other materials arguably protected by the First Amendment, and the basis for the seizure is disapproval of the message contained therein, it is especially important that the Fourth Amendment’s warrant requirement be scrupulously observed.

(b) Nor does the fact that the packages and one or more of the boxes had been opened by a private party before they were acquired by the FBI excuse the failure
to obtain a search warrant. Even though some circumstances – for example, if the results of the private search are in plain view when materials are turned over to the Government – may justify the Government’s re-examination of the materials, the Government may not exceed the scope of the private search unless it has the right to make an independent search. Here, the private party had not actually viewed the films, and prior to the Government screening one could only draw inferences about what was on the films. Thus, the projection of the films was a significant expansion of the previous search by a private party and therefore must be characterized as a separate search, which was not supported by any exigency or by a warrant even though one could have easily been obtained. Pp. 656-657.

(c) The fact that the cartons of film boxes, which cartons were securely wrapped and had no markings indicating the character of their contents, were unexpectedly opened by a third party before the shipment was delivered to its intended consignee, thus uncovering the descriptive labels on the film boxes, does not alter the consignor’s legitimate expectation of privacy in the films. **The private search merely frustrated that expectation in part and did not strip the remaining un-frustrated portion of that expectation of all Fourth amendment protection.**


(Facts previously discussed regarding field test for presence of cocaine.)

When a Federal Express employee accidentally damaged a container with a forklift, they saw it contained a silver taped tube, which they cut open. In the tube were cellophane bags of white powder. They called DEA whose agents field-tested for cocaine.

**The court distinguished this case from Walters, because the nature of the items found were obviously contraband and fully revealed to private citizens, before government agents inspected.**

C. **Government Agent Need Not Be Law Enforcement Officer to Implicate Fourth Amendment.**

**New Jersey v. TLO, 469 US 325 (1984)**

Teacher discovered girls smoking in bathroom and turned them over to assistant principal. While the court found that students have a reduced expectation of privacy and that search reasonable, the Fourth Amendment limitation does apply to public school staff.
IX. Emergency/Community Caretaker Exclusion

- “We do not question the right of police to respond to emergency situations…the need to protect or preserve life is justification for what would otherwise be illegal” *Mincey v Arizona*, 437 U.S. 385 (1978).

- Law Enforcement has ‘community caretaker’ responsibility “which is totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *Cady v Dombrowski*, 413 U. S. 433, 441 (1973).

- Test Applicable in most States:
  - Police have reasonable grounds to believe emergency or community caretaker need exists.
  - Entry into home/car must be **primarily motivated** by intent to protect life/safety.
  - Scope of search must be related to protection or preservation of life or property (of some significance ie. fire, flood)

- Primary Motivation does not necessarily mean ‘sole motivation:

  “It is unrealistic for officers to completely abandon their investigative function…but, the protection of human life must be the primary motivation to enter homes, not the desire to apprehend a suspect or gather evidence.”

  *New Mexico v Ryon*, 2005 NMSC 5 (2005)