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Technology and Searches: Constitutionality

Advances in technology have certainly made it easier for law enforcement agencies to access and obtain information, but at what cost? With relatively new technology making it far easier for officers to gain private information about potential suspects, the question of constitutionality under the Fourth Amendment is bound to surface.

In a March 2013 decision, the Supreme Court ruled in *United States v. Jardines*, that the use of a drug-sniffing dog outside a home to obtain a warrant to search the inside of the home was unconstitutional.

In 2006, the Miami Police Department received a tip that there was marijuana being grown inside Joelis Jardines' residence. A drug-sniffing dog was brought to Jardines' front porch and indicated the presence of drugs, which was enough for police to obtain a warrant to search the interior of the premises. Marijuana was found inside the home and Jardines was arrested. Jardines claimed that use of the dog to obtain a search warrant was a Fourth Amendment violation. After both a trial court and the Florida Supreme Court agreed with Jardines, the State of Florida petitioned for and was granted a Supreme Court review.

Justice Scalia, in delivering the Court's 5-4 opinion, agreed, "The government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment."

Under the Constitution, the area immediately surrounding the home, or "curtilage", is protected from illegal search. The Court's opinion weighed heavily on the fact that the government physically intruded onto the curtilage of Jardines' home for the purpose of gathering evidence. In its decision, the Court acknowledged the existence of an unspoken license permitting visitors to approach the home via the front path; knock on the door; wait a short period; and then, absent any invitation from the occupant to remain on the doorstep or enter the premises, leave the property. "Complying with the terms of that traditional invitation does not require fine-grained legal knowledge," wrote Scalia. "It is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." The Court further explained that since officers had been able to learn of the marijuana only by "physically intruding on Jardines' property to gather evidence," without a warrant, the search was unconstitutional.

In a January, 2012 decision, the Supreme Court found in *United States v. Jones* that the use of a GPS tracking device affixed to a vehicle for surveillance purposes was a violation of the Fourth Amendment. As Justice Scalia explained in his opinion, the physical intrusion involved in placing a tracking system on a privately owned vehicle without a warrant was indeed an act of trespass, as well as a violation of "reasonable expectation of privacy."

Kyllo v. United States (2001) offers a different perspective. In this case, government officials sat in a vehicle on a public roadway and used a thermal imager to detect the interior temperature of a suspect's home. Since there was no trespass committed, the Court evaluated the constitutionality of the government's actions based on what types of information the technology itself could reveal, and its accessibility by the general public. The Court found in this case that when an agency "uses a device that is not in general public use to explore details of a home that would have previously have been unknowable without physical intrusion, that surveillance is a 'search' and is presumptively unreasonable without a warrant."

Kyllo undoubtedly stirs new questions. What if the drug-sniffing dog had alerted officers from the public sidewalk in front of Jardines' home? And, for that matter, should a police dog be considered technology? In her concurrence, Justice Kagan, joined by Justices Ginsburg and Sotomayor, considered a drug-sniffing dog to be a device not in general public use; however, Justice Alito and the three other dissenting justices disagreed that Kyllo was applicable in Jardines, since a dog is "neither a new form of technology nor a device."

Technology may be making it easier to gain information, but it may not always be constitutional. Agencies should take special care and consider seeking legal advice before using new technology to conduct surveillance or gather intelligence on a case. Until enough precedent is established, courts will undoubtedly be faced with the difficult task of determining what constitutes legal search in light of new capabilities.