End the ‘reasonable expectation of privacy’ test

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The Supreme Court has struggled to apply the Fourth Amendment when technology is involved. In the late 1920s (when telephony was “high tech”), Chief Justice William Howard Taft described wiretapping adequately well: “Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners,” who were suspected bootleggers. But to defend a finding of no search or seizure, Taft declaimed something different: “The evidence was secured by the use of the sense of hearing, and that only.” It’s hard to square the two statements.

Justice Pierce Butler had a different take in Olmstead v. United States: “The communications belong to the parties between whom they pass,” he said. “During their transmission, the exclusive use of the wire belongs to the persons served by it. . . . Tapping the wires and listening in by the officers literally constituted a search for evidence.” Butler’s dissent has been lost to history, overshadowed by Justice Louis Brandeis’s more creative and floral appeal for a “right to be let alone.”

The Court corrected its approach to surreptitious gathering of communications in its 1967 Katz v. United States decision. But some overshadowing happened there, too. Rather than follow the majority, which noted how the concealment Charles Katz, the defendant, gave to his voice in a phone booth made his words protected, later courts seized on Justice John Marshall Harlan II’s

solo concurrence. “My understanding of the rule that has emerged from prior decisions,” Harlan wrote, “is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”

The test is rife with problems. Courts almost never perform the first part of the test. The test turns the Fourth Amendment back on the people it is supposed to protect, examining the reasonableness of privacy preferences rather than the reasonableness of government searches. Circularity is another issue; courts’ rulings set expectations for the public as much or more than they rely on people’s privacy sensibilities. Almost no court actually investigates what privacy people expect. The “reasonable expectation of privacy” test makes amateur sociologists of men and women whose strength is applying the law to facts. When new technology is involved, there may be no “true” expectations to rely on anyway.

In a Supreme Court brief I wrote for the Cato Institute and the Rutherford Institute, we asked the Court last week to grant certiorari in the case of Travis Tuggle, a man convicted of drug crimes after government agents video-recorded him and all activity in the area around his house nonstop for 18 months. In the lower courts, Tuggle argued that video capture of his every entry and exit, every visitor, and the things he and others carried amounted to an illegal search without a warrant.

The district court and the Seventh Circuit Court of Appeals affirmed his conviction, with the appeals court openly dubious of the result reached using the “reasonable expectation of privacy” test. The logic is simple but errant: People are routinely seen outside their houses, so they cannot expect privacy in their comings and goings. If one cannot expect privacy in any given minute, multiplying that zero privacy expectation by 18 months still reaches zero privacy expectations. Thus, video-recording a person’s activity outside for months on end is not a search.

The Supreme Court need not retreat to doctrine when the claim is that some form of technology has been searched or used for searching. It should merely dig deeper into whether the essence of searching is found in the behavior of government agents.

When the Fourth Amendment was adopted, as now, to "search" meant "[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.

That's from the 2001 case Kyllo v. United States, citing Webster's 1828 dictionary. Searching is activity that has that "purpose of finding something."

In Tuggle's case, government agents video-recorded his every coming and going day and night for 18 months, as well as the effects he carried, every visitor he had, the time and duration of their visits, the things they carried, and more. This highly directed and persistent observation provided new facts about Tuggle's activities and associations, and it permitted inferences about him and his activities inside the home. The government looked over Mr. Tuggle and his house with a purpose of finding evidence. That's a search.