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DOES "VIRTUAL CHILD PORNOGRAPHY" HARM ACTUAL CHILDREN?
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This term, in *Ashcroft v. The Free Speech Coalition,* Case No. 00-795, the United States Supreme Court will decide the constitutionality of the Child Pornography Prevention Act (18 U.S.C. §2256 (8) (2001)). The Act expanded the federal definition of "child pornography," making it a criminal offense to possess or distribute expressive material that "appears to be" or "conveys the impression" of minors engaged in sexually explicit conduct. This broader definition targets so-called "virtual child pornography," which, unlike traditional child pornography, includes sexually explicit images that were not created with actual minors but, instead, were created with computers. The end product is child pornography which is indistinguishable to the unsuspecting viewer from actual photographic images of real children engaging in sexually explicit conduct.

In the landmark decision of *New York v. Ferber,* 458 U.S. 747 (1982), the Supreme Court held that sexually explicit material depicting actual children is not speech and, therefore, not protected by the First Amendment regardless of whether the material reached the level of legal obscenity. The Court based its ruling, in part, on documented evidence that the depicted children suffer serious harm by participating as performers in sexually explicit materials. The Court is now faced with the dilemma of deciding if "virtual child pornography," which does not utilize real children, should be illegal.

Insight into the Court's "mind" may be found in *Osborne v. Ohio,* 495 U.S.103 (1990), wherein the Court ruled that it was illegal to possess child pornography because, in part, "evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." Attorney General Ashcroft, in his brief for Petitioner, relies heavily on this reasoning and sets forth four reasons he believes the Court should find that "virtual child pornography" is not protected by the First Amendment: (1) child pornography is often used as part of a method of seducing other children into sexual activity; (2) child pornography is often used by pedophiles and child abusers to stimulate and whet their own sexual appetites; (3) computers can alter sexually explicit depictions which make it almost impossible to determine if real children were used; and (4) computer-generated images of children engaged in sexual conduct are often exchanged for pictures of real children engaged in sexual conduct.

The Respondent, in its opposing brief, has alleged that the above arguments are not supported by "sufficient evidence." They further assert that the Act was unconstitutionally vague and not narrowly tailored to serve Congress' interest in regulating child pornography. By its very terms, they argue, virtual child pornography does not contain a "child" and therefore does not directly harm a child . Additionally, material which "appears to be" a depiction of a minor engaged in sexual activity could include materials clearly protected by the First Amendment, such as movies using adult actors to depict teenage sexual activity, illustrations of childhood sexuality in scientific texts, and sexually explicit artwork depicting completely fictitious children.

Until recently, the technology that has made virtual child pornography a reality did not exist. Today, however, readily available and inexpensive software and scanners are being used to manipulate photographs of actual children into sexually explicit poses and altered in such a way as to make it impossible to determine whether the image is of an actual child (a process called "morphing"). The Child Pornography Protection Act was a tool designed by Congress for law enforcement to "keep up" with technology being used by criminals and help protect children.

While such a goal is worthy, it must be analyzed in light of Congress' tendency to regulate against what amounts to merely "evil ideas." This concern was expressed by the lower court from which Petitioner appealed, which held that the "secondary effects" argument advanced by the legislative history and adopted by the Petitioner simply fails constitutional scrutiny, and that to "hold otherwise would require a significant shift in First Amendment jurisprudence." *Free Speech Coalition v. Reno,* 198 F.3d 1083 (9th Cir. 1999), *cert. granted,* 121 S.Ct. 876 (2001).

While few would argue against the repugnancy of child pornography, resolving this issue will be particularly challenging for the Court, which must once again decide where to draw the First Amendment line. Oral arguments were held on October 30, 2001.

Techo-Search Violates the Fourth Amendment, for now ...

On June 11, 2001, the United States Supreme Court in *Kyllo v. United States,* 121 S.Ct. 2038 (2001), applied the 209 year-old Fourth Amendment to modern technology. Justice Scalia delivered the majority decision that "the warrantless use of a thermal imaging device to detect heat in a residence is a search within the meaning of the Fourth Amendment." The Court reasoned that because the government used a "device not in general public use to explore details of the house that would not have been previously discovered without physical access" the surveillance constituted a "search" and was presumptively unreasonable without a warrant.

In *Kyllo,* the police suspected the defendant of operating an indoor marijuana growing operation. Based on a tip and Kyllo's utility records, police used a thermal imaging device that showed a substantial concentration of heat flowing from various parts of the house, consistent with growing marijuana indoors. Kyllo's house also "showed warmer" than the other homes. This information was interpreted as further evidence of marijuana production, "inferring that the high levels of heat emission indicated the presence of high intensity lights used to grow marijuana indoors." A warrant was issued to search Kyllo's home. The search revealed an indoor marijuana cultivation operation with more than 100 plants.

While the sense-enhancing technology used in this case was relatively crude, the rule adopted by the Court took account of more sophisticated systems already in use or in development in drawing a "bright line" for the day when technology might allow "through the wall surveillance" of a person's home. This decision came despite the Court's previous rulings which upheld visual surveillance of homes and industrial complexes without a warrant. *See California v. Greenwood,* 486 U.S. 35 (1988) (the search and seizure of garbage left for collection outside the curtilage of a home); *California v. Ciraolo,* 476 U.S. 207 (1986) (the aerial surveillance of a fenced-in backyard from an altitude of 1,000 feet); *Florida v. Riley,* 488 U.S. 445 (1989) (the aerial observation of a partially exposed interior of a residential greenhouse from 400

feet above); *Dow Chemical Co. v. United States,* 476 U.S. 227 (1986) (the aerial photography of an industrial complex from several thousand feet above); *Air Pollution Variance Bd. of Colo. v. Western Alfalfa Corp.,* 416 U.S. 861 (1974) (observation of smoke emanating from chimney stacks).

Justice Stevens, in his dissent, drew a constitutional distinction between "through-the-wall surveillance" that gives authorities direct access to information in a private area and "off the-wall" surveillance, observations made, for instance, of the exterior of the home. Therefore, he reasoned that the conduct did not constitute an illegal search and seizure inside a home. Justice Stevens, joined by Justices Rehnquist, O'Connor and Kennedy, did not find the sense-enhancing technology problematic, unless it "provided its user with the equivalent of actual presence in the area searched."

One is, however, left to wonder if the Court would have decided *Kyllo* differently if it was argued after September 11, 2001. The September 11, 2001 terrorist attacks have diminished most Americans' sense of security, and may well have tipped the balance of the Fourth Amendment toward allowing law enforcement broader surveillance and investigatory powers.

The federal and state governments are moving quickly to strengthen and expand antiterrorism legislation. New antiterrorism bills are being considered that would give the government broad new powers to utilize technology not in general public use to monitor e-mail among terrorism suspects and wiretap any phones a suspect might use. Legislation would also increase penalties for those who support terrorist groups, and encourage greater sharing of information - including information obtained by grand juries - among intelligence and law enforcement agencies. These proposed bills apparently have overwhelming bipartisan support on all legislative levels and overwhelming support from the American people, despite civil liberties advocate's warnings that the new bills could be a dangerous infringement on American privacy and constitutional rights.

It will, however, ultimately come down to the Court, who must strike a difficult balance to ensure not only that law enforcement has enough tools to keep us safe, but also that our liberties remain safe. In doing so, *Kyllo* may simply become "a thing of the past."

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