

CHAPTER ONE

Telephones: How a Fateful Call in 1965 from a Los Angeles Pay Phone Still Rings Out Today

If a statute were to authorize placing a policeman in every home or office where it was shown that there was probable cause to believe that evidence of crime would be obtained, there is little doubt that it would be struck down as a bald invasion of privacy, far worse than the general warrants prohibited by the Fourth Amendment. I can see no difference between such a statute and one authorizing electronic surveillance, which, in effect, places an invisible policeman in the home. If anything, the latter is more offensive because the homeowner is completely unaware of the invasion of privacy.

—JUSTICE WILLIAM DOUGLAS
CONCURRENCE, *BERGER v. NEW YORK* (1967)

October 16, 1967
Washington, DC

As the door slammed shut in his Washington, DC, hotel room, Harvey Schneider sat alone with his thoughts for the first time that day.

His boss, Burton Marks, had just gone out for the evening to visit his in-laws in nearby Virginia. Although Marks, 37, wasn't that much older than Schneider, he gave the impression that he was. Marks had an established law practice on Wilshire Boulevard in Beverly Hills. He wore well-pressed suits. He com-

manded courtrooms all over Los Angeles. Still, to save money, the two men shared a hotel room.

Marks, one of the top criminal defense lawyers in Southern California, seemed relatively unconcerned about the fact that the two of them were about to appear the next day before the Supreme Court of the United States. Nor, seemingly, was Marks worried about letting his young, recently-out-of-law-school protégé make the opening arguments to the court. After all, it was Schneider who had come up with a new legal theory that would challenge conventional privacy law and surveillance practices of the era.

Just one day earlier, Schneider had been formally admitted to the Bar of the Supreme Court. Marks, who had appeared before the court a year before (*Douglas v. California* [1966]), had to go through the perfunctory procedure to get his younger colleague admitted.

Schneider stared down at his notes, strewn across his makeshift desk. It was like preparing for an exam, only the stakes were higher. And unlike most, if not all, modern-day Supreme Court oral argument preparations, Schneider and Marks had not engaged in moot court, or a mock hearing, involving other lawyers playing the part of the justices.

Thus, Schneider would have been shocked at the time to know that their case, *Katz v. United States*, was to become, decades later, a landmark decision in the history of American surveillance and privacy law. It established a key phrase—"reasonable expectation of privacy," which has now served as the legal underpinning of a substantial portion of Fourth Amendment law for the last 50 years. In essence, it is shorthand for determining whether something is considered to be a search under the Fourth Amendment. After all, the Constitution does not prohibit all searches, but simply unreasonable ones. What exactly is considered a search has been a matter of debate since the founding of the Republic. Whether a particular surveillance technology or technique is permitted often hinges on this question, and others that derive from *Katz*.

Marks returned around midnight, fumbled about, and promptly collapsed in an exhausted heap on one of the beds. Schneider looked up, but didn't say a word. He went back to his notes.

Eventually, Schneider got himself to bed, but he barely caught a few hours sleep. This wasn't like a championship basketball game—years earlier, he'd been a guard on various youth teams. Appearing before the Supreme Court was every lawyer's dream, especially younger ones.

The next morning was Tuesday, October 17, 1967. Marks and Schneider suited up and walked over to the Supreme Court. It was a warm, clear day in the nation's capital.

Schneider was confident, but a little nervous. As the two lawyers walked into the imposing column-fronted building, they passed under the inscription "Equal Justice Under Law." They made their way to the main courtroom. As the pair began to get set up for the 10:00 AM oral argument, a marshal of the court approached.

"If you're caught in the middle of oral arguments, would you like to have lunch?" the marshal asked the two lawyers. They agreed—having lunch at the Supreme Court sounded stupendous. (This turned out to be much less grandiose than they had imagined: during the lunch break, Marks and Schneider were treated to "two little turkey sandwiches" at the end of a large dining table, with the only other person nearby being the marshal standing guard outside the room.)

The courtroom filled up, and the court was called to order. In walked eight justices—Thurgood Marshall, who had left the Office of the Solicitor General to join the Supreme Court just two weeks earlier, had recused himself from hearing the case as he represented the government's side in earlier filings. They took their places on the raised podium behind a desk, flanked by American flags on either side. The justices sat down, one by one.

Suddenly, the marshal called out:

The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!

Chief Justice Earl Warren, a native Californian, presided over the court. By then, Warren was nearing the end of his influential 16-year tenure as the head of the nation's highest court. As chief justice, he had led the liberal majority in landmark cases like *Brown v. Board of Education* (1954), which eliminated racial segregation in schools nationwide. Before that, Warren had been governor of California, after being the state's attorney general. Before that, he served as district attorney of Alameda County and began his legal career as deputy city attorney of Oakland.

"Number 35, Charles Katz, Petitioner versus United States," Warren intoned flatly, in his tinny, high-pitched voice.

He paused for a few seconds and waited for Schneider to begin.

"Mr. Schneider?"

Schneider approached the lectern, and quickly glanced at the justices who sat several feet away, and saw giants: Warren, Hugo Black, William Douglas, John Harlan, Byron White, William Brennan, Potter Stewart, and Abe Fortas. They were all more than twice as old as he was.

"Mr. Chief Justice, and may it please the Court," Schneider began. His voice did not waver. He looked straight ahead at the justices.

The facts of this case that is now before the Court are really quite simple. The law applicable is something else again. But the facts are as follows. Mr. Katz was surveilled by agents of the Federal Bureau of Investigation for a period of approximately six days. During

that period of time, the surveillance was conducted by the use of a microphone being taped on top of a public telephone booth or a bank booth, so it was actually three booths.

“One booth had been placed out of order by the telephone company and with the telephone company’s cooperation, the other two booths were used by Mr. Katz,” he continued, building a rhythm.

The courtroom was silent.

“Sometimes he used one booth, sometimes he used another,” Schneider read from his notes.

The tape was placed on top of the booth or the microphone was placed on top by a tape. The FBI Agents had undoubtedly read their homework and had not physically penetrated into the area of the telephone booth. Subsequently after about six days of surveillance, Mr. Katz was arrested. He was then taken to his apartment building where his room was searched under a search warrant and numerous items were seized from Mr. Katz’s apartment. The issues before the Court are fairly clear. One, whether or not, the search and seizure or one of the interceptions of the telephone communications was proscribed by the Fourth Amendment; and two, whether or not, the warrant that was used to search his apartment building is constitutionally proper or constitutionally defective.

After a few minutes of back-and-forth with Stewart and Warren, Schneider drove right to the heart of the matter.

Surprisingly, Schneider largely abandoned the entire question that the court was being asked to consider: Was a telephone booth a constitutionally protected area? If so, does the government necessarily need to physically trespass into it in order to violate the Constitution?

Avoiding this was a highly unusual move. No doubt the justices were a little bit surprised at the sharp left turn.

“We think and respectfully submit to the Court that whether or not, a telephone booth or any area is constitutionally protected, is the wrong initial inquiry,” Schneider declared.

Schneider proposed a way to evaluate such a situation.

“It’s an objective test which stresses the rule of reason, we think,” he continued. “The test really asks or poses the question: ‘Would a reasonable person objectively looking at the communication setting, the situation and location of a communicator and communicatee—would he reasonably believe that that communication was intended to be confidential?’ ”

Or put another way, could that “reasonable person” have a reasonable expectation of privacy?



The 1789 Bill of Rights enshrines a number of rights to individuals: freedom of speech, freedom of religion, the right to bear arms, and so forth. The Fourth Amendment protects against unreasonable searches and seizures. However, nowhere in the Bill of Rights, or in the Constitution, is the word “privacy” mentioned. But scholars, lawyers, judges, and others have intuited, or extrapolated, something resembling a privacy right from both documents.

Government overreach was certainly on the minds of the Framers of the Constitution. In the 1760s, American colonists were very much aware of the invasiveness of British authorities. At that time, a writ of assistance was issued by British courts as a way to combat smuggling. Unlike a modern warrant, these writs, also known as general warrants, allowed nearly anywhere to be searched. Worse still, they lasted for the lifetime of the King under which they were issued, and nearly always, in practice, could not be challenged.

In 1761, a 36-year-old lawyer, James Otis, Jr., represented dozens of Boston merchants, who argued that their rights had been violated by Charles Paxton, a British customs agent who

had used writs of assistance against them. In a famous five-hour argument, Otis argued before the Superior Court of Massachusetts that “every one with this writ may be a tyrant.”

He continued:

Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.

While Otis lost the case, his oratory made a lasting impression on a young John Adams, then 26, who observed in the courtroom. The 1776 Declaration of Independence itself refers briefly to this practice, in its laundry list of grievances against King George III: “He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.”

Fifteen years later, the Framers, and in particular James Madison, were so put off by the idea that anyone’s home or business could suddenly be searched by a government agent that such protections were distilled into the single—albeit lengthy—Fourth Amendment, which was ratified in 1791:

The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

For well over a century, the Fourth Amendment right largely turned on the notion of a physical trespass. The idea, simply, was that it was the physical act of invading someone’s private space that was so offensive to the Framers. It is still fundamental to our reading of the Fourth Amendment—the police cannot kick in your door without a warrant absent exigent circumstances.

But in the nineteenth century, new notions of what constituted an invasion of privacy began to develop—for example, the idea of invading someone’s privacy through the telegraph line was patently offensive. Thus, in 1862, California became the first state in the union to formally outlaw the tapping of telegraph lines.

And in 1928, the Supreme Court considered its first telephone wiretapping case, the case of *Olmstead v. United States*. Roy Olmstead was a Seattle police officer turned bootlegger whose phone had been tapped, leading to his arrest. No warrant had been issued for the tap. (In an interesting side note, Mabel Walker Willebrandt, who served as assistant attorney general from 1921 until 1929 and served as the lead prosecutor at nearly all Prohibition-related cases, refused to represent the government at the Supreme Court because she opposed the use of the wiretap evidence.)

Ultimately, the court found that it didn’t matter if federal authorities had wiretapped Olmstead’s phone without a warrant. Writing for the majority opinion in a 5–4 decision, Chief Justice William Howard Taft concluded that the government had not violated Olmstead’s Fourth Amendment rights, essentially, because there was no physical trespass on his private property. This focus on the physical infringement rather than moral trespass—honoring the letter, if not the spirit of the Founders, one might say—would haunt privacy cases in the country for nearly a century.

“The [Fourth] Amendment does not forbid what was done here,” Taft wrote, noting that by that point, the telephone was 50 years old. “There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing,

and that only. There was no entry of the houses or offices of the defendants.”

In essence, the Supreme Court did not want to impose a new law where it felt Congress or the Constitution had not specifically authorized them to. (This is a common reasoning of many conservative judicial opinions, that the courts should not have an expansive view of the law. Rather, they should simply stick to what the law actually says. By contrast, liberal judges generally view the Constitution as a “living document”—its meaning can be reinterpreted over time to accommodate modern realities.) But by the 1920s, both telephones and wiretaps were decades-old technology. The law, then as now, often struggled to keep up with the common realities of the day.

Presciently, that was exactly the point made by Justice Louis Brandeis, then roughly midway through his fabled tenure on the court, in a dissent in which he referenced Otis’ famous speech.

“The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping,” Brandeis wrote. “Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.”

He continued, citing the Framers, asserting that they “sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.”

Decades later, when Schneider told the 1967 Supreme Court, in the opening minutes of his argument in the *Katz* case, “The FBI Agents had undoubtedly read their homework and had not physically penetrated into the area of the telephone booth,” he was largely referring to the *Olmstead* precedent. The government in the 1960s, as it had in the 1920s and decades earlier, relied solely on the physical trespass of the space.

In *Katz*, that meant that the FBI did not invade Katz’ possibly private space—a telephone booth—but they went physically right up to the edge of it.



The *Katz* case originated in October 1964, when FBI agents in Los Angeles were tipped-off to a local betting man. By February 1965, the FBI had determined that this person was 53-year-old Charles Katz, and that he lived at Sunset Towers West, 8400 Sunset Boulevard, Room 122.

Nearly every day, agents watched the dapper middle-aged man leave his apartment on Sunset Boulevard, and walk just a few blocks down to a bank of three telephone booths at 8210 Sunset Boulevard, across the street from the Chateau Marmont hotel. To anyone who might have seen Katz, he simply looked like a businessman. He wore suits, button-up shirts, and long ties, according to Joseph Gunn, a Los Angeles Police Department (LAPD) officer who testified at Katz’ two-day bench trial.

“Some of these telephone calls,” Benjamin Farber, a federal prosecutor, said during an April 5, 1965 court hearing, “were being placed to a telephone number in Massachusetts which was listed to an individual whose reputation was well known to the Federal Bureau of Investigation as that of a gambler.”

Katz, it turned out, was a handicapper, someone who studies the outcomes of sporting events and places large bets on them. He’d been doing it for 30 years in Los Angeles, he told agents later, and claimed he made \$60 a week (or \$470 in 2017 dollars). After establishing a pattern of behavior, on February 19, FBI agents placed a microphone on top of two of the phone booths that were part of the bank of three that Katz liked to use. Likely as a way to make their jobs easier, law enforcement disabled one of the booths—with the phone company’s permission—simply by putting a sign on the third one saying, “OUT OF ORDER.” This tactic encouraged Katz to choose between the centermost and easternmost booths.

The FBI and the LAPD assigned several people to the Katz investigation. The FBI went as far as to rent the room next to Katz’ in the Sunset Towers West—Room 123. Katz sometimes called East Coast bookies from his room and he could plainly be heard in the hallway outside his room. At the time, both federal

and local law enforcement were particularly interested in vice cases, not only because they were illegal, but because controlling gambling was a powerful check on police corruption.

"We felt in LA that there wasn't any corruption as far as cops taking bribes, so one of the ways you make sure that there aren't takes like that is to get involved," Gunn, who retired from the LAPD in 1983 after 20 years on the force, told me. "You make sure that they don't get a major foothold and that they're not trying to pay off cops for protection."

Gunn was well-aware of the potential of his fellow officers to be corrupted. In fact, just one year earlier, in 1964, Gunn learned that his partner, Henry De Maddalena, a veteran vice officer, was accepting bribes from another bookmaking ring. At the behest of Police Chief William H. Parker, Gunn went undercover and helped dismantle one of the city's largest gambling rings. In the end, two LAPD officers, including De Maddalena, and four other men were found guilty of illegal betting and bribery.

The recording operation of Katz began on February 19, 1965. One team of agents would watch Katz at home, and then would radio to another agent closer to the phone booths. The two microphones and recording apparatus only took about a minute or so to set up—one person had to scramble up to the top of the booth and turn it on before Katz arrived. (Amazingly, during the six days that Katz was under surveillance, only one other person came to use the phone booth around the same time as he.) Then, once Katz left, the agents would turn the microphones off. In addition, agents also created a false surface on the counter of the phone booths, with carbon paper secretly placed underneath, so that it would capture anything that Katz wrote.

After recording Katz' calls for nearly a week, and in combination with the observations near his apartment, they moved in and arrested him on February 25 at the phone booth. Armed with a warrant, the LAPD and the FBI searched his apartment and recovered 148 written pages of betting notes, various sports

magazines, and two \$10 rolls of quarters, among other items. When he was arrested, Katz was polite and did not resist.

It was during Katz' two-day bench trial at the federal district court (the lowest level of federal court) in May of 1965 that Harvey Schneider's boss, Burton Marks, laid out the beginnings of his argument about the expectation of privacy.

"I think that *Olmstead* is a dead letter," he told US District Judge Jesse Curtis. "It hasn't been specifically overruled, but either by this case or some other case it is going to be in the very near future...The right to privacy doesn't just extend to a person's home, it extends to his office, and I believe it extends to any place in which there is intended to be privacy."

The judge was unconvinced; Katz was convicted and sentenced to a \$300 fine (approximately \$2,300 in 2017 dollars). Marks appealed to the 9th Circuit US Court of Appeals, where again, he reprised his arguments. Marks was denied, and the stage was set for a writ of *certiorari* petition—that is, the appeal to the Supreme Court.



Burton Marks didn't argue against *Olmstead* due to mere bluster. Rather, the choice was tactical.

Just as general writs were an anathema to the values of Colonial Americans, so too was the entire concept that a person's telephone calls could be easily invaded without warning to modern Americans. Although the Supreme Court had not formally taken up the issue until the 1920s, other lower federal courts and even some local courts had, albeit sometimes in roundabout ways.

For example, on December 1, 1907, the *New York Times* reported on a curious local case where a Tenth District Municipal Court judge had ruled that "a protesting tenant has rights of privacy in the telephone that connects his apartment with the outside world."

The case involved a rental dispute and a tenant who was being eavesdropped upon by his landlord's wife on the common

telephone line for the entire building. Judge Wauhope Lynn noted that the telephone had “passed the period of experiment and is now a real living part of ourselves.” He went on, “where it is installed as a part of an apartment house and made an inducing cause for the rental of such apartment, then its presence must be regarded as a sacred part of the home, entering into its privacies and secrets and giving communion with those we love and cherish.”

Of course, this case was a civil and not a criminal matter, and it was only relevant to the local court, but it is illustrative of at least some of the typical judicial thinking of the era. In the nineteenth century and well into the twentieth, sensitive telegrams often had the protection of some type of encryption. The telephone, by contrast, typically did not. Most people did not speak in code, and they usually didn’t write letters in code, either. Judges were responding to the obviousness of this to people of the time.

In 1931, no less an authority than the head of the FBI, J. Edgar Hoover—certainly no wilting flower when it came to aggressive law enforcement—declared during a Senate hearing that he thought wiretapping was “unethical.” (Hoover rather dramatically changed his tune on this later on.)

In 1932, a federal judge in Boston, during a bootlegging trial, denounced federal agents’ wiretapping as a “contemptible, vile practice.”

Two years later, Congress passed the Communications Act of 1934, which, among other things, established the Federal Communications Commission. Notably, the act specifically forbade wiretapping under Section 605. (However, federal agencies routinely ignored the law and conducted wiretaps, although they were forbidden from introducing the evidence at trial.)

In short, by the time of *Katz*, there was a growing consensus that wiretapping—or even warrantless eavesdropping, as was the case in *Katz*—was improper.



Three Supreme Court cases in particular had a significant influence on Marks and Schneider’s view that *Olmstead* was “dead letter”—one from the 1940s, one from 1961, and another decided in June 1967, just after *Katz*’ cert petition had been submitted. Taken together, these three cases offered a distinct roadmap for how the young Los Angeles lawyers might convince the Warren Court in the fall of 1967.

The first of those cases, *Goldman v. United States* (1942), involved men who had been indicted for conspiracy to violate federal bankruptcy laws. The defendants had been eavesdropped upon by federal agents who rigged up a “listening apparatus in a small aperture in the partition wall with a wire to be attached to earphones extending into the adjoining office.” Using this system, authorities were able to overhear and ultimately transcribe crucial moments of the conspiracy, which proved to be grounds for their indictment.

The men attempted to challenge the collection of this evidence, on the grounds that it violated both the Fourth Amendment and Section 605 of the Communications Act. Denied by lower courts, they challenged it up to the Supreme Court, which upheld the ruling.

The Supreme Court ultimately found (5–3) that the surveillance system was “no more the interception of a wire communication within the meaning of the Act than would have been the overhearing of the conversation by one sitting in the same room.”

As in *Olmstead*, the case largely turned on whether a trespass had occurred, and it had not. However, again, the more liberal members of the court dissented, largely reiterating what Brandeis had argued decades earlier.

“The conditions of modern life have greatly expanded the range and character of those activities which require protection from intrusive action by Government officials if men and women are to enjoy the full benefit of that privacy which the Fourth Amendment was intended to provide,” Justice Frank Murphy wrote in his dissent in *Goldman*. “It is our duty to see

that this historic provision receives a construction sufficiently liberal and elastic to make it serve the needs and manners of each succeeding generation.”

Nearly two decades later, in *Silverman v. United States* (1961), the Supreme Court again found itself faced with an eavesdropping case involving gamblers in a Washington, DC, house. In this instance, however, federal agents camped out in a house next door to the suspects and used a rather advanced listening apparatus, specifically, a spike mike. The microphone was effectively plugged into the target home’s heating system, which enabled the agents to hear everything going on next door. Again, the defendants challenged the use of the listening apparatus under the Fourth Amendment and Section 605 of the Communications Act.

In a unanimous decision, the Supreme Court ruled that while the agents had violated the Fourth Amendment, it wasn’t because they had trespassed (even slightly) into the home without a warrant. “But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law,” the court found. “It is based upon the reality of an actual intrusion into a constitutionally protected area.”

This notion was rather strange, in light of *Goldman*.

“Our concern should not be with the trivialities of the local law of trespass, as the opinion of the Court indicates,” wrote Justice William Douglas, in a concurring opinion in *Silverman*. “But neither should the command of the Fourth Amendment be limited by nice distinctions turning on the kind of electronic equipment employed. Rather, our sole concern should be with whether the privacy of the home was invaded.”

While it seems somewhat quaint now, the late 1950s into the mid 1960s were a time when there was still a great deal of intense debate as to the ethics and legality of wiretapping and eavesdropping. Many, including the American Civil Liberties Union, argued that the practice should be banned outright. Others felt that it should be allowed in very narrow circumstances (such as situations pertaining to national security), while others

felt that it should be allowed simply with a judge’s approval. One of the most ardent pro-wiretap advocates of that era was Attorney General Robert F. Kennedy. In a June 1962 op-ed in the *New York Times*, he argued that properly crafted legislation could strike the necessary balance between privacy interest and the needs of law enforcement.

“Wiretapping should be prohibited except under clearly defined circumstances and conditions involving certain crimes,” Kennedy wrote. “Because wiretapping potentially involves greater interference with privacy than ordinary search and seizure, it is proper to limit it narrowly and permit it only where honestly and urgently needed.”

By January 1967, President Lyndon Johnson even mentioned the issue in his State of the Union address:

We should protect what Justice Brandeis called the “right most valued by civilized men”—the right to privacy. We should outlaw all wiretapping—public and private—wherever and whenever it occurs, except when the security of this Nation itself is at stake—and only then with the strictest governmental safeguards. And we should exercise the full reach of our constitutional powers to outlaw electronic “bugging” and “snooping.”

Months before Schneider and Marks arrived to argue their case, the Supreme Court had just decided on the legality of a New York state law that authorized specific eavesdropping, or bugging, under the approval of any high-ranking police officer, district attorney, or the state attorney general, if there is “reasonable ground to believe that evidence of a crime may be thus obtained.”

At the time, nine states prohibited wiretapping—listening to a voice communication transmitted over a wire—in all circumstances. New York was just one of seven states that specifically forbade bugging, or eavesdropping, but of those seven, six (including New York and California) allowed it under certain cir-

cumstances. The 1967 case, *Berger v. New York*, was a case involving bribery of the chairman of the New York State Liquor Authority. There, a miniature recording device was used to capture voices in an attorney's office, with the approval of a judge of the state's supreme court.

In June 1967, the US Supreme Court decided 6–3 that the New York law was too broad, and was too close to the general warrants that were abhorred by the Framers.

"I can see no difference between such a statute and one authorizing electronic surveillance, which, in effect, places an invisible policeman in the home," wrote Justice William Douglas in his concurring opinion. "If anything, the latter is more offensive because the homeowner is completely unaware of the invasion of privacy."



By the time the *Katz* case fell in the lap of a young Harvey Schneider, it was early 1967.

Marks and Schneider occupied a small office in Beverly Hills—just the two of them and a pair of secretaries. Marks at heart was really a skilled litigator and orator. The elder lawyer wasn't known for his creative legal writing. Marks likely thought that Schneider could persuade the Supreme Court to not only agree to hear the case, but to rule in Katz' favor.

Schneider spent long hours in the law library, ensconced in legal texts. He dove deep into the analysis and scholarship of *Goldman* and *Silverman* and he came to a quick conclusion about the federal prosecutors on the other side.

"They thought they had a *Goldman* case and not a *Silverman* case," he told me. "So I couldn't argue trespass because that was the going theory and so I argued whether a telephone booth was a constitutionally protected area."

Schneider learned there were other cases that had also taken place, showing that the court had found spaces that weren't private homes to be protected under the Constitution—these included hotel rooms and taxicabs.

"I argued that in the language the court had been using," Schneider continued. "The court never really articulated a two-step analysis, but I think there was one. The first inquiry was whether they were dealing with a constitutionally protected area, if not, then there was no second step. So the first step was protected area, if they found one, then the next issue was trespass, that was the old analysis. They never articulated [it,] but I think if you read the cases, that's what you glean from reading the cases."

This was the crux of the petition to the Supreme Court, which was formally accepted in early 1967. That summer, while the rest of the country was embroiled in the Summer of Love alongside riots over racial discrimination and police abuse broke out in several cities across America, Schneider began to formulate his arguments before the court.

One day, Schneider realized that there was another, better way that he might be able to convince the court, and it involved arguments that (highly unusually) were not mentioned in his petition briefs to the court.

Arguing the question of trespass was surely to fail, because, again, the microphones were on top of, and not in, the phone booth. Plus, asking the court to consider that a public phone booth was a constitutionally protected area was a dicier proposition. After all, unlike taxis and hotel rooms, phone booths are wholly transparent to the outside world. Whether the court, even the liberal-leaning Warren Court, would find this to be private nonetheless, was not a slam dunk.

Schneider thought that the justices might have an easier time adopting a new test of sorts: whether a person in a telephone booth would reasonably expect to have privacy inside of a phone booth. Immediately after this epiphany, Schneider rushed over to Marks' office.



During the oral argument at the Supreme Court on October 17, 1967, Schneider quickly floated this idea of a reasonable expec-

tation of privacy.

"The test really asks or poses the question, 'Would a reasonable person objectively looking at the communication setting, the situation and location of a communicator and communicatee—would he reasonably believe that that communication was intended to be confidential?' We think that in applying this test there are several criteria that can be used."

Justice Brennan, an influential liberal justice, jumped right in: "So that parabolic mic on the two people conversing in the field a mile away might—" (Brennan's comment appeared to reference a combination of two cases: *Hester v. United States* [1924] and *Silberman*. In *Hester*, the Supreme Court found that the Fourth Amendment does not apply to open fields, even when that land is within a person's private property. In *Silberman*, the Supreme Court had referred to the parabolic microphone as one type of "frightening paraphernalia" that could be used to conduct ever-more-invasive types of surveillance at a distance.)

Schneider didn't miss a beat.

"Absolutely," he said. "And I think that *Hester*, the *Hester* case which is cited on the Government's brief, we think that *Hester* is wrong."

Schneider's voice slowed down and rose towards the end of the sentence, as if to be gentle with the notion that he wanted the Supreme Court to upend *Hester*. (Ultimately, the court would decline to overturn it in its *Katz* decision.)

"We think that if a confidential communication was intended and all the other aspects of confidentiality are present, then it makes no difference whether you're in an open field or in the privacy of your own home," Schneider continued. "We would submit to the Court that there are factors present which would tend to give the Courts, the trial courts, and ultimately this Court, some guidelines as to whether or not, objectively speaking, the communication was intended to be private."

Part of the analysis, Schneider went on to argue, should be determined on various factors, such as the location of the con-

versation—was it surrounded by other people, or not? Was the person speaking in an unusually loud tone of voice?

And then Schneider really drove home his argument.

And again, I—we—feel that the emphasis on whether or not you have a constitutionally protected area may be placing the emphasis on the wrong place. We feel that the Fourth Amendment and at the Court's decisions recently for a long time, I believe, have indicated that the right to privacy is what's protected by the Fourth Amendment. We feel that the right to privacy follows the individual.

This was the crux of Schneider's stunning point: that an affirmative right to privacy is not necessarily contingent on where a person is—here, the question of trespass was irrelevant.



Then, it was the government's turn to present its arguments. That duty fell to John S. Martin, Jr., 32, newly appointed assistant to the Office of the Solicitor General of the United States.

Martin called Schneider's arguments a "radical change in the concept to the Fourth Amendment," and argued that under the *Goldman* standard—no penetration of the phone booth itself—that eavesdropping was wholly justified. Law enforcement did not need to get a warrant, he explained, and so the agents didn't even attempt to. In the government's eyes, the case was that simple.

Martin got into an extended discussion with Chief Justice Warren about the specific design of phone booths, pointing out that, after all, phone booths are not soundproof.

Warren foiled his assertion: "Well, not many homes are soundproof."

To which Martin replied that in a phone booth, people don't "expect" to be "protected in that area as you are in your home."

"Perhaps not as much but you certainly expect it to be private and you don't talk to the world, when you talk on the telephone there, do you?" Warren said.

"No, of course, you don't," Martin continued, explaining that anyone passing by a phone booth might overhear a conversation. In other words, Martin argued, the law should not recognize the same level of core, innate protection, as is the case when someone is at home.

The justices seemed generally skeptical of the government's view. Chief Justice Warren asked Martin to speculate as to why, in some places, there were specific booths as opposed to just banks of phones. In the end, Burton Marks himself had the final minutes for rebuttal—and he closed on the question of the phone booth glass.

"I submit that if the Court wants to make a test, go and sit in some phone booth, the one at the Sunset Boulevard, it's the ordinary type with a little glass door," Marks said.

"Just sit in it and listen next door and see if you can hear a person and determine what he is saying in an ordinary conversational voice. I submit that you cannot so hear and that there was intended to be privacy and this right of privacy of the individual should be respected."

The case was submitted. As the justices went into conference, it wasn't necessarily obvious to Schneider and Marks how it was going to turn out. Justice Fortas, for example, who was a secret advisor to President Lyndon Johnson, thought that there shouldn't be any restraining of the government's power when it came to national security.

"[Fortas] didn't draw any distinction between informers who were wired for sound and electronic devices that were planted in someone's property," Laurence Tribe told me in an interview. Tribe, now a well-known Harvard Law professor, had been a clerk for Justice Potter Stewart at the time. "He thought that if you don't physically invade something it shouldn't require a warrant and it was not because of his analytical view of the

Fourth Amendment—it was his practical sense of law enforcement."

At first blush, without Justice Marshall participating, the case seemed likely to split 4–4, which would have meant that the 9th US Circuit ruling—against Katz—would have stood. The *Olmstead* standard, based on physical trespass, would essentially remain intact. Justice Douglas was perturbed by the fact that such warrantless eavesdropping was essentially like a general warrant—it lacked specificity. Chief Justice Warren, by contrast, having served as a local prosecutor and also as California's attorney general, was mindful of the needs of law enforcement and the necessity for tools like this.

In Tribe's telling, the mood was indeed rather tense. Justice Stewart, a centrist Republican jurist, was prepared to affirm the 9th Circuit's ruling. The court was simply not prepared to overturn the *Olmstead* and *Goldman* precedents.

At the age of 26, Tribe was one of the younger clerks. He had just started that fall, fresh off of another clerkship at the California Supreme Court, which he'd taken on immediately after completing Harvard Law School.

Tribe hadn't attended oral arguments during *Katz*, but he was familiar with the crux of both sides' arguments. He had read their filings, the transcript of the oral arguments, and studied the case law. His job was to help Justice Stewart formulate and draft his opinion, which would be circulated amongst the other justices for review.

During the period of "conference" where the justices discuss privately how they might rule, Tribe approached Justice Stewart. The young lawyer wanted to change his boss's mind. But by that point, Justice Stewart had been on the court for nearly a decade and was set in his ways. Plus, it was Justice Stewart who had famously dissented in 1965 in *Griswold v. Connecticut*, where he wrote that he did not believe that the Bill of Rights, nor the Constitution, nor "any case ever before decided by this Court" afforded a "general right of privacy." Still, Tribe was undeterred.

"I had a little bit more spunk at the time than I did in years since," Tribe recalled. "Even though I was wet behind the ears, I had the tenacity or the chutzpah to say: 'Mr. Justice, it would be terrible if the case were affirmed by an equally divided court—the law is in a chaotic condition.'"

But Stewart wouldn't have it.

"I don't need a lecture from one of my law clerks on this," he said. Stewart and the other justices had made up their minds. The case was about to split, along predictable lines. "This case is going to be decided on Monday, without opinion. Get over it."

Tribe was undeterred. He stayed late one night and prepared a draft opinion. Stewart was incensed, and almost threatened to fire the young lawyer.

"Larry, you're new here," Stewart told him. "The Dragon Lady has made her decision."

"Dragon Lady" was the nickname the justices had given Margaret McHugh, Earl Warren's secretary. What Stewart meant was that she had already officially recorded the justices' votes. The circuit court's ruling on *Katz* was going to be upheld.

"This is a great opportunity to overrule *Olmstead* and rip the Fourth Amendment from its no longer plausible moorings in ancient property concepts," Tribe recalled feeling. "And so I said 'Would you give me a chance over the weekend to see if I can come up with a draft of something that could persuade people on both sides?'"

"Don't make a nuisance of yourself," Stewart retorted. Still, he gave Tribe until Monday. If this new opinion didn't impress Stewart, then the original plan—a 4–4 split—would stand.

On Monday, Stewart read Tribe's draft. After a few beats, he told Tribe: "Let me think about this. Actually, it's conceivable."

As Tribe explained years later, his "idea had to do with actually recognizing that something is a search when [there are] justifiable intrusions of privacy needn't mean that it would automatically be impermissible. It was a blueprint for the kinds of electronic surveillance warrants that would be required. We [didn't] have to decide [then] where there might be exceptions

for national security concerns. It was designed to deal with the concerns of White, Fortas, and maybe Douglas."

This argument largely tracked with Schneider's arguments, but was designed to appease the concerns of the conservative wing of the court.

A few days later, Tribe got his own memo from Stewart: "Larry, the indication is AF [Abe Fortas] will join our *Katz* opinion, excepting only with reservations as to how we say that there is no constitutional right of privacy." This note currently hangs in Tribe's office at Harvard Law School.

Even Chief Justice Warren wrote in a one-sentence memo to Stewart: "I am happy to join your opinion, and I believe that it will be a milestone decision."

What Tribe presented was largely what ended up being the majority opinion in *Katz*.

"For the Fourth Amendment protects people, not places," the 7–1 opinion from December 18, 1967, states, echoing some of the language that Schneider had laid out. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

Justice Harlan, in a concurrence, outlined a specific two-part test:

My understanding of the rule that has emerged from prior decisions 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." Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected," because no intention to keep them to himself has been exhibited.

Indeed, since then, the question has been, What does it mean for society to recognize something as reasonable? Some legal scholars have even tried to conduct empirical research, using surveys, to better understand where ordinary people feel the limits are, or at least, ought to be. For now, such scholarship is largely limited to the academic realm, and has not yet made a substantive impact on what many courts, much less the Supreme Court, considers to be reasonable.

Katz' impact was immediately felt on both a local and national level: the LAPD quickly issued a notice to all personnel clarifying what officers could and could not do with respect to physical surveillance.

At a federal level, however, during the Johnson administration, months before *Katz* had been considered at the Supreme Court, Attorney General Nicholas Katzenbach spearheaded a commission to examine the state of criminal justice in America. In February 1967, the body produced a voluminous report: "The Challenge of Crime in a Free Society," which noted that the patchwork of laws pertaining to wiretapping and "electronic eavesdropping...is so thoroughly confused that no policeman, except in States that forbid both practices totally, can be sure about what he is allowed to do."

Congress largely incorporated much of the commission's recommendations, and passed the Omnibus Crime Control and Safe Streets Act of 1968. The law also included a provision, known as Title III, that would formally allow real-time wiretaps to exist, but only as part of a super-warrant, whereby, not only does a law enforcement agent have to establish probable cause of a crime, but the request must come from senior department officials, rather than any federal prosecutor. Further, the federal judge must also determine that any other investigative technique has failed, would fail, or would be too dangerous to undertake. Today, this law is a crucial foundation for most modern surveillance of suspected criminals.

But even at the time, Title III was not without its critics. While President Johnson signed the Safe Streets Act into law in

June 1968, he specifically called out his unhappiness with that part of the bill:

If we are not very careful and cautious in our planning, these legislative provisions could result in producing a nation of snoopers bending through the keyholes of the homes and offices in America, spying on our neighbors. No conversation in the sanctity of the bedroom or relayed over a copper telephone wire would be free of eavesdropping by those who say they want to ferret out crime.

Thus, I believe this action goes far beyond the effective and legitimate needs of law enforcement. The right of privacy is a valued right. But in a technologically advanced society, it is a vulnerable right. That is why we must strive to protect it all the more against erosion.

Since *Katz*, the notion of a "reasonable expectation of privacy" is one that regularly comes up in court cases at all levels. But as Justice Harlan noted, the crucial question of whether that expectation is one that society is prepared to accept as reasonable remains open.

There are some more recent cases that have obvious outcomes. For example, does one have a reasonable expectation of privacy in the trash you leave curbside to be picked up? No, the Supreme Court ruled in 1988. Taken one step further, does a person have a reasonable expectation of privacy in documents that have been shredded and thrown out? No, the 1st Circuit US Court of Appeals concluded in 1992. Does a criminal have a reasonable expectation of privacy in a computer that was obtained fraudulently? No, the 9th Circuit US Court of Appeals decided in 2005. Does a burglar who abandons his cell phone at the scene of a crime have a reasonable expectation of privacy in the phone? No, a Sacramento federal judge ruled in 2016.

More recently, a federal judge in Seattle ruled in 2016 that users of the online anonymity tool Tor do not have a "reason-

able expectation of privacy in their IP [Internet Protocol] addresses while using the Tor network.” Therefore, a man who the government believed was running an online drug website (Silk Road 2.0) and obscuring his online tracks by using Tor was not searched when the government in effect hacked his Tor Browser to locate him.

Katz, in short, has become the bedrock of modern surveillance jurisprudence. It has benefited all of us by expanding our rights against some forms of warrantless government intrusion beyond the four walls of our homes. Thanks to Title III, the government must now clear extraordinary hurdles if it wants to listen in on our voice calls. But of course, in the early twenty-first century, investigators have many more tools at their disposal beyond mere wiretaps. The promise of *Katz*, and of the intent of Harlan’s concurrence, has somewhat been lost in the intervening decades. Is it reasonable to accept video cameras everywhere? What about drones? What about mandatory DNA collection? Is it reasonable for individuals to carry digital devices that are difficult for the government to access?

After all, there’s not always an obvious, immutable, bedrock expectation of privacy. That’s a lesson well understood even today by Harlan’s law clerk Louis Cohen, who wrote the first draft of Harlan’s *Katz* opinion and is now an established Washington, DC-based lawyer.

“The rule that we are creating is not solely governed by the preexisting expectations of privacy, they are also determinative of what expectations are reasonable,” Cohen said. “By writing rules about who can make what use of data, we are determining society’s expectation. So that the next time there is a constitutional case and the question is: is this something that society is prepared to accept as reasonable? Well, maybe society has been influenced by developments on the ground.”

CHAPTER TWO

How the Government Cracked an iPhone —Without Apple’s Help

From the beginning of our Nation’s history, we have sought to prevent the accretion of arbitrary police powers in the federal courts; that accretion is no less dangerous and unprecedented because the first step appears to be only minimally intrusive.

—JUSTICE JOHN PAUL STEVENS DISSENT
UNITED STATES v. NEW YORK TELEPHONE Co. (1977)

February 13, 2016
Los Angeles, California

It was something of a chilly Saturday in Southern California, high 50s with a slight haze lingering over the western side of the city, just a few miles inland from the beach. Ted Boutrous was relaxing at his stately home in the hills of West Los Angeles, perched high above the constantly packed 405 freeway, when his phone buzzed.

He was expecting a call from Noreen Krall, one of Apple’s top lawyers. She wanted to speak with him about a “potentially significant matter that would be on a fast track,” but she didn’t explain precisely what it was about.

When Krall called, she was all business.

“I need to talk to you about something,” she said urgently.

Apple had a new problem, and it was with the federal government. Apple had complied with government access before—handing over data when presented with a court order. Apple