Security and Liberty

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The Fourth Amendment to the Constitution, ratified in 1791, states:

> 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.

As with many elements of the Constitution and the Bill of Rights, this amendment was in part a response to what was viewed by many Americans as the abuses of the English Crown against the American colonies. In this case, British officials had been able to issue general warrants to engage in open-ended searches and seizures for evidence of a crime, without identifying either the people to be searched or the items to be seized.

On Friday, I will discuss the history of the Fourth Amendment and the Supreme Court's interpretation of its requirements. We will then examine several unresolved issues involving the Fourth Amendment and its protections concerning electronic communication such as emails, texts, and cell phone calls.

Attached are excerpts from two important Supreme Court decisions involving electronic eavesdropping and wiretapping: *Olmstead v. United States* (1928), which holds that wiretaps on telephone lines without a warrant do not violate the Fourth Amendment; and *Katz v. United States* (1967), which overturns *Olmstead* and offers a very different analysis of the Fourth Amendment.

Note that in the *Olmstead* excerpt, you will find the opinion of the majority of the Court, written by Taft, and two dissenting opinions by Brandeis and Butler. In *Katz,* Stewart writes for the majority of the Court, while Harlan presents a concurring opinion (agreeing with the outcome, but offering a different analysis than the majority) and Black dissents.

As you read these cases, keep in mind the following questions:

- What is the purpose or importance of the Fourth Amendment? What are the values or beliefs which form the basis for its protections?
- In your view, based on the Fourth Amendment and these cases, to what extent may the government, acting in the interest of national security, gather electronic information about individuals without a search warrant?

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Olmstead v. United States

277 U.S. 438, 48 S.CT. 564 (1928)

Roy Olmstead was indicted and convicted in federal district court of illegally importing and selling liquor in violation of the National Prohibition Act. At his trial, prosecutors introduced incriminating evidence obtained by wiretaps on telephone lines between his home and office. Olmstead challenged the constitutionality of using this evidence on the grounds that it was obtained in violation of the Fourth Amendment guarantee against unreasonable searches and seizures and the Fifth Amendment guarantee against being compelled to testify against oneself. But an appellate court affirmed his conviction, and Olmstead appealed to the Supreme Court.

The Court's decision was five to four, and the majority's opinion was announced by Chief Justice Taft. Justices Brandeis, Holmes, Stone, and Butler dissented.

□ *Chief Justice TAFT delivered the opinion of the Court.*

There is no room in the present case for applying the Fifth Amendment, unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually and voluntarily transacting business without knowledge of the interception. Our consideration must be confined to the Fourth Amendment. . . .

The well-known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will. . . .

The amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized. . . .

The amendment does not forbid what was done here. 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. . . .

The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched. . . .

Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. The reasonable view is that

one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation. . . .

We think, therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

□ *Justice BRANDEIS, dissenting.*

The government makes no attempt to defend the methods employed by its officers. Indeed, it concedes that, if wire tapping can be deemed a search and seizure within the Fourth Amendment, such wire tapping as was practiced in the case at bar was an unreasonable search and seizure, and that the evidence thus obtained was inadmissible. But it relies on the language of the amendment, and it claims that the protection given thereby cannot properly be held to include a telephone conversation. . . .

When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken" had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of "the sanctities of a man's home and the privacies of life" was provided in the Fourth and Fifth Amendments by specific language. *Boyd v. United States*, 116 U.S. 616 [1886]. But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

Moreover, "in the application of a Constitution, our contemplation cannot be only of what has been, but of what may be." The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day 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. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. . . . Can it be that the Constitution affords no protection against such invasions of individual security? . . .

Time and again this Court, in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it. . . .

The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wire tapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. . . .

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

□ *Justice BUTLER, dissenting.*

The single question for consideration is this: May the government, consistently with that clause, have its officers whenever they see fit, tap wires, listen to, take down, and report the private messages and conversations transmitted by telephones? . . .

Telephones are used generally for transmission of messages concerning official, social, business and personal affairs including communications that are private and privileged—those between physician and patient, lawyer and client, parent and child, husband and wife. The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down. . . .

This Court has always construed the Constitution in the light of the principles upon which it was founded. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions.

Under the principles established and applied by this court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words. . . .

When the facts in these cases are truly estimated, a fair application of that principle decides the constitutional question in favor of the petitioners. With great deference, I think they should be given a new trial.

Katz v. United States

389 U.S. 347, 88 S.Ct. 507 (1967)

Charles Katz was convicted in federal district court of violating federal law for placing bets and wagers from a public telephone booth in Los Angeles to bookies in Boston and Miami. Federal Bureau of Investigation agents had recorded his conversations with an electronic listening device placed outside the booth, and those recorded conversations were used against him at trial. After a federal appellate court rejected an appeal of his conviction, Katz appealed to the Supreme Court.

The Court's decision was seven to one, and the majority's opinion was announced by Justice Stewart. There were concurrences by Justices White, Harlan, and Douglas, who was joined by Justice Brennan. Justice Black dissented.

□ *Justice STEWART delivered the opinion of the Court.*

The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston in violation of a federal statute. At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment. . . .

We granted *certiorari* in order to consider the constitutional questions thus presented.

The petitioner has phrased those questions as follows:

> A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.
>
> B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

We decline to adopt this formulation of the issues. In the first place the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. 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. . . .

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. . . . One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication. . . .

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted 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.

The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he

used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself. . . .

It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. . . .

Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification . . . that is central to the Fourth Amendment," a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

□ *Justice HARLAN, concurring.*

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, *Weeks v. United States*, 232 U.S. 383 (1914), and unlike a field, *Hester v. United States*, 265 U.S. 57 (1924), a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." 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. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

□ *Justice BLACK, dissenting.*

My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the times" and thus reach a result that many people believe to be desirable. . . .

The Fourth Amendment says that

> 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.

The first clause protects "persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those "particularly describing the place to be searched, and the persons or things to be seized." A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. . . .

Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was. . . . There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges.

Since I see no way in which the word of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times." It was never meant that this Court have such power, which in affect would make us a continuously functioning constitutional convention.

California v. Ciraolo

476 U.S. 207, 106 S.Ct. 1809 (1986)

Chief Justice Warren Burger discusses the facts of this case, involving a warrantless search for marijuana plants by police helicopter, at the outset of his opinion for the Court.