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“Protecting People, Not Places”: How Katz v. United States Restructured the Fourth Amendment

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“PROTECTING PEOPLE, NOT PLACES”:

HOW *KATZ V. UNITED STATES* RESTRUCTURED THE FOURTH AMENDMENT

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Abstract

The Fourth Amendment is broken into two clauses which protect freedom within the home and impose warrant restrictions to enter private space. In 1967, the Supreme Court decided *Katz v. United States*, which impacted the Fourth Amendment as it changed the meaning of the Amendment and required continued judicial review to provide ongoing clarification. In 1965, Charles Katz was arrested for transmitting gambling information across state lines using a public telephone booth. Federal agents had attached an eavesdropping device to the top of the telephone booth to acquire evidence of illegal activity. At the time, the Supreme Court precedent allowed police to use recording equipment without a warrant as long as the apparatus did not invade the space of the person. Based on the collected information, Katz was arrested. In his appeal, Katz argued that the evidence should not be used against him. The Court of Appeals rejected his claim based on precedent.

The Supreme Court regularly uses judicial review to strike a balance between governmental control and individual liberty with regard to Constitutional meaning. *Katz v. United States* created uncertainty in the application of the search and seizure laws and extended protections to guarantee a right to privacy. A thorough evaluation of oral history interviews with the lawyers who argued for Katz and the government, the Justices' personal notes on the case, the newspaper accounts of social and political issues, and Supreme Court precedents show that the Warren Court's 7-1 decision for Katz came with a lack of consensus on what protections the Fourth Amendment guarantees, thus restructuring an expectation of privacy that requires continuous judicial review for clarification. The subjective assessment developed in the decision not only undermined a

realistic and measurable system that had been established by precedent, but also created ambiguity in application.

Acknowledgments

At the start of this project, I was most excited about the research aspect. I truly enjoy the hunt - finding great sources, meeting new people, and most of all, completely changing the focus of my argument as I discover new information. My advisor was most patient with my giddy excitement every time I discovered new details. This project could not have been possible without the assistance of so many people.

I need to thank the various librarians, manuscript clerks, and assistants at the Library of Congress and Yale University. With the limited access to research materials as a result of the pandemic, these research gurus went above and beyond trying to find what I was looking for and making these resources accessible.

I am grateful to the two people involved in arguing *Katz v. United States* before the Supreme Court, Harvey Schneider and John Martin Jr., for sharing their experiences with me. Luckily, I stumbled upon Judge Schneider, who served as the counsel for Charles Katz, when I first started researching the case. His willingness to answer my various questions, clarify legal principles, and keep an open line of communication gave me a new, and much more personal, perspective to the case. Additionally, I had the pleasure to interview John Martin, Jr., who served as the counsel for the Solicitor General's Office. His insight on the government's perspective helped to elucidate the significance of the legal challenge in relation to the 1960's social climate. His stories of Thurgood Marshall were also very entertaining. He allowed me to have a glimpse of the human behind the accomplishments reveled in the textbooks.

I am beholden to my friend and colleague, Katherine Duke, for proofreading each of my chapters to make sure I followed the proper rules for standard English conventions

and to cut out the fluff. She was never hesitant to say, “That is interesting, but does it relate?” I treasure her friendship, support, and guidance.

Finally, I am most indebted to Dr. Linda Van Ingen of the University of Nebraska Kearney for mentoring me throughout the process and indulging my research digressions. I could not have completed this project without her expertise, constant support, and direction. Thank you!

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Introduction/Historiography

"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."[1]

-Fourth Amendment, United States Constitution

Since the founding of the nation, governments at all levels in American society pushed the limits of authority which often conflicted with the popular idea of individual freedoms. The liberties guaranteed within the Bill of Rights were constantly under attack, specifically the Fourth Amendment. These protections were important to the Founding Fathers of our nation, as the principles originated in England and were entrenched in the early American tradition. Although the amendments created a set of fundamental values for the nation, they were broad in nature and ultimately required the Supreme Court to judicially review laws for violations. As the social, political, and technological environments changed in the middle of the twentieth century, petitions for guidance and interpretation inundated the highest Court of the land. The Supreme Court accepted many challenges to perceived violations of the Fourth Amendment as federal and state law agents increasingly employed various eavesdropping devices in the enforcement of criminal law.

The arrest of Los Angeles bookmaker Charles Katz in 1965 for transmitting wagers across state lines using wire communications activated a challenge to the use of eavesdropping devices by law enforcement to collect evidence. In 1967, the decision in *Katz v. United States* became one of the most significant Fourth Amendment cases as the

[1] U.S. Const. amend. IV; *Annals of Congress*, 1st Congress, 2nd Session.

Court not only overturned its precedents concerning the use of constitutionally protected places and electronic eavesdropping, but also engaged in judicial activism to reinterpret the amendment to include a right to privacy.

The foundation of this thesis revolves around the semantics of the Fourth Amendment, which provides general protections concerning search and seizure. This amendment has its origins in English common law and the early colonial experience. During colonial times, writs of assistance and general warrants permitted government authorities to invade the sanctity of the home in search of evidence of criminal activity. Colonists objected to the British government's use of warrants to invade personal property, as it violated their rights as British citizens. The need to ensure specific rights was at the heart of many debates in the development of the nation. The Fourth Amendment emerged from the Founders' concerns that a newly developed national government would exceed its specific powers, and in turn, limit the rights of individuals.

The Fourth Amendment has two distinct clauses that safeguard individual liberties. The first clause enforces the individual's right to be free from an unreasonable search and seizure by the government. The second clause stipulates that a warrant will not be approved unless an official provides probable cause, or reasonable grounds for making a search, as well as specificity in the location and materials to be searched. The significance of the separate clauses is that the amendment does not specifically forbid warrantless searches, thus a search by law enforcement is not prohibited by the Fourth Amendment on basis of no warrant alone. However, the second clause provides the greatest protection for individuals against unreasonable searches and seizures. The dual

clauses create a conundrum for law enforcement, as the broad nature of the amendment only guides procedures, but cannot provide context to situational factors.

Although the Bill of Rights guarantees specific individual rights, it did not provide for unlimited, or completely unregulated, freedoms. The broad nature allows for an appropriate amount of government authority to maintain a functioning society. The initial proposal of rights, extracted from the Declaration of Rights within Virginia's Constitution, provided for a compromise between the Federalists, who believed the Constitution provided limitations on the government's authority that would ensure individual rights, and Anti-Federalists, who believed a separate listing ensured the government did not exceed its powers at the expense of individual rights.

Initially, the protections contained within the Fourth Amendment did not apply to the states so the Supreme Court's jurisprudence centered on curbing Federal violations. Following the addition of the incorporation doctrine of the Fourteenth Amendment in 1868, the Supreme Court started with a selective incorporation of specific elements of the Fourth Amendment to the states, and then later fully incorporated. However, this new level of adjudication of both state and federal laws under judicial review eventually led to differences in how various Supreme Courts interpreted the Constitution.

The Supreme Court has the complex role of interpreting the Constitution. Each Justice is free to employ individual methods to determine the meaning of the Constitution. Some Justices follow a textualist approach using the ordinary meaning of the text and structure of the Constitution as a guide. Originalists focus on the historical origins and original intent of the Founders. On the other hand, many Justices use a

pragmatist approach viewing the Constitution as a living document and the meaning of the text changes with modern social perspectives. The interpretations of Courts have shifted over time along a spectrum from a policy of judicial activism, where the Court considers underlying Constitutional principles and social concerns to legislate from the bench, to judicial restraint, where the Court follows precedents and only strikes down laws if they clearly violate the wording of the Constitution.[2] *Katz v. United States* is an excellent example of the complexity of precedent and judicial approach in Constitutional interpretations. The Warren Court ultimately rejected precedents and interpreted the Constitution in a way to meet shifting societal expectations regarding the right to be free from government intrusions.

To understand the significance of the numerous Court interpretations of the Fourth Amendment, it is important to first evaluate the origins through early Congressional records, colonial Writs of Assistance, and the actual construction of the amendment. These sources provide a reasoning for the creation of the amendment and how the Founders intended for the protections to be applied. An assessment of Supreme Court decisions, newspaper articles, journal evaluations, judicial notes, and memoirs allow for an analysis of changing interpretations as well as the popular sentiment under the leadership of Chief Justice Earl Warren.

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[2] Keenan Kmiec, "The Original and Current Meanings of Judicial Activism," *California Law Review* 92 (May 2004): 1444, accessed May 13, 2021, https://doi.org/10.2307/3481421; Bruce G. Peabody, "Legislating from the Bench: A Definition and a Defense," *Lewis and Clark Law Review* 11, no. 185: 208 (2007), accessed June 1, 2021, https://law.lclark.edu/live/files/9581-lcb111peabodypdf.

Many early state governments made provisions for safeguards against Writs of Assistance that the British Colonial government used extensively. Insight into the original intent of the Founders can be found within *The Debates and Proceedings in the Congress of the United States,* also known as the *Annals of Congress*. The *Annals* were later replaced by the *Register of Debates*, the *Congressional Globe* and now the *Congressional Record.* The *Annals* provide a record of congressional debates from the first through the eighteenth Congresses. Although not created until the early years of the nineteenth century and many speeches were summarized, it delivers the most in-depth record available to represent the early nation's values and concerns. These records provide the vision regarding the intent of the Founders in the creation of the Fourth Amendment.[3]

For almost a hundred years following its inception, there were limited challenges to the Fourth Amendment. For challenges that reached the Supreme Court, early opinions focused specifically on determining a threshold of applicability. During this period, decisions reflected the Supreme Court's role of evaluating the relevancy of challenges. In *Boyd v. United States* (1886), the Supreme Court held that although a physical search did not take place, the compulsory requirement to furnish private papers to the government was, in essence, a search and was unreasonable as a means to secure evidence of criminal activity. This broad interpretation of the Fourth Amendment laid the foundation for the mere evidence rule, where private documents, not involved in the commission of a crime, cannot be obtained by the government for evidence purposes. In another decision limiting

[3] U.S. Const. amend. IV; *Annals of Congress*, 1st Congress, 2nd Session.

government authority, the Court ruled in *Weeks v. United States* (1914) that warrantless seizures of objects in private homes were in violation of the Fourth Amendment. This decision determined that evidence seized illegally was not admissible in court. *Weeks* created an exclusionary rule that protected individual rights, but it only applied to federal courts.[4]

As technology started to change in the early twentieth century, the Supreme Court faced new challenges regarding search and seizure. In *Olmstead v. United States* (1928), a decision that expanded government authority, the Supreme Court held that wiretaps are not considered search or seizure under the Fourth Amendment; the use of wiretaps did not require a search warrant. The dissenting opinions in this case, especially those voiced by Justice Louis Brandeis, challenge the use of wiretapping to acquire evidence. Brandeis remarked that "[w]ays 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."[5] This foreshadowing of the rise of technological advancements in surveillance heavily influenced the Warren Court's revolutionary changes in the early 1960s. More than twenty years after *Olmstead*, a 6-3 split Supreme Court ruled in *Wolf v. Colorado* (1949) that the clause requiring warrants in the Fourth Amendment also applies to states, further protecting individual rights, but the exclusionary rule does not. The dissenting Justices in

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[4] *Boyd v. United States*, 116 U.S. 616, 630 (1886); *Weeks v. United States*, 232 U.S. 383 (1914).

[5] O*lmstead v. United States*, 277 U.S. 438 (1928).

this case agreed with the applicability to the states, but maintained that the exclusionary rule, which would set a remedy for abuses, must also apply to states. The majority Court determined, however, that states have other protections against warrantless searches and seizures.[6]

In 1953, Earl Warren became the Chief Justice of the Supreme Court. Under his leadership, the Supreme Court significantly expanded the reach of the Fourth Amendment's protections for individual rights against government authority. The first landmark case, *Mapp v. Ohio* (1961), created an exclusionary rule that extends to both the federal and state courts. Ultimately, *Mapp* overruled the limitation to federal agencies in the 1949 *Wolf* decision. Justice Tom Clark, who wrote the majority opinion in *Mapp*, addressed some of the internal conflicts within the Supreme Court over the idea of federalism in his collection of personal papers. These memorandum and letters to other sitting justices show the judicial concerns over maintaining a division of authority within government while ensuring the rights of the people. Legal scholars consider *Mapp* the revolutionary case of the Warren era because it extended the Fourth Amendment's protections to individuals and limited the state government's authority. [7]

Newspapers during this period also provide a view of the social and political environment in which the Warren Court operated, which allowed for the Justices to use

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[6] *Wolf v. Colorado*, 338 U.S. 25 (1949).

[7] *Mapp v. Ohio*, 367 U.S. 643 (1961); Letter to Brethren, January 31, 1962, in *The Papers of Justice Tom C. Clark*. https://tarltonapps.law.utexas.edu/clark/pdf/mapp/a115-06-07.pdf.

social cues in making decisions. In September 1964, a *New York Times* article commended the Warren Court's use of judicial activism to protect individual liberties. It claimed, "AGAIN, in a whole series of precedent-shattering decisions, the Court extended the protection of parts of the Bill of Rights well beyond old established limits and set aside several past Court rulings to do so."[8] This social support continued throughout the 1960s, especially as the Warren Court handed down judicially-created legislation in *Katz v. United States*.

Coming more than half a decade after *Mapp*, the Warren Court decided *Katz v. United States* (1967), which attempted to answer the needs of society with regard to constitutionally protected places at the time, but ultimately had the most intense ramifications of Fourth Amendment cases of the Warren era. It reinterpreted and redefined the meaning of search and seizure and overruled the precedent set in *Olmstead*, which excluded wiretaps from warrant requirements. *Katz* also broadened the protected areas of the Fourth Amendment, and in a concurring opinion, added "a reasonable expectation of privacy."[9] Following the decision in *Katz*, many articles in the *Los Angeles Times* and *New York Times* praised the Court's willingness to strengthen privacy rights

[8] "The 'Warren Court' Stands Its Ground," *New York Times* (New York, NY), September 27, 1964, sec. SM, accessed February 2, 2020, https://www.nytimes.com/1964/09/27/archives/the-warren-court-stands-its-ground.html?searchResultPosition=1; "New Protection for Privacy Right," Los Angeles Times (Los Angeles, CA), December 19, 1967, 32, PDF; "THE LAW: Landmark Decision on Bugging," Los Angeles Times (Los Angeles, CA), December 24, 1967, 24-25, PDF.

[9] *Katz v. United States*, 389 U.S. 347 (1967).

through Court initiative, but claimed that the decision opened the door for state and federal legislatures to ease warrant requirements for electronic eavesdropping to counter the broadened scope of the Fourth Amendment. The Warren Court restructured the Fourth Amendment in ways that clearly expanded individual rights over government authority, but the decision in *Katz* had unforeseen complications with regard to the application of standards and requirements for continuous judicial review to provide clarity.

By the late 1960s, the Supreme Court realized that its judicially-created expansion of the scope of the Fourth Amendment produced situational application concerns. In response, the Court developed exceptions to recent legal precedents, placing some limits on individual liberties. In *Warden v. Hayden* (1967), the Supreme Court provided an exception to the warrant rule due to pressing circumstances, like law enforcement involved in hot pursuit situations. This decision overruled the mere evidence precedents set in *Boyd v. United States*, where the government could not require the individual to produce private papers to obtain information, and *Gouled v. United States,* which extended *Boyd's* ruling to materials beyond papers. The *New York Times* claimed the Supreme Court's newest exclusions expanded the ability of the government to use evidence improperly seized. Within the next two years, the Supreme Court created a reasonable suspicion category in *Terry v. Ohio* (1968) and within immediate reach

category in *Chimel v. California* (1969), adding yet more layers of exemptions that increased government authority.[10]

Newspaper coverage, especially in the *New York Times*, reported that new decisions regarding the scope of application resulted in a lack of transparency in the implementation of new rules. During the late 1960s, requests for relief inundated the Supreme Court in accordance with new guidelines. To limit the number of requests for relief, the Supreme Court determined that the Fourth Amendment will not be "applied retroactively."[11] At the same time, the Court received several amicus curiae briefs, especially from legal advocacy groups like the American Civil Liberties Union, which reflected public concerns over a lack of "specificity" in application.[12] The Warren Court attempted to answer social problems through judicial review, but created additional problems with how to implement the standards. By removing the standard of a constitutionally protected place in *Katz*, the new policies lacked precision for both the

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[10] *Warden v. Hayden*, 387 U.S. 294 (1967); *Gouled v. United States*, 255 U.S. 298 (1921); "Justices Widen Right of Police to Seize Evidence from Homes," *New York Times* (New York, NY), May 30, 1967, Page 1, accessed February 28, 2020, https://www.nytimes.com/1967/05/30/archives/justices-widen-right-of-police-to-seize-evidence-from-homes.html?searchResultPosition=1; *Terry v. Ohio*, 392 U.S. 1 (1968); *Chimel v. California*, 395 U.S. 752 (1969)

[11] "A Summary of Actions Taken by the Supreme Court," *New York Times* (New York, NY), March 1969, Page 26, accessed February 28, 2020, https://timesmachine.nytimes.com/timesmachine/1969/03/25/78333436.html?pageNumber=26

[12] Fred P. Graham, "Court to Review State 'Frisk' Law," *New York Times* (New York, NY), March 13, 1967, Page 1, accessed February 28, 2020, https://timesmachine.nytimes.com/timesmachine/1967/03/14/90291508.html?pageNumber=1.

public and government law enforcement to understand the requirements for implementation.

To understand the motives of the leadership during the Warren Era, it is important to consider the personal memoirs of the Chief Justice. In the *Memoirs of Earl Warren,* published three years after his death, Warren discussed all aspects of his life including his early years and his political career as a means to becoming the highest judicial leader in the United States. Although Warren provides an immense amount of information about his life, he is very selective in what is discussed. Only one chapter is devoted to his work on the Supreme Court, which is surprising as most scholars claim that his main achievements regarding civil rights come from those years.[13] A 1968 special edition to the *New York Times* described Earl Warren's role in the progressive rulings during his tenure as Chief Justice. Using the next term's docket as a measurement of the effectiveness of the Court, the report noted that "there is a remarkable dearth of the type of towering law reform…[which would lead to] crucial questions looming in the near future."[14] The judicial activism radiating from the Warren Court created a slippery slope of constant challenges to vague standards.

The Supreme Court is not a stagnant institution. As Justices leave the bench by removal, retirement, or death, the President has the opportunity to nominate new Justices

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[13] Earl Warren, *The Memoirs of Earl Warren* (Garden City, N.Y.: Doubleday, 1977).

[14] "The 'Warren Court' Era: Bold, Liberal Decisions," *New York Times* (New York, NY), June 22, 1968, Page 7, accessed February 28, 2020.

who likely reflect the administration's own political agenda. The judicial review process in place today is far removed from the early days of the Supreme Court when some of the original Framers still served in political roles. The current controversy over whether the Court employs judicial activism or relies on judicial restraint was not part of the inaugural Supreme Court's safeguarding responsibility. In fact, the Constitution does not even specifically identify judicial review as a duty of the Supreme Court, but it implies this authority through a system for balancing the branches. The Federalist Papers No. 78 highlighted the significance of judicial review to ensure that Congress does not "substitute [its] WILL to that of their constituents."[15] The Supreme Court initially served to ensure that the legislature did not overreach its powers through legislative acts. The Court aligned specific articles within the Constitution to the statutory laws to detect violations. If the law violated the Constitution, the Court invalidated the legislative act.

As social, political, and technological changes occurred, the Supreme Court swung between judicial restraint and judicial activism. With judicial restraint, Justices limit their own power by following precedents and only striking down laws if they are undeniably unconstitutional. Philip A. Talmadge argues that it prevents society from viewing the Court as "another partisan branch of government."[16] Nevertheless, some

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[15] Alexander Hamilton, John Jay, and James Madison, *The Federalist Papers* (Champaign, IL: Project Gutenberg, 1998).

[16]Philip A. Talmadge, "Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems," *Seattle Law Review* 22 (1999): 696, accessed May 13, 2021, https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1588&context=sulr.

Justices of the Supreme Court expanded their roles by taking a more aggressive interpretative role through judicial activism. As the makeup of the Court shifted, scholars claimed that the Justices practiced judicial activism. However, they applied the term loosely without consistent meaning. For the purpose of defining judicial activism as applicable to the Warren Court's decision in *Katz v. United States*, the five key principles as defined by Keenan D. Kmiec in his 2004 article, "The Origin and Current Meanings of 'Judicial Activism,'" are employed. If a Court engages in judicial activism, there must be "(1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial "legislation," (4) departures from accepted interpretive methodology, and (5) result-oriented judging."[17] The majority opinion in *Katz*, as well as the various concurring opinions, highlight all five of these traits of judicial activism. As such, the Court engaged in legislating from the bench beyond its own scope of power. The essential element of the Warren Court was that it "facilitated….an open-ended legal standard allowing for a considerable degree of discretionary judgment that some…might associate with legislative decision making."[18]

As an additional element, it is important to keep in mind the role of the Supreme Court in interpreting the law. In 2006, Supreme Court Justice Stephen Beyer discussed in

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[17] Keenan Kmiec, "The Original and Current Meanings of Judicial Activism," *California Law Review* 92 (May 2004): 1444, accessed May 13, 2021, https://doi.org/10.2307/3481421.

[18] Bruce G. Peabody, "Legislating from the Bench: A Definition and a Defense," *Lewis and Clark Law Review* 11, no. 185: 208 (2007), accessed June 1, 2021, https://law.lclark.edu/live/files/9581-lcb111peabodypdf.

a speech at the University of Chicago how judicial activism has changed and what needs to be accomplished by the Supreme Court. After referencing several Court cases and well-known justices, Beyer maintained that the Constitution specifically grants power to the legislature for public policy and Justices should not impose their individual views on social policy without critical analysis. The Justices must always be cognizant of the fine line between judicial activism, where social policy may be judicially created, and judicial restraint, which fosters a culture of judicial review that allows legislatures to formulate the laws within the constraints of the Constitution.[19] One of the most significant issues with judicial activism is that "[b]y altering the meaning of the Constitution to achieve the result the Court wants to reach, neither law enforcement, lower courts, nor the people know the scope of their rights and responsibilities."[20] The Warren Court's frequency of creating social policy instead of referring the violations back to the legislature is the main reason for inconsistencies in enforcement by government officials, but also the Court's large number of exceptions that developed in the subsequent years.

There are very few holes in the historiography of the development of the Bill of Rights. The plethora of books and articles on its development explain what led to the guarantees provided in the Constitution and why the Court amended it to specifically

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[19] Stephen G. Breyer, "Judicial Activism - Power without Responsibility?" (lecture transcript, University of Chicago School of Law, Ulysses and Marguerite Schwartz Memorial Lectureship, Chicago, IL, February 7, 2006).

[20] Jennelle London Joset, "May it Please the Constitution: Judicial Activism and its Effect on Criminal Procedure," *Marquette Law Review* 79, no. 4 (Summer 1996): 1022, accessed May 22, 2021, https://scholarship.law.marquette.edu/mulr/vol79/iss4/5/.

address individual freedoms. Americans are quick to claim that government procedures infringe upon their Constitutional rights. Political ideologies, changing technologies, and cultural shifts are partially responsible for the perceived intrusions into personal liberties; however, the interpretation of what exactly is protected is continuously under attack. In order to determine exactly what the Bill of Rights represents for Americans, it is important to understand the foundation of the supreme law of the land.

Several scholars focus on the framework of the early American experience to explain how and why the Bill of Rights developed. Interestingly, these accounts brought about varied explanations which rendered small glimpses into the social, economic, and political environments of colonial America. Research Professor Robert A. Rutland contends that British rule and Common Law heavily influenced the colonial experience. Rutland provides a thorough chronology of the development of the new American nation and concentrates on the impact of the British influences on the Constitutional process. What his account lacks in depth, as he skims over hundreds of years of English and American history, he makes up for in his enthusiasm on documenting the evolution of the Bill of Rights.[21]

Moving beyond the impact of the British traditions on the development of the Bill of Rights, American historian Carol Berkin accounts for the political and personal motivations of the Founders, specifically James Madison. She maintains that the divisive political process surrounding the ratification of the Constitution led to the inclusion of the

[21] Robert Allen Rutland, *The Birth of the Bill of Rights, 1776-1791* (Boston, MA: Northeastern University Press, 1991).

Bill of Rights. Berkin contends that Anti-Federalists used the Bill of Rights as a defensive technique to limit federal powers. She adds a new perspective to the historiography which indicates that British foundational documents were a much smaller influence on the creation of the Bill of Rights than early American politics.[22]

Some scholars look beyond the roots of the Bill of Rights and explain constitutional modifications. Leonard Levy, an American historian, former professor and Pulitzer Prize winner, is highly regarded as an American Constitutional scholar. A prolific writer of Constitutional issues, his book, *The Origins of the Bill of Rights*, expanded upon previous literature and produced a key connection between the development and interpretation of the amendments. Levy argues that James Madison intentionally used broad language for the amendments because he believed that the court system could regulate the assumption of powers by other branches. However, Levy notes that the process has led to the Supreme Court constantly interpreting semantics. In addition, Edgar McManus and Tara Helfman analyzed the development of the Bill of Rights over time by exploring the legal themes in *Liberty and Union: A Constitutional History of the United States.* They suggest that societal changes led to constitutional shifts in interpretation by the Supreme Court.[23]

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[22] Carol Berkin, *The Bill of Rights: The Fight to Secure America's Liberties* (New York, NY: Simon & Schuster, 2015).

[23] Leonard W. Levy, *Origins of the Bill of Rights* (New Haven, CT: Yale University Press, 2008); Edgar J. McManus and Tara Helfman, *Liberty and Union: A Constitutional History of the United States* (New York, NY: Routledge, 2014).

American legal scholar, Akhil Reed Amar, promotes a different perspective about original intent as he places it in relation to the Reconstruction period and changes brought about by incorporation of due process to former slaves under the Fourteenth Amendment. He argues that Americans misinterpret the Founders' intent as the changes brought by the Fourteenth Amendment altered who the Bill of Rights protects. Amar challenges existing theories of interpretations, and specifically addresses the Fourth Amendment. He argues that reasonableness and warrants are two distinct standards. Thomas Davies assesses the original intent of the Founders as well as the multitude of different understandings of the meaning of the amendment. He specifically addresses Amar's argument in his article, "Recovering the Original Fourth Amendment," and notes that Amar selectively chose evidence in his evaluation of the search and seizure processes to produce his interpretation regarding incorporation of the Fourteenth Amendment.[24]

The historiography on the Fourth Amendment is not lacking analytical evaluations nor discussions of specific approaches to meaning. In 2003, William Greenhalgh developed a handbook of significant Fourth Amendment cases which reviews Supreme Court decisions. It adds to the historiography by providing a chronology of noteworthy cases, but his analysis leans heavily toward the theory of promoting individual rights. Three years later, Andrew Taslitz extends Greenhalgh's work by examining the history of the Fourth Amendment. The Fourth Amendment lost its value as misinterpretations led

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[24] Akhil Reed Amar, *Bill of Rights: Creation and Reconstruction.* (New Haven, CT: Yale University Press, 1998); Thomas Y. Davies, "Recovering the Original Fourth Amendment," *Michigan Law Review* 98, no. 3 (December 1999): 575, accessed February 2, 2020, https://doi.org/10.2307/1290314.

to few protections against privacy invasions or public safety. Eugene Hickok also engaged in a Constitutional exchange of ideas through a series of articles that address the progression of interpretations and a look at possible remedies for violations. Thomas McInnis evaluates changes that developed after the 1960s when the exclusionary clause was applied to the states. He agrees with Taslitz that protections declined over time.[25]

The Supreme Court has interpreted and reinterpreted the meaning of the Fourth Amendment over time. Although there are a variety of sources regarding the Fourth Amendment in general, there are few books discussing specific Supreme Court decisions regarding search and seizure. However, the landmark case, *Mapp v. Ohio,* which applied the exclusionary clause to the states, has significant coverage. History professor and politician Carolyn Long argues that subsequent, and more conservative, Supreme Courts weakened the decision in *Mapp*. Jack Day and Bernard Berkman examined the effect of *Mapp* on non-exclusionary states. They addressed both the scope and application of the exclusionary clause and how this decision related to other Fourth Amendment precedents. In addition, Arlen Specter provides a social perspective to the impact of the *Mapp* decision in the year following the decision. Specter argues that the attempt to make all state criminal proceedings conform to federal mandates ultimately led to the decreased

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[25] William W. Greenhalgh, *The Fourth Amendment Handbook: A Chronological Survey of Supreme Court Decisions*, 2nd ed. (Chicago, Ill.: Criminal Justice Section, American Bar Association, 2003); Andrew Taslitz, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789-1868* (New York: NYU Press, 2006), accessed February 13, 2020, http://muse.jhu.edu/book/7599; Eugene W. Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding* (Charlottesville: University Press of Virginia, 1991); Thomas N. McInnis, *The Evolution of the Fourth Amendment* (Lanham: Lexington Books, 2009).

efficacy of law enforcement and elevation of privacy rights. The exclusionary clause does provide protections to the individual, but the community, in turn, suffers.

There is no lack of scholarly discussion regarding Supreme Court search and seizure decisions. Interestingly, many of the journal articles, written within a few years of the Supreme Court opinions, provide an effective perspective of how judicial mandates of criminal procedures regarding search and seizure immediately affected society. Various scholars attempt to draw attention to the dissolving of precedents and how political and social environments affected judicial decisions.[26] These scholars maintained that new

[26] Carolyn Nestor Long, *Mapp V. Ohio: Guarding against Unreasonable Searches and Seizures* (Lawrence, Kan.: University Press of Kansas, 2006), 148; Jack G. Day and Bernard A. Berkman, "Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of Mapp v. Ohio," *Western Review Law Review* 13, no. 1 (1961), accessed February 13, 2020, https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=4029&context=caselrev; Arlen Specter, "Mapp v. Ohio: Pandora's Problems for the Prosecutor," *University of Pennsylvania Law Review* 111, no. 1 (November 1962): 42, accessed February 2, 2020, https://doi.org/10.2307/3310540; Thomas E. Africa, "Search and Seizure - Incident to Lawful Arrest - Permissible Scope [Chimel v. California, 395 U.S. 752 (1969)]," *Case Western Reserve Law Review* 21, no. 2 (1970), accessed March 31, 2020, https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2789&context=caselrev; Alan F. Cain, "Search and Seizure: Seizure of Purely Evidentiary Items Held Constitutional (Warden, Maryland Penitentiary v. Hayden, 87 S.Ct. 1642, 1967)," *Montana Law Review* 29, no. 1 (Fall 1967), accessed March 31, 2020, https://scholarship.law.umt.edu/cgi/viewcontent.cgi?article=2203&context=mlr; Norman H. Clark, "Roy Olmstead, a Rumrunning King on Puget Sound," *The Pacific Northwest Quarterly* 54, no. 3 (July 1963), https://www-jstor-org.unk.idm.oclc.org/stable/40487821; Gerald V. Bradley, "Present at the Creation? A Critical Guide to Weeks v. United States and Its Progeny," *Saint Louis University Law Journal* 30 (1986), accessed March 31, 2020, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1285&context=law_faculty_scholarship; Dale W. Broeder, "The Decline and Fall of Wolf v. Colorado," *Nebraska Law Review* 41, no. 1 (1961), accessed March 31, 2020, https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2740&context=nlr; Edmund W. Kitch, "Katz v. United States: The Limits of the Fourth Amendment," *The Supreme Court Review* 1968 (1968), accessed

rules, such as the exclusionary clause and *Katz's* Reasonable Expectation of Privacy test, developed as the society pushed for additional protections regarding search and seizure from increasing government interventions.

Legal and constitutional experts weighed in on the Supreme Court adjudication of Fourth Amendment cases under Earl Warren's leadership. Professor of Law Philip Kurland's immediate review of the Chief Justice's influence in 1968 discounts his impact and argues that Warren had no other influence on Supreme Court proceedings beyond his individual vote as a Justice of the Court. He added that measurements of individual concurring and dissenting votes indicate that Warren may not have been the significant force behind the changes the Court made during his tenure as Chief Justice. Jerold Israel disagrees with Kurland's analysis and argues that Warren had a significant role in leading to social change. Israel focused on the impact of the decisions by comparing the Warren Court with the subsequent Burger Court on issues of incorporation, equality and police practices. Public policy advocate, Bernard Schwartz, contends that Earl Warren had a distinct leadership style that produced immediate social impacts that were beneficial for the period. He also suggests that the judicial purpose of the Supreme Court is to reshape the laws to fit the justices' ideas about social policy. Schwartz's perspective not only approves of judicial activism, but definitively promotes the use of Supreme Court justices' personal views as reasons for adjusting laws. Law professor Lucas Powe

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February 2, 2020, https://www-jstor-org.unk.idm.oclc.org/stable/3108771; Harvey A. Schneider, "Katz v. United States - The Untold Story," *McGeorge Law Review* 40 (2009), accessed March 31, 2020, https://www.mcgeorge.edu/Documents/Publications/06_Schneider_Master1MLR40.pdf.

reviews several key search and seizure cases under Chief Justice Warren and puts them in perspective of the Civil Rights movement. He maintains that change did not come solely from judicial activism, but argues that a liberal leaning Court that developed in the early 1960s helped to reshape American society. [27]

As the Fourth Amendment continues to be challenged by new technology, several scholars consider where the protections fit within modern conventions. Legal expert Stephen Schulhofer argues that new technologies in the digital age made Americans vulnerable to more government surveillance. Schulhofer maintains that the Fourth Amendment is not absolute, and demonstrates through a rigorous appraisal of the degrees of protections, that a compromise must be made between the safety of the community and individual liberties. Michael Gizzi and R. Craig Curtis also evaluate the legal application of search and seizure procedures from the initial usage to protect the home to the digital age. By defining the meaning and applications, the authors provide a measure of clarity to a fluidly interpreted amendment.[28]

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[27] Philip B. Kurland, "Earl Warren, the 'Warren Court,' and the Warren Myths," *Michigan Law Review* 67, no. 2 (December 1968): 354, accessed February 2, 2020, https://doi.org/10.2307/1287425; Jerold H. Israel, "Criminal Procedure, the Burger Court, and the Legacy of the Warren Court," *Michigan Law Review* 75, no. 7 (June 1977), accessed February 2, 2020, https://doi.org/10.2307/1287805; Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court: A Judicial Biography* (New York: New York University Press, 1983); Lucas A. Powe, *The Warren Court and American Politics*, 2nd ed. (Cambridge, MA: Belknap Press of Harvard U.P., 2001).

[28] Stephen J. Schulhofer, *More Essential than Ever: The Fourth Amendment in the Twenty-first Century* (New York, NY: Oxford University Press, 2012); Michael C. Gizzi and R. Craig Curtis, *The Fourth Amendment in Flux: The Roberts Court, Crime Control, and Digital Privacy* (Lawrence, KS: University Press of Kansas, 2016).

Although there is significant literature on the Bill of Rights, the Fourth Amendment, Supreme Court eras, and landmark cases, the historiography of the Fourth Amendment is not complete. The Warren Court's decisions developed an environment that initially promoted individual rights, but also created long-term unintended results. This thesis extends the historiography by augmenting the dialogue of the legacy of the Warren era's judicial activism in *Katz v. United States*. This case not only extended the meaning of the Fourth Amendment by adding individual protections with regard to privacy, but also executed a subjective measurement for search warrants that lacked clarity and hindered law enforcement. This thesis connects the Warren Court's *Katz* decision that significantly enlarged the scope of search and seizure protections to a modern-day challenge of the Court to be able to strike a balance between government authority and individual rights.

Chapter One traces how British America developed under a combined tradition of charters and Common Law customs from England as well as codes and ordinances created by the colonists. Under the authority of the British crown, colonists were both protected by and subjected to the power of the British government. Although this governmental power was not initially challenged, colonists resisted general warrants and writs of assistance provisions which permitted law enforcement officers to search and seize without restrictions. In response to continuous abuse, the Massachusetts colony was the first to develop legislation in 1756 that barred the use of general warrants, although it still permitted writs of assistance. By the 1760s, many colonial governments challenged the unrestricted use of writs when the British implemented stronger enforcement

procedures. The colonies constructed other codes, including the Virginia Bill of Rights and the Massachusetts Declaration of Rights, that defined rules of law and specified basic rights including a key guarantee for protections against unreasonable search and seizure. The Founders eventually incorporated these early attempts to safeguard liberties as the Fourth Amendment in the United States Constitution. The broad nature of the Fourth Amendment ultimately required the Supreme Court to clarify the constitutionality of police procedures and the rights protected within the search and seizure framework.

Chapter Two focuses on the arrest of Los Angeles resident Charles Katz for illegally transmitting wagering information across state lines. Federal agents believed Katz had ties to illegal betting so in order to collect evidence of his crimes, attached a listening device to a public telephone booth that he was known to frequent. The placement of the listening device outside of the booth on the roof is significant as the law enforcement officers followed guidance in Supreme Court precedents with regard to the location of listening devices and constitutionally protected places. This chapter follows the constitutional challenges to the collection of information by law enforcement personnel, the progression of the case through the lower courts, and the acceptance of Certiorari by the Supreme Court. Interviews with both Harvey Schneider, the attorney representing Charles Katz, and John Martin, Jr., the attorney representing the government, provide significant insight to why the social and political environment at the time allowed for the Supreme Court to consider a change to Fourth Amendment protections.

Chapter Three briefly evaluates the oral arguments brought before the Supreme Court including the petitioner's suggestion to eliminate the constitutionally protected place measurement for electronic surveillance and to develop a new test using the reasonable person test of tort law. Assessing the Justices' notes on the case, this chapter examines the deliberations of the Justices. The Court moved from an evenly divided initial vote to a 7-1 majority that ultimately reinterprets the Fourth Amendment to include a right to privacy. Although the Justices voted to reverse the lower Court's decision, a compromise clearly developed as the Court needed to find some common ground to deal with the increasing use of technology in surveillance. *Katz v. United States* is not considered by most to be the leading Fourth Amendment case of the Warren era, however, this arrest in a public telephone booth led to the Supreme Court to use "result-oriented judging"[29] with unanticipated consequences. The procedures for when search warrants are required remains a complex and vague application, riddled by exceptions and supplementary judicial rulings. A thorough examination of the Justices' opinions reveals that the Warren Court's judicial activism in *Katz* did not come with a consensus on what constituted a workable Fourth Amendment balance between government authority and individual rights. Instead, the varying statements in the majority opinion increased the responsibility of the Court to arbitrate what constitutes a reasonable expectation of privacy, ensuring that judicial activism would continue to restructure the Fourth Amendment for years to come.

[29] Kmiec, "The Original and Current Meanings."

Chapter One
Experience Breeds Wisdom: Roots of the Fourth Amendment

Most Americans today have few concerns about an agent of the government forcibly entering their front doors and randomly searching and seizing property from their homes. In part, this security in the home comes from a broad policy created by the Founding Fathers of the Constitution that designated a right to be free from intrusions for its citizens. The policy, for all of its protections, was intentionally general, ultimately allowing the Supreme Court to adjudicate an umbrella of privacy and calibrate its meaning with societal shifts. These protections did not develop in a vacuum. They were inextricably linked to the early colonial experience, common law under the British monarchy, and the customs developed within British America.

Under the authority of the British crown, colonists were both protected by and subjected to the power of the British government. Colonists believed, as British subjects, they had the same rights and privileges in the colonies as if they lived within the borders of England. The British government, however, did not view the colonies, nor the people who lived within them, in the same manner. Each of the thirteen colonies had charters or agreements between the colony and the British government, with direct rule provided by the King. Although the administration of a colony was under the leadership of a Royal Governor, appointed by the King, colonial legislatures developed and began to influence political measures affecting their colonies. The vast expanse of the Atlantic Ocean eventually allowed for various elements of self-rule to establish. However, these movements toward autonomy did not fall in line with the policies of the British monarchy for its American colonies. The colonies were considered an investment under the policy

of mercantilism, a strategy which regulated all economic interests. The American colonies only existed to increase the wealth and prestige of the mother country, not to benefit the colonies.

As early as 1621, the British government-imposed restrictions, limiting the economic policies of the colonies. The implementation of the Navigation Acts between 1650 and 1654 hindered the colonies' abilities to trade with foreign nations, as specific products could only be shipped to the mother country. Colonists bypassed many of these restrictions by trading within the colonies and moving goods to various ports, thus limiting the ability of the Royal Navy to enforce the Acts. The Royal Navy did not have the manpower to effectively patrol the entire length of the Atlantic coast. Consequently, turn of the century colonists experienced salutary neglect, an English policy that did not require strict enforcement of regulations. The British Parliament imposed several other Navigation Acts in the 1650s and 1660s; however, the American colonists again found creative ways to limit their impacts.

By 1733, the colonies created an effective trade pattern with various plantations in the Caribbean including colonies owned by France. In response to complaints of loss of revenue by the colonies in the British West Indies, the British Parliament enacted the Molasses Act. This Act created an import tax on molasses, sugar, rum, and other goods, which Parliament designed to curtail colonial trading with non-English holdings. The Act eventually led to a massive smuggling effort by American colonists to avoid the import taxes. Again, the Royal Navy could not patrol the vast area to discourage smuggling.

To assist the Royal Navy's enforcement of the Acts, while also discouraging smuggling, the British government and courts allowed the use of Writs of Assistance. These written orders were a type of search warrant that allowed law enforcement officers, like customs officials or sheriffs, to search for smuggled goods and seize within homes and businesses, without restrictions. Once issued, writs did not expire, except upon the death of the monarch. By the 1760s, the use of these Writs became increasingly invasive within the American colonies.

The death of George II in 1760 gave the American colonies a venue for opposing the validity of the Writs. All Writs currently in use would expire within six months of the king's death. Sixty-three merchants and residents of Massachusetts, moreover, challenged the issuance of new Writs of Assistance. Notably, James Otis Jr., the King's Advocate-General of Boston's Vice-Admiralty Court, resigned his position and argued for the merchants before the Superior Court of Massachusetts that these warrants were not legal. During his justification, Otis argued that Writs of Assistance were "the worst instrument of arbitrary power, the most destructive of English liberty…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."[1] This was the first legal challenge against the use of Writs and invasive searches in the American colonies. Although Otis remarked the warrants were not constitutional, England did not have a

[1] Josiah Quincy, Jr., comp., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772*, ed. Samuel M. Quincy (Boston, MA: Little, Brown, and Company, 1865), 471, PDF E-Book.

written constitution at the time. His reference connected to common law decisions and the legitimate rights of colonists under common law. Carol Berkin, author of *The Bill of Rights: The Fight to Secure America's Liberties*, adds that although Otis lost his challenge when the British monarchy reaffirmed the use of writs, his efforts started a wave of resistance to the increasingly punitive British policies.[2]

Following the Seven Years' War in 1763, the British government could no longer afford its lax enforcement procedures. It, therefore, instituted new policies, such as the enactment of increased taxes, that required the colonists to bear the burden of the costs of the war. First, it implemented the Sugar Act of 1764, a replacement of the Molasses Act of 1733, that actually lowered the tax, but would now be heavily enforced. It levied an indirect tax, or duty, on sugar and other goods. The next year, the Stamp Act of 1765 became the first tax imposed directly on the American colonies. It required that printed materials, previously printed without a tax, be produced on paper bearing the embossed revenue stamp. Although it was repealed a year later, Parliament passed the Declaratory Act that dictated the British government has the power to implement policies in the American colonies as deemed necessary. Despite rising discontent, the British government continued to implement new taxes and restrictions on the colonies to maintain control.

In 1767, the British administered the Townshend Acts, which ultimately had the most impact on the later development of the Fourth Amendment. These Acts permitted an

[2] Carol Berkin, *The Bill of Rights: The Fight to Secure America's Liberties* (New York, NY: Simon & Schuster, 2015), 74.

unrestricted use of general warrants and writs of assistance. The Townshend Acts consist of five separate parts but, significantly, the Revenue Act permitted officials to search private property without notice when searching for smuggled goods. Colonists argued that the writs of assistance violated their personal property rights. The discontent continued to grow throughout the colonies. By 1773, the Sons of Liberty in Boston responded and protested the taxation and tyranny in what became known as the Boston Tea Party. The British Parliament followed up with a new plan to divide the colonies to reduce the resistance.

Part of this plan included a series of laws known as the Coercive Acts. Passed by the British Parliament in 1774, these four punitive acts were designed not only to restore order in Massachusetts, but also to provide a warning to other colonies. Instead of division as the British Parliament expected, its actions created a platform for colonial unity, evident in the establishment of the First Continental Congress in September 1774. Working together in opposition to the British government, colonists continued as a collective body when the Declaration and Resolves of the First Continental Congress, also known as the Declaration of Rights, was approved in October of the same year. This document not only objected to the restrictions and punitive measures designed in the Coercive Acts, but also indicated that colonists wanted to have specific rights. One of the resolutions reminded the British Parliament of its responsibilities and addressed the rights of the colonies. It states "that our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and

immunities of free and natural-born subjects, within the realm of England."[3] Although British general search warrants continued to be legal, colonial governments challenged the unrestricted use of writs and constructed codes which defined rules of law and specified basic rights, including guarantees for protections. Following the American Revolution and development of the United States Constitution, these rights and responsibilities were incorporated into the Bill of Rights.

Revolutions usually bring about sweeping changes to existing political, economic, and social policies. The American Revolution was no different in its impact, but fundamentally, the basis for the revolution was not primarily to create an entirely new social order, but instead to receive what the colonists already felt entitled. Robert Allen Rutland argues in *The Birth of the Bill of Rights* that this rebellion "was promulgated as an attempt to give the people not something new, but that which they had formerly possessed…the freedoms won a century earlier in the mother country."[4] Prior to the Revolution, colonies relied heavily on rights that existed in the common law model, without specific statements of guaranteed rights, because the colonists believed they were entitled to common law protections. Common law mandates do not always cover specific individual rights so the individual colonial governments produced affirmations of their own to meet the needs of their residents.

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[3] Charles C. Tansill, comp., *Documents Illustrative of the Formation of the Union of the American States* (Washington, DC: U.S. Government Printing Office, 1927), accessed September 26, 2020, https://avalon.law.yale.edu/18th_century/resolves.asp.

[4] Robert Allen Rutland, *The Birth of the Bill of Rights, 1776-1791* (Boston, MA: Northeastern University Press, 1991), 3.

Between 1776 and 1778, most colonial governments produced constitutions that conformed to the rights and traditions of British common law. Seven colonies, beginning with Virginia in June 1776, introduced new state constitutions by securing specific civil liberties in a preamble. Four other colonies incorporated specific protections in their state constitutions. Most of these new state constitutions specifically addressed and created protections against unreasonable search and seizure.[5] The Virginia Declaration of Rights, a creation of George Mason and the foundation for other states' declarations, not only showcased the basic principles on the administration of government, but also identified liberties guaranteed to citizens. In the tenth article, the Declaration notes "that general warrants…commanded to search suspected places without evidence of a fact committed, or to seize any person…not named, or…supported by evidence, are grevious [sic] and oppressive, and ought not to be granted."[6]

In 1791, the thirteen new states ratified ten amendments to the Constitution of the United States which secured additional rights and freedoms for the people. The Fourth Amendment promises a collective right to freedoms against search and seizure. The guarantees include "[t]he 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

[5] Staff, ed., "State and Continental Origins of the U.S. Bill of Rights," Teaching American History, last modified 2020, accessed September 27, 2020, https://teachingamericanhistory.org/resources/bor/origins-chart/.

[6] Mason, "Virginia Declaration of Rights.

particularly describing the place to be searched, and the persons or things to be seized."[7] This amendment has two distinct features. First, searches and seizures must be reasonable. In other words, a reasonable person would infer from the evidence that it was justified. Second, a neutral body, usually a magistrate, determines if probable cause, a reasonable foundation that a crime has been committed, existed. If so, a search and seizure may be conducted. The development of this specific amendment clearly had its roots in the colonial experience prior to the American Revolution.

Unlike many other parts of the Bill of Rights, the Fourth Amendment actually builds upon a tradition of common law or judicial precedents from England. "The language of the amendment," Bradford P. Wilson argues, "does not purport to create the right to be secure against unreasonable searches and seizures but rather recognizes it as already existing."[8] The common law aspects included not only a right to be free from intrusion, but also provided an avenue for the remedies for abuses.

The common law principles concerning search and seizure have its roots from the early 17th century and continued in the implementation of the Fourth Amendment. In 1604, a challenge to illegal search and seizure developed in the case, *Peter Semayne v. Richard Gresham.* More popularly known as Semayne's Case, lawyers argued before the Court of the King's Bench, a court of common law in the English legal system, and ultimately setting a legal precedent for the Fourth Amendment. The facts of the case

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[7] U.S. Const. amend. IV

[8] Eugene W. Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding* (Charlottesville: University Press of Virginia, 1991), 157.

provided an interesting scenario in regards to civil issues and intrusions into the home. George Berisford, a man indebted to Semayne, shared a home with Richard Gresham in London. Berisford died prior to satisfying his debt to Semayne. As such, Semayne secured a writ of attachment, a court order to seize the property of Berisford to compensate for the debt, from the home now occupied only by Gresham. When approached by the Sheriff, Gresham shut the door and denied entry. The Sheriff did not forcibly enter the premises. Peter Semayne consequently sued Gresham to recover Berisford's property, but the Court ruled in favor of the defendant on the notion that he had the right to shut his door. The Court maintained that the sheriff could break and enter on King's business, but the sheriff did not choose to enter the premises by force in this instance, nor did he enter on the request of a common person.[9]

The precedent for search and seizure protections in this case derive from statements made by Sir Edward Coke, Attorney General of England. He argued "[t]hat the house of everyone is to him as his castle and fortress, as well for his defence [sic] against injury and violence, as for his repose."[10] Although Coke's remarks led to the popular sentiment that "a man's home is his castle," and thus a protected venue, Coke's declaration was multifaceted, including accommodations for entry and the ability to defend. Robert Blakey points out in his 1964 article, "The Rule of Announcement and

[9] *Semayne v Gresham* [1604] Yelverton 29, accessed September 26, 2020, https://groups.csail.mit.edu/mac/classes/6.805/admin/admin-fall-2005/weeks/semayne.html.

[10] *Semayne.*

Unlawful Entry: *Miller v. United States* and *Ker v. California*," that the ruling in Semayne's Case was not unique. He cites the biblical precedent in Deuteronomy 24:10 which "prohibited a creditor from entering his debtor's house to obtain security for a debt."[11] Additionally, Leonard Levy, a prolific author on the Bill of Rights, notes that Coke's statements may not have set the precedent as solidly as he hoped, as his own home and law office were invaded and searched by government officials while he lay dying in 1777.[12] Regardless, Semayne's case created a standard in prospective American law including a protection of security within the home that requires law enforcement to announce their intentions, as well as the owner's ability to protect the home from violations.

Other British cases also set precedents for expanded civil liberties and limitations of the government's power with regard to search and seizure. One of the most well-known cases, heavily cited by Revolutionaries during the American Revolution, was the decision in the 1763 case *Wilkes v. Wood*. John Wilkes was a journalist and member of Parliament whose written work was quite critical of King George III's policies. The King's representatives issued an unlimited general warrant to conduct searches and find evidence of any purported illegal activity. In response, Wilkes sued for trespass. He

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[11] George Robert Blakey, "The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California," *University of Pennsylvania Law Review* 112 (1964): 501, accessed September 26, 2020, https://scholarship.law.nd.edu/law_faculty_scholarship/440.

[12] Leonard W. Levy, *Origins of the Bill of Rights* (New Haven, CT: Yale University Press, 2008), 153.

argued that the warrant was illegal as it did not specify the evidence, nor the location of said evidence. The Judge agreed with Wilkes, noting that "[i]f such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."[13] This decision anticipates the specific principles of reasonableness and validity found in the Fourth Amendment of the Bill of Rights.

In 1765, the court again ruled against the government for an illegal warrant in *Entick v. Carrington.* Several King's messengers, including Nathan Carrington, under the orders of Lord Halifax, the Secretary of State for the Northern Department, forcibly entered the home of writer John Entick. These messengers entered, searched for four hours, and seized charts and pamphlets deemed to be seditious. John Entick sued, seeking a remedy for violations and claiming that the messengers had trespassed. The messengers argued in the Court of the Common Pleas that they had legal authority granted by Lord Halifax and lawfully executed his warrant. However, the Chief Justice, Lord Camden, maintained that Lord Halifax had no right to issue a warrant under the written law or precedent. The court determined that "[a] power to issue such a warrant as this, is contrary to the genius of the law of England."[14] This limited use of warrants indicated a significant step toward a protection of private property rights.

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[13] *Wilkes v. Wood*, 98 Eng. 489 (C.P. 1763), accessed September 27, 2020, https://press-pubs.uchicago.edu/founders/documents/amendIVs4.html

[14] *Entick v Carrington & Ors* [1765] EWHC KB J98, accessed September 26, 2020, https://www.bailii.org/ew/cases/EWHC/KB/1765/J98.html

In the years following the development of the United States Bill of Rights, some constitutional amendments received more attention by the public than others. Main contentions revolved around limitations on speech, the press, religious freedoms, and unreasonable searches. However, the United States Supreme Court seemed unreceptive in adjudicating violations as the amendments were assumed to only reflect violations by federal, not state officials. The earliest challenge to the Fourth Amendment resolved by the Supreme Court was *Boyd v. United States* in 1886.

In 1885, Port officials seized thirty-five cases of plate glass claiming the importer, E.A. Boyd & Sons, did not pay import duties. The government required that the company provide documentation, including their invoice from the glass company in England, to demonstrate that all requisite taxes were paid. This case not only showed that compulsory production of private papers was an unreasonable search and seizure under the Fourth Amendment, but also created a link between the Fourth and Fifth Amendments. This important relationship between the right to be free from illegal searches and seizures in the Fourth Amendment and the right of people to be free from self-incrimination in the Fifth Amendment lays the foundation for due process in the United States. In his opinion, Justice Joseph P. Bradley cites Lord Camden's remarks in *Entick* as the guiding principles of the Fourth Amendment. He notes that "[i]t is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public

offense, it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."[15]

A large gap in adjudication on the Fourth Amendment by the Supreme Court exists between the late 19th and early 20th centuries. Many of the challenges during the turn of the century focused on state, not federal, laws with regard to search and seizure procedures. The Supreme Court did not handle Fourth Amendment challenges to state laws because, at the time, the Fourth Amendment restrictions did not apply to the state agencies. The Supreme Court denied any requests for interpretation regarding state intrusions.

In 1914, the Supreme Court ruled in the case of Fremont Weeks, which solidified protections under the Fourth Amendment and the requirements for legal warrants. In late 1911, a police officer arrested Weeks for allegedly transporting lottery tickets via the mail, a violation of the Missouri Criminal Code. Using a spare key to the home, officers entered, searched, and seized property without a search warrant. Weeks asked for his property to be returned, but the courts denied his request and placed the seized property into evidence. The Supreme Court ruled that without a warrant, the search was illegal. Justice William R. Day noted in the unanimous decision that "[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure

[15] *Boyd v. United States*, 116 U.S. 616, 630 (1886)

against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."[16]

In the late 1920s, federal agents arrested Roy Olmstead, a police officer and bootlegger in the Pacific Northwest, along with over seventy other people for violating the National Prohibition Act, which forbade the transfer and sale of alcoholic beverages. Several wiretaps were placed near the homes and businesses of the alleged conspirators, which did not violate any trespass laws. Over several months, agents recorded telephone conversations indicating the depth and scope of the bootlegging operation. After referring to common law and judicial precedents, Chief Justice William Taft delivered the split opinion that wiretapping, in this instance, was not a violation of the Fourth Amendment. Taft notes that "[t]he 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."[17] Taft reiterated that the police had not trespassed and that a search could only be of material things. The most significant component of the decisions in this case was not in the majority opinion, but in an oft-cited dissent by Justice Louis Brandeis. He evaluated the notable increases in technology and argued that "[t]he progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the government, without removing papers

[16] *Weeks v. United States*, 232 U.S. 383 (1914)

[17] *Olmstead v. United States*, 277 U.S. 438 (1928)

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."[18] Brandeis recognized the evolving nature of society, and these new technologies may require the Supreme Court to reevaluate its interpretation of the Fourth Amendment. However, Taft's declaration that a search only exists when dealing with tangible items is addressed in later Supreme Court challenges as society begins to demand less government intrusions. Leonard Levy agrees that "original intent cannot provide a decision…The Framers and ratifiers cannot speak from their graves to run our lives by settling the constitutional issues of our time."[19] The Supreme Court cannot search for what the Framers may have intended, as modern issues are beyond the scope of the foundational period. However, the Supreme Court under Taft continued to strictly interpret the Constitution and believed the Fourth Amendment revolved around a protection for the material possessions of private citizens.

In order to clarify the meaning of the Fourth Amendment, the Supreme Court determined the threshold of applicability against unreasonable federal government intrusions in two separate cases, the 1942 *Goldman v. United States* and the 1961 *Silverman v. United States.* Each set a precedent and guideline for determining violations based on a trespass, specifically a physical intrusion into someone's constitutionally protected space.

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[18] *Olmstead*

[19] Levy, *Origins of the Bill of Rights,* 298.

In 1942, the Supreme Court heard the petitions of Martin Goldman and another lawyer, Shulman, who were arrested for conspiracy to violate the Bankruptcy Act. Goldman and Shulman had contacted a third attorney, Hoffman, about asking his client to sell his assets in bulk, so that the three lawyers could split the difference of the dividend. Hoffman, uneasy with the deal, reported the deal to a referee and then to federal agents. Federal agents asked Hoffman to continue negotiations. The agents obtained permission from the building superintendent to gain access to Shulman's office and an adjoining room in order to place a listening device in the office that would be recorded in the adjoining room. The listening device, connected to headphones did not work, so the federal agents employed a detectaphone, a listening device that could pick up sound waves from the partition wall. The federal agents picked up several conversations between Hoffman, Shulman, and Goldman. Justice Owen Roberts delivered the majority opinion and noted that this case was not distinguished enough from the opinion in *Olmstead* to overrule it. Additionally, there was not a trespass into the office by detectaphone; therefore, the use of the detectaphone was not in violation of the Fourth Amendment.[20]

In 1961, the Supreme Court solidified this trespass standard in *Silverman v. United States*. The case stems from the arrest of petitioner, Silverman, and several others for violating gambling laws under the District of Columbia Code. In 1958, Washington D. C. police believed a gambling enterprise operated in a row house on 21st Street NW.

[20] *Goldman v. United States*, 316 U.S. 129 (1942)

Officers received permission from the owner of an adjoining row house to use the space for observation. The officer then inserted an instrument known as a spike mike under the baseboard in the second floor of the observation house, which connected to the heating duct of the row house of the suspected gambling operation. The officers listened to and documented conversations for later use in the trial. The counsel for Silverman argued that a trespass occurred in violation of the Fourth Amendment, and the Court should reconsider the findings in earlier decisions including *Goldman* and *Olmstead*. Justice Potter Stewart delivered the unanimous opinion. In this instance, it was not necessary to evaluate the ever-changing technological means of eavesdropping, but rather the methods to obtain the information. Steward noted that the record showed, in this instance, physical penetration of the listening device into the space of the petitioners was a violation of the Fourth Amendment. *Silverman,* combined with *Goldman*, created a way for the Supreme Court to evaluate Fourth Amendment challenges by determining whether or not a device physically invaded a constitutionally protected area."[21] Several other cases leading up to *Silverman* indicated that the Supreme Court had already received challenges as to what constituted a constitutionally protected area. These precedents became the standard for law enforcement in determining the need for warrants, as required by the second clause of the Fourth Amendment. However, the expansion on what determines a constitutionally protected place had already required the Supreme Court to settle multiple challenges, thus creating exceptions and creating a layer of uncertainty for law enforcement.

[21] *Silverman v. United States*, 365 U.S. 505 (1961)

At the end of the 1950s, the Civil Rights movement brought attention to inequalities and injustices as well as an explosion of new technologies changing social interactions. During this period, the Supreme Court saw an increase in challenges of perceived violations of rights under the Bill of Rights, specifically the Fourth Amendment. The multidimensional aspects of the Fourth Amendment are not easily interpreted as various Supreme Courts struggled to find objective tests for standards of reasonableness regarding constitutionally protected areas.

A new element of Supreme Court interpretations, however, developed as Earl Warren settled into the Chief Justice role on the Supreme Court in the 1960s. Under his leadership, the Court saw an increase in the use of judicial activism, a philosophy that justices interpret the law with regard to societal values, rather than the original intent of the Founders. Although a few justices continued to adhere to judicial restraint, where justices relied on precedent and rarely invalidated laws unless obviously unconstitutional, significant changes occurred during the 1960s as the Court struggled to deal with social and technological changes as well as increased Constitutional challenges.

Justice Felix Frankfurter, who served on the Supreme Court from 1939 to 1962 and followed the principle of judicial restraint, noted in his concurring opinion of *Chapman v. United States* (1961) that "the Fourth Amendment incorporates a guiding history that gives meaning to the phrase 'unreasonable searches and seizures' contained within it far beyond the meaning of the phrase in isolation and taken from the context of that history and its gloss upon the Fourth Amendment."[22] Frankfurter maintains that the

[22] *Chapman v. United States*, 365 U.S. 610 (1961

strength of a democracy allows elected officials to make policy, not the courts. The role of the Supreme Court is to protect Constitutional rights, not develop new meanings out of context. A challenging twist of the Fourth Amendment are the two parts – a right against unreasonable search and seizure and warrants can only be issued with probable cause. Akhil Reed Amar, a scholar on Constitutional areas, weighed in on how the Supreme Court often misinterprets the relationship between the two parts of the Fourth Amendment leading to new interpretations by various Supreme Courts. He maintains that "[i]t is not that a reasonable search or seizure without a warrant was presumptively unreasonable, as the Court has assumed; rather, an overbroad warrant lacking probable cause or specificity."[23]

During the 1960s, the Supreme Court decided several landmark cases, as challenges to and new interpretations of the Fourth Amendment developed. In 1961, the Court determined in *Mapp v. Ohio* that evidence obtained illegally cannot be used in court. This was previously determined in *Weeks*, but only against federal agents. *Mapp* extended these protections against state officials as well.[24] Significantly, *Weeks* and *Mapp* both build on the connection between the Fourth and Fifth Amendments developed in *Boyd* in 1886. This extension of due process constructed a new pathway for challenges to reach the Supreme Court. However, in 1968, the Supreme Court recognized that the exclusionary clause has limitations in *Terry v. Ohio*. The Court determined that a person

[23] Akhil Reed Amar, *Bill of Rights: Creation and Reconstruction.* (New Haven, CT: Yale University Press, 1998), 71.

[24] *Mapp v. Ohio*, 367 U.S. 643 (1961)

may be stopped and frisked along the street, even without probable cause to arrest.[25] The most significant case for the Fourth Amendment during the 1960s was *Katz v. United States*, which challenged the Supreme Court's reliance on constitutionally protected areas as a measure of the appropriateness of the officials' actions, and ultimately changed the meaning of the Fourth Amendment in the United States.[26]

[25] *Terry v. Ohio,* 392 U.S. 1 (1968)

[26] *Katz v. United States*

Chapter Two
The Telephone Booth: Privacy in a Public Place?

The 1960s ushered in a period of hope and change in the United States with the election of John F. Kennedy, Jr. This innovative Democrat ran on a platform of reforms as America entered into, what he termed, a “New Frontier" in social, economic, and political development. Kennedy maintained that the American frontier had not truly closed, but had transformed from a physical expansion into the uncharted west to a country shrouded in domestic injustices and foreign challenges.[1] This new course, or frontier, commenced in the 1950s when American society prospered economically, and for some groups, socially; however, the government struggled to embrace the rise of the Civil Rights movement to end racial discrimination as well as handle the consequences of the spread of communism abroad. In his acceptance of the Democratic nomination in July 1960, Kennedy encapsulated the state of American society. He noted that the country must develop a plan to deal with the “uncharted areas of science and space, unsolved problems of peace and war, unconquered pockets of ignorance and prejudice, [and] unanswered questions of poverty and surplus.”[2] This push for change, which increased government entanglement in the affairs of Americans, became a mainstay of the 1960s. The effects of government intervention became quite apparent in the rise of Constitutional challenges submitted to the Supreme Court, more specifically in the quest

[1] History.com Staff, ed., "The 1960s History," History, last modified June 26, 2020, accessed November 21, 2020, https://www.history.com/topics/1960s/1960s-history.

[2] John F. Kennedy, Jr., "The New Frontier" (speech transcript, Democratic National Convention, Los Angeles, CA, July 15, 1960).

for increasing the protections regarding searches and seizures. By the time Katz's petition reached the Supreme Court, the Warren Court had already started to tweak the application of the Fourth Amendment to apply to both federal and state institutions. These early changes, along with intense social pressure, created a foundation for the Warren Court to alter the meaning of the Fourth Amendment. It allowed the Court to move beyond only deciding on constitutionality, but to also legislate from the bench.

As a motivated public launched a revolution against inequality and injustice, the government took a more active role in controlling the change. The Federal Bureau of Investigations (FBI) spearheaded the enforcement of the criminal laws in the United States. Its role intensified to focus on illegal interstate crimes. Ultimately, the enforcement of United States Code §1084, the statute that criminalized the interstate transmission of wagering information via wire communications as well as identified penalties for violations, led to the arrest of Charles Katz in 1965, and an eventual shift in the interpretation of the Fourth Amendment.[3]

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[3] 18. *Transmission of Wagering Information; Penalties. U.S. Code (1994), §§l084.* The sections that are pertinent to this case include: '(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined no more than $10,000 or imprisoned not more than two years, or both. '(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.'

The enforcement of this code, with the help of various informants, unveiled significant gambling and betting links between the east and west coasts of the United States using wire-based technology. An unidentified, yet historically reliable, FBI informant notified the agency in October 1964 that a New York bookmaker, a person who received and settled bets on events, had associates operating in Los Angeles. A surveillance of activities of the bookmaker identified Charles Katz, also known as Larry Day, as the Los Angeles associate. At the time, Katz was a top basketball handicapper. He was also known as a "commission man…[as he often placed] bets for another for certain consideration."[4] Katz predicted the outcomes of games, placed bets for clients, and at times, placed his own wagers based on predictions. Using this information, the FBI launched an investigation into suspected illegal wagering violations early the next year.

In February 1965, FBI Special Agents observed the commission man's daily routine. Charles Katz lived in apartment #122 in the Sunset Towers West at 8400 Sunset Boulevard (Figures 1 and 2) and often used the three red and silver public telephone booths located at 8210 Sunset Boulevard (Figures 3, 4, and 5). These booths, lined side-by-side with folding doors, occupied a space near The Plush Pup, a local restaurant, and close to the intersection of Sunset Boulevard and Havenhurst Drive. On February 10th and 11th, the FBI reported that Katz made a series of early morning telephone calls from

[4] United States District Court for the Southern District of California, "United States v. Katz" (1965). *Historical and Topical Legal Documents-Trial Memorandum*. https://digitalcommons.law.scu.edu/historical/2.

these public booths. After consulting with Pacific Telephone Company, the agents obtained evidence that Katz was in contact with known bookmakers on the east coast.[5]

Figure 1
Circa 1966: Sunset Towers West and domicile of Katz in 1967;
Taken from *Every Building on the Sunset Strip*

Figure 2
Circa 2020: The Best Western Plus Sunset Plaza Hotel replaced the former apartment building. Taken from www.bestwestern.com/

[5] United States District Court, *Grand Jury Indictment*.

Figure 3
Circa 1967: Phone Booths at 8210 Sunset Blvd. Taken from
www.joshblackman.com

Figure 4
Circa 1966: 8210 Sunset Blvd. The Plush Pup to the left and one of the three phone booths is seen at far right. Taken from
Every Building on the Sunset Strip

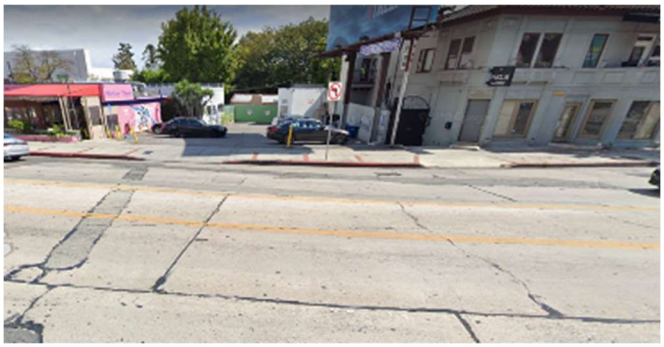

Figure 5
Circa 2019: 8210 Sunset Blvd, with no phone booths. Taken from www.googlemaps.com

The FBI implemented a plan to continue surveillance of Katz. It worked with the phone company to place one phone booth out of commission to limit the available locations that Katz could use. Also, the phone company granted permission to attach a listening device on top of the phone booths, which would then be connected to a tape recorder.[6] Significant to the placement of the device was the previous Supreme Court decisions regarding electronic listening devices. The agents specifically followed the standing precedent and guidance set out in *Goldman*, where the Fourth Amendment did not require a warrant as long as the device did not penetrate into occupied space. The device was purposefully placed outside between the two accessible phone booths so Katz's selection of a booth would not impede the eavesdropping. In addition, FBI agents ensured that the listening devices were not permanently affixed and would only be placed on the booths as Katz approached the booths and removed when he finished.

John Robert Barron, an FBI Special Agent who worked the surveillance, testified that Katz made long distance phone calls to Boston, Massachusetts, and Miami, Florida, to place bets. Over the period of February 19 to February 25, 1965, Katz made eight phone calls, with six to Massachusetts and two to Florida. His calls to Boston, verified by the phone company's general business records, identified the location as Apartment 4 at 28 Colborne Road in Brighton, Massachusetts. Although the apartment was registered to Harry Green, it was frequented by several gambling contacts including Harry Clayton and George Lanzetta. These men, using the apartment for betting purposes, were known associates of indicted bookmaker Elliot Paul Price. The associate at the Miami location

[6] United States District Court, *Trial Memorandum*.

was unidentified and the recorded conversation referred to sports bets on several college basketball games. This information provided a connection to Katz and an east coast syndicate for betting via wired communications. To corroborate this information, another special agent, Allen F. Frei, occupied an adjacent room to Katz's apartment in Sunset Towers West. Without the use of a listening device, Frei overheard numerous telephone conversations made by Katz to unknown people making sports bets. Based on this evidence, the agents acquired a search warrant and seized various materials indicating activities associated with wagering and betting.[7] Katz was arrested, and then indicted in March 1965 on eight counts of violating Title 18, United States Code, Section §1084.

On this same day, in the southern California city of San Diego, young lawyer Harvey A. Schneider was unaware that Katz's legal troubles would eventually lead to the most important legal experience of his career. Although Supreme Court cases carry the name of the person arrested for violating existing legislative regulations, these people usually only serve as the springboard to challenge elements of state and federal laws. Very little is known about Charles Katz besides his location in 1967, his involvement in wagering, and that he was around the age of fifty when arrested. A systematic investigation into his life produced no results concerning living relatives or his activities following the decision in the case. Regardless, the Supreme Court case may carry his name, but his actions were minor in scope of the case. It came down to a savvy lawyer

[7] United States District Court, *Search Warrant*.

whose insight about the social changes and makeup of the Supreme Court created a platform for the transformation of the law.[8]

Harvey Schneider was born in Lincoln, Nebraska, in June 1937. Staying for two years in Nebraska, then an additional three in Red Oak, Iowa, his homemaker mother and food business father made their way to California when Schneider turned five. For someone who would change the course of Fourth Amendment interpretations, most would assume it was Schneider's lifelong dream to become an attorney. However, becoming a lawyer was more of a fluke for the University of California – Los Angeles (UCLA) senior, who did not know his future plans beyond his two-year Navy ROTC commitment. A friend's request to join him in his daily activities was the first step to a long, and prestigious, legal career.[9]

Schneider's best friend was on his way to take the Law School Admission Test (LSAT) and coerced him into taking it as well. Upon recollection, Schneider remarked, "I am not sure I even knew what [the LSAT] was. I went down and took it without studying. I know they [students] study really hard these days, but I did not. I did fine."[10] After applying to UCLA and the University of Southern California (USC), Schneider was offered a full scholarship to USC so "it was an easy decision [about where to attend law

[8] Harvey A. Schneider, interview by the author, Mechanicsville, VA, July 8, 2020.

[9] Harvey A. Schneider, interview by the author, Mechanicsville, VA, August 11, 2020.

[10] Schneider, interview by the author.

school.]"[11] Although Schneider did not work throughout the school year, he did work during the summer sessions as an order taker at a meat packing plant and an intern for Los Angeles attorney Burton Marks. Upon graduation, Schneider left Los Angeles for San Diego to work in a small law firm. While working in San Diego, Schneider was admitted to the California State Bar on January 14, 1964, and continued to gain experience.[12]

A year later, Burton Marks, the attorney who Harvey Schneider interned with during law school, became the lead attorney for Charles Katz. Marks, a graduate of UCLA Law School and a member of the California Bar since 1956, immediately grasped upon the implications of the agents' actions with regard to the Fourth Amendment.[13] On March 8, 1965, Marks filed a Motion to Suppress Evidence and a Return of Evidence, as items collected from Katz's apartment would be argued as unlawfully seized under Fourth Amendment protections. The motion maintains that agents made an unlawful invasion into the phone booth through listening devices, and the subsequent search warrant, based on information obtained during the telephone booth recordings, was negated as its primary goal was to search for evidence.[14] This motion is the first

[11] Harvey A. Schneider, interview by the author, Mechanicsville, VA, August 11, 2020.

[12] Schneider, interview by the author.

[13] "Burton Marks, 57, Noted Criminal Trial Lawyer, Dies," *Los Angeles Times* (Los Angeles, CA), June 6, 1987, accessed November 10, 2020, https://www.latimes.com/archives/la-xpm-1987-06-06-fi-5114-story.html.

[14] United States District Court, *Notice of Motion and Motion to Suppress*.

indication of the defense's strategy to challenge standards and strengthen privacy protections under the Fourth Amendment.

Marks' motion to suppress first challenged the ability to wiretap private phone conversations in *Olmstead*, a key tactic as this United States Supreme Court decision limits searches and seizures to material things. This limitation has continuously been challenged with the rise of new surveillance technologies. The Supreme Court had not overturned *Olmstead*, or discounted its findings, but instead used *Goldman* and *Silverman* to interpret if there had been a trespass when using surveillance techniques. If successful, the evidence obtained in the *Katz* case would not be admissible in court. However, using the current measures, Marks also maintained, based on a California 9th Circuit Court's decision, that Katz's use of the phone booth had the same "right to be let alone" as if he was in his own apartment, indicating a constitutionally protected place.[15] Marks maintained that the statute violated his client's constitutional rights. On March 13, 1965, Judge Jesse Curtis denied the motion to suppress evidence on the grounds of an illegal search and seizure on the basis of *Goldman*. The listening device was placed outside of the phone booth and did not penetrate an interior space. The constitutionality of the statute would be addressed in District Court.[16]

On May 19, 1965, Charles Katz stood trial in the United States District Court, the Southern Division of California, Central Division. Burton Marks, continuing as the counsel for Katz, argued to dismiss the indictment, which the Court promptly denied.

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[15] *People of the State of California v. Hurst*, 325 F.2d 891 (9 Cir. 1963)

[16] United States District Court, *Trial Memorandum.*

Over the course of the day, the government presented the evidence against Katz, introducing not only the transcripts of conversations obtained from the phone booth, but also items related to bookmaking like betting markers and handicap sheets obtained from his apartment. After a full day of testimony, the case reconvened the next day for the defense. Marks realized that he needed to refocus his efforts on the unconstitutionality of the initial recordings from the telephone booth, as it would make all other evidence inadmissible. The Court again denied the motion, noting the precedent set in *Goldman.* The precedent established a threshold standard for listening devices; as long as the device did not penetrate inside the phone booth, it was legal. Following closing statements, Katz was found guilty of eight counts of violating the federal statute. Katz was released on bond, and Marks went back to work to appeal the decision.[17]

In November 1966, the United States Court of Appeals for the Ninth Circuit heard the appeal. Marks reiterated his initial claims made at the lower level, but focused on three main points concerning the lower court's decision. First, he maintained that the recording of the conversations at the phone booth constituted an illegal search and seizure under the Fourth Amendment and the findings of *Silverman*, which addressed the method of penetration that would indicate trespass. Second, as the recording constituted an illegal search and seizure, the subsequent search warrant was not valid as it established an evidentiary search. Marks argued the invalidity of the warrant made the search for evidence of a crime illegal. Finally, he maintained the statute within US Code §1084,

[17] United States District Court, *Court Minutes and Exhibits and Witness Lists*.

under which Katz was arrested, was unconstitutional as it was "indefinite, vague, and uncertain."[18]

A panel of three judges, two from the Circuit Court and one from the District Court, heard the appeal. The judiciary panel evaluated each of the court precedents used to explain the reasoning behind the appeal. The first challenge concerning the use of a listening device on the phone booth, which became the key element in the later Supreme Court challenge, centered on whether the use of *Olmstead*, *Goldman*, or *Silverman* was appropriate. As the Supreme Court had not decided to overrule or set aside *Olmstead*, thus making evidence from wiretapping legal, this challenge would not be overturned on the use of a listening device alone. The Appeals Court then had to determine which precedent was valid to determine if a trespass occurred. The lower court cited *Goldman*, where no trespass took place as the device did not penetrate the space, whereas, the defense argued that *Silverman*, a penetration of the space, was more appropriate. The panel determined that the lower court was correct in using *Goldman*, as there was no invasion of the space.[19]

Additionally, the appellant claimed that by closing the doors to the telephone booth that Katz had the right to the same protections as if in his home, thus creating the booth as a constitutionally protected place. The judiciary panel cited *Smayda v United States*, a case where police officers observed illegal activities taking place in a public

[18] U.S. Court of Appeals for the Ninth Circuit - 369 F.2d 130 (9th Cir. 1967)

[19] U.S. Court of Appeals for the Ninth Circuit.

restroom. It was determined that no Fourth Amendment violation took place in that case because "the appellants impliedly consented to the search when they carried on their illegal acts in a public toilet."[20] The panel ruled that the telephone booth was also a public place, therefore, no Fourth Amendment violation took place.

After ruling that the telephone booth recordings were not a violation of the Fourth Amendment, the subsequent search warrant was determined to be valid. The appellant, however, argued that it was an evidentiary search and a general search, both illegal searches and seizures. As the search warrant was valid, the evidence found would not be considered a random search for materials in the hopes of finding evidence for a crime. Moreover, the search warrant described the items to be obtained that aligned with the crime. The Appeals Court, nonetheless, determined that the lower court ruled appropriately when it refused to suppress evidence.[21]

Finally, the appellant stated that the vagueness of the statute made it unconstitutional, violating the rights to due process under the Fifth Amendment. Most lawyers realize the close connection between the Fourth and Fifth Amendments, and use the relationship to extend their legal arguments. Determining whether a statute is too vague is a difficult task for the Court, as a statute must have enough clarity to be understood by the people. Referring to several precedents, the Appeals Court ruled that "[t]he plain and unambiguous language used in the statute is entitled to its ordinary and

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[20] *Smayda v. United States*, 352 F.2d 251, 253 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966).

[21] U.S. Court of Appeals for the Ninth Circuit - 369 F.2d 130 (9th Cir. 1967)

reasonable interpretation. This statute meets the standard of certainty required by the Constitution."[22] Ultimately, the Appeals Court upheld the conviction by the lower court.

For most court cases in the United States, the ruling by the Federal Appellate Court marks the end of the judicial process. However, parties that are unhappy with the results of the lower courts can request a final review by the United States Supreme Court. The likelihood of a case being selected to be heard by the United States Supreme Court is slight, but it is the last opportunity to pursue relief in legal matters. In order to petition the Supreme Court, the petitioner must ask the Supreme Court to grant a writ of certiorari. If granted, a writ of certiorari requires the lower court to send up records for review by the Supreme Court.[23]

Several significant elements are evaluated when a person decides whether to request a review by the Supreme Court. A primary factor is the cost of continuing legal services. At this point, Katz had run out of money and could not afford legal services. The second key factor is whether the disputed issue could have a wider legal impact beyond the initial case. Burton Marks decided to continue to push Charles Katz's case to the highest level of the judicial system, as he believed that it could be the seminal case to clarify interpretations of the Fourth Amendment.[24]

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[22] U.S. Court of Appeals for the Ninth Circuit - 369 F.2d 130 (9th Cir. 1967)

[23] Administrative Office of the U.S. Courts, "Supreme Court Procedures," United States Courts, last modified 2020, accessed December 1, 2020, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1.

[24] Burton Marks, "Petition for Writ of Certiorari," University of Minnesota Sociology Department, last modified November 1966, accessed November 13, 2020,

Burton Marks, however, needed some assistance to push this case through to the Supreme Court. Although Marks was one of the top attorneys in Los Angeles, his practice only consisted of himself and a legal secretary. To strengthen his legal attack, he decided to hire his former intern, Harvey Schneider, to assist with the case. Schneider, who had been gaining experience in criminal law in San Diego, recalls that Marks asked him to prepare the writ for certiorari because he had been "impressed with [his] writings" while interning.[25]

On March 13, 1967, the Supreme Court granted the writ of certiorari. When the Supreme Court approved the writ, it also granted Charles Katz to proceed *in forma pauperis*. By this point in the appeals process, Katz was a pauper. The Court granted the petitioner's motion and allowed Katz to continue the legal process without the liability of paying the costs of the proceedings.[26]

Although Schneider detailed a number of challenges in the request, the Supreme Court decided to only consider two points: the evidence obtained with the listening device outside of the public telephone booth as a violation of the Fourth Amendment, and the subsequent search warrant as a violation of the Fourth Amendment. The Court also requested that the counsel for Katz and the government consider the 1965 ruling by the

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http://users.soc.umn.edu/~samaha/bill_of_rights/case%20materials/katz/katz_petition_for_writ_of_certiorari.pdf.

[25] Schneider, interview by the author.

[26] Cornell University, Petition for Writ of Certiorari Granted - Katz v. United States, Legal Information Institute, last modified March 13, 1967, accessed November 3, 2020, https://www.law.cornell.edu/supremecourt/text/386/954.

United States Court of Appeals District of Columbia Circuit in *Frank v. United States* as the ruling may be significant in Katz's case.[27] *Frank v. United States* involved the placement of a wiring device in violation of the Federal Communications Act of 1934. The appellants had placed the device in a room for the purpose of recording information. The information obtained was not excluded from evidence. The decision in *Frank* that relates to *Katz* in whether information gained during appeal and any imposed type of self-incrimination or immunity would prohibit a subsequent retrial of the case if the Court reversed the decision.[28] It was clear that the Supreme Court accepted the case to clarify not only what establishes a constitutionally protected place, but also whether penetration into these protected locations with a device was necessary to violate the Fourth Amendment. Schneider prepared this additional brief requested by the Supreme Court concerning the use of a bugging device as noted in *Frank*, focusing his arguments on whether a "reasonable man" would consider speech private in the phone booth.[29]

While Charles Katz's case progressed through the legal system making its way to the Supreme Court, government agencies were transforming as the 1960s social revolution reached the highest levels in the country. The Department of Justice saw its

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[27] Petition for Writ of Certiorari Granted.

[28] *Frank v. United States* 347 F.2d 486 (D.C. Cir. 1965)

[29] Burton Marks and Harvey A. Schneider, "Reply Brief for Petitioner," University of Minnesota Sociology Department, last modified 1966, accessed November 19, 2020, http://users.soc.umn.edu/~samaha/bill_of_rights/case%20materials/katz/katz_reply_brief_for_petitioner.pdf.

first African-American Solicitor General appointed in August 1965. Thurgood Marshall, a graduate of Lincoln University and Howard University Law School, initially served in private practice and then as the chief counsel for the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund, where he successfully argued *Brown v Board of Education of Topeka* before the Supreme Court in 1954. Under Kennedy's administration, he served as a judge for the United States Court of Appeals for the Second Circuit where he remained until Johnson appointed him to the Solicitor General's Office. [30] As Solicitor General, Marshall became the highest ranking African-American in the United States Government.

The Solicitor General's office is responsible for administering and directing the legal process for the government through the United States Supreme Court. While Marshall served as Solicitor General, he argued various cases in front of the Supreme Court, revised and approved petitions and briefs on behalf of the government, reviewed lower court decisions, and sponsored lawyers to become part of the Supreme Court Bar.[31] The Solicitor General's Office would prepare the brief outlining the government's standpoint with regard to the challenges brought up by Charles Katz. A small team of attorneys, ten when Thurgood Marshall was at the helm, brought a wide range of

[30] History.com Staff, ed., "Thurgood Marshall," History, last modified November 17, 2019, accessed December 1, 2020, https://www.history.com/topics/black-history/thurgood-marshall.

[31] U.S. Department of Justice, "Office of the Solicitor General," United States Department of Justice, last modified October 27, 2014, accessed December 1, 2020, https://www.justice.gov/osg/about-office-1.

experience covering civil and criminal law. To serve in the Solicitor General's Office was a challenging, yet prestigious position coveted by many as a stepping stone in their legal careers.

In April 1967, another young lawyer, John S. Martin, Jr., was sitting in the small office of his private practice in Nyack, New York, when his secretary buzzed him to let him know Judge Marshall was on the phone. Marshall's first words to Martin were: "You dying to become a country lawyer?"[32] Thurgood Marshall offered him an opportunity to be an Assistant to the Solicitor General in the United States Department of Justice.

Martin originally met Thurgood Marshall about three weeks after he started clerking for the Honorable Leonard P. Moore of the United States Court of Appeals for the Second Circuit in 1961. Martin had developed a relationship with Marshall while clerking, but touched base again about four years later while he worked as a U.S. Attorney for the Southern District of New York. Martin had traveled to Washington, D.C., with some friends to be admitted to the Supreme Court Bar. Marshall was Solicitor General at the time and sponsored his admission. Following his acceptance to the Supreme Court Bar, Martin stopped by Marshall's office to chat. Marshall asked about his future plans, in which Martin responded he was ready for a change from the U.S. Attorney's Office. Marshall told Martin that he would like him to work for him in the Solicitor General's Office, but he did not have any openings at that time. Martin went

[32] John S. Martin, Jr., interview by the author, Mechanicsville, VA, August 24, 2020.

back to the U.S. Attorney's Office, but opened a private practice the following year with his brother-in-law and a friend. The call in April 1967 set Martin's career in a new direction.[33]

In June 1967, President Lyndon B. Johnson nominated Thurgood Marshall as an Associate Justice to the Supreme Court.[34] In announcing his nomination to the press, Johnson noted that "it is the right thing to do, the right time to do it, the right man, and the right place."[35] John Martin recalls that he found out about the appointment when he got off the plane in Berlin en route to his friend's wedding and saw the headline in the *Paris Tribune* that Marshall was going to the Supreme Court.[36]

Martin started in the Solicitor General's Office in July 1967 as Marshall transitioned to the Supreme Court. The briefs representing the government for the *Katz*

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[33] Martin, interview by the author. Martin accepted the position and worked out details for employment. He needed to not only close his private practice, but was also committed to attend a friend's wedding in Geneva in June. Marshall agreed to a July 1967 start.

[34] Lyndon B. Johnson, "Message of President Lyndon B. Johnson Nominating Thurgood Marshall of New York to be an Associate Justice of the Supreme Court," 1967, in *Record Group 46*, Anson McCook Collection of Presidential Signatures, 1789 - 1975, accessed November 29, 2020, https://catalog.archives.gov/id/306369.

[35] Lyndon B. Johnson, "Remarks to the Press Announcing the Nomination of Thurgood Marshall as Associate Justice of the Supreme Court" (address transcript, Rose Garden, Washington, DC, June 13, 1967).

[36] Martin, interview by the author. Martin recalls that he called Marshall when he returned to the United States and told him that he could not take the Supreme Court job. Marshall tried to reassure him that he would do fine in the Solicitor General's Office; however, Martin was more concerned that he had promised him a ride to work every day as part of the deal since they lived near each other in Capitol Park.

case were already in the process of development and revision. Briefs were assigned somewhat at random in the Solicitor General's Office during this period, usually allocated to the person or group who specialized in that area of law in the Department of Justice. The briefs went through the chain of command at the Solicitor General's Office for comments and revisions to clarify the government's position. Who gets to argue the case before the Supreme Court, however, was a matter of hierarchy, not experience. The Solicitor General selected which cases he desired to argue first, followed by the deputies. If a case was not selected, it would continue down the chain until it reached the newest member of the office.

In his two years in the Solicitor General's Office, Martin argued eight cases before the Supreme Court, a high number for a new staff member. Martin recalls that it was not because of his experience in criminal law that allowed him to argue that many times in front of the highest Court in the nation, but that "nobody wanted to argue the losers."[37] The staff knew that *Katz* was going to be a losing effort for the government, thus assigning the case to Martin. It was obvious, even to the newest member of the Solicitor General's Office, that the recent rulings of the Warren Court showed a tendency to legislate from the bench to answer societal changes. For example, the Supreme Court had recently ruled in *Berger v. New York*, which nullified a New York statute as unconstitutional that permitted electronic listening devices without procedural safeguards,[38] thus making *Katz* seem like a losing effort for the government. The

[37] Martin, interview by the author.

[38] Berger v. New York, 388 U.S. 41 (1967)

Supreme Court did not take on *Katz* to reaffirm the trespass doctrine; it needed to decide on it. Too many Fourth Amendment cases with close, but distinctive circumstances crept into the Supreme Court's scope of review. However, Martin's role would be to ensure the Supreme Court dealt specifically with the Constitutionality of the laws without significantly changing the scope of the Fourth Amendment.

Oral arguments were set to be heard before the Supreme Court in October 1967. Both sides filed briefs and prepared arguments based on the standing precedents. Schneider recalls many late nights in his office shared with Burton Marks, prepping for possible questions and comments by the Supreme Court during oral arguments. While considering the many lines of thought, Schneider thought back to his law school classes on torts and realized that both the lawyers and the Supreme Court were taking the wrong approach on this issue by focusing on a constitutionally protected place. Under tort law, negligence can be determined if someone "departed from the conduct expected of a reasonably prudent person acting under similar circumstances."[39] This test used in tort law provides a sensibly objective standard for determining negligence while addressing how to deal with the broadly interpreted reasonableness standard. Schneider considered that an expectation approach may be the answer to the trespass dilemma raised in *Katz*. No longer should the Court consider whether or not there was a constitutionally protected

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[39] "Negligence - The Reasonable Person," Law Library - American Law and Legal Information, last modified 2020, accessed November 27, 2020, https://law.jrank.org/pages/8780/Negligence-Reasonable-Person.html#:~:text=A%20person%20has%20acted%20negligently,conduct%20of%20others%20is%20judged.

place or trespass, but whether the defendant had a reasonable expectation of privacy.[40] The representative of the Solicitor General's Office, John Martin, and the sitting Justices of the Supreme Court, would hear this argument for the first time during oral arguments as Schneider's insight moment came well beyond the date for filing briefs.

Schneider and Marks flew to Washington D.C. separately two days before the oral arguments, but stayed in "the same dingy hotel room because money was tight."[41] As the Supreme Court recognized their client as in forma pauperis, thus the attorneys knew their efforts in the case were specifically to make a legal change, not to reap a financial windfall. Marks decided that Schneider would present the opening arguments, as he also planned to introduce the reasonable expectation theory; however, Schneider needed to become a member of the Supreme Court Bar. A swearing-in ceremony, admitting new lawyers to the Supreme Court Bar was the first order of business in a new Supreme Court term. Sponsored by Burton Marks, who was already a member of the Supreme Court Bar and had previously argued several cases, Schneider met the requirements and was admitted. Following the ceremony, Marks and Schneider returned to their hotel room. Schneider again pondered what to present to the Supreme Court the next day, meticulously considering various arguments. Amidst his pondering, Marks stated that he planned to visit nearby family and left Schneider to prepare the case. Around 11 p.m., Marks returned to the hotel room and went to sleep while Schneider stayed up most of the

[40] Harvey A. Schneider, interview by the author, Mechanicsville, VA, July 8, 2020.

[41] Schneider, interview by the author.

night, anxiously anticipating what would happen before the Court in the morning. Schneider knew that his legal experience was limited, especially when arguing before the highest Court in the land, but he believed in what he was fighting for - the principle that Americans have a right to privacy.[42]

On October 17, 1967, the two young lawyers, Harvey Schneider representing Charles Katz, and John Martin, representing the Solicitor General's Office and the government, walked into the Supreme Court building ready to argue their first case before the Supreme Court. Not surprisingly, the courtroom's set up maximized efficiency. The Justices' bench, equipped with large leather chairs, dominated the far side of the room. Directly in front of the bench were counsel tables on either side. Schneider and Marks occupied one side as Martin and other Solicitor General's office staff sat on the other. Each side would argue their case at a lectern positioned between the two tables. It was fortified with lights to indicate how much time an attorney had left to argue. Interestingly, the attorneys for each side were given an entire hour to argue, rather than the customary thirty minutes. Clearly, the Justices of the Supreme Court anticipated a resolution. Behind the counsel tables were chairs that held the lawyers in subsequent cases. Once the arguments for one case end, the next set of lawyers immediately assume their seats and start arguments.[43] The *Katz* case was first on the docket. As the Justices filed into the courtroom, only eight were seated. Newly appointed Justice Thurgood

[42] Schneider, interview by the author.

[43] Schneider, interview by the author.

Marshall would not sit during the trial of Charles Katz. Marshall recused himself from the proceedings, as his previous position as the Solicitor General, and the Office's preparation of legal briefs on behalf of the government in the case, served as a conflict of interest. Although Marshall did not rule in this case, his judicial philosophy - "You do what you think is right and let the law catch up"[44] – would become the cornerstone of proceedings.

[44] Charlie Savage, "Kagan's Link to Marshall Cuts 2 Ways," *New York Times* (New York, NY), May 13, 2010, sec. A, 16, accessed November 30, 2020, https://archive.nytimes.com/www.nytimes.com/2010/05/13/us/politics/13marshall.html.

Chapter Three
A Slippery Slope: Judicial Activism in the Supreme Court

The Supreme Court rarely deviates from its normal judicial procedures of allowing thirty minutes for each party to argue its case. *Katz v. United States* is one of the few exceptions, allowing each side a full hour to present arguments and answer questions posed by the Justices. In the years leading up to the oral arguments in *Katz*, requests for relief inundated the Supreme Court to clarify which protections are guaranteed by the Fourth Amendment with regard to police procedures and protected locations. Confusion about the overarching ideal of a right to privacy, which is not directly stated in the Fourth Amendment, started to filter into court decisions at all levels. In the 1960s, the Supreme Court received multiple Writs of Certiorari centering on Fourth Amendment issues, but accepted very few. However, the Supreme Court recognized that *Katz* provided an opportunity to address legal precedents through its non-controversial issue of gambling, the public venue of the telephone booth, and the lack of an initial warrant.[1]

Little time was wasted on formalities once the Justices entered the Courtroom. The counsel for the petitioner argued first. The petitioner's counsel, Harvey Schneider, moved to the podium and began with a brief recounting of the facts of the case. Subsequently, he presented the two main issues to the Court – whether the communications could be intercepted under search and seizure of the Fourth Amendment

[1] Harvey A. Schneider, interview by the author, August 11, 2020.

and whether the warrant obtained for the subsequent search of Charles Katz's apartment was constitutional or not.[2]

Initially, the Justices asked Schneider to clarify the difference between wire-tapping and bugging, to which he argued the difference was not the key issue. Rather, it was the interception itself that mattered. The agents did not obtain a warrant for the telephone booth or the interception obtained by the device placed outside of the booth. In recent Warren Era Supreme Court decisions, especially *Wong Sun v. United States* and *Berger v. New York*, the Court conceded that Fourth Amendment protections included seizing "communication," however, a key component of these decisions was the focus on "the trespassory intrusion into a constitutionally protected area."[3] Schneider emphasized legal precedents making communication as a seizable item, ultimately moving beyond the previous focus on tangible items in searches and seizures. The location to be searched, however, was an obstacle to overcome. Although initial briefs referred to "constitutionally protected places," Schneider remarked that the Court placed the emphasis on determining the constitutionality of the Fourth Amendment protections in the wrong place. He stated, "We feel the right to privacy follows the individual and that whether or not he's in a space enclosed by four walls...or any other physical location, is not determinative of the issue of whether or not the communication can ultimately be

[2] *Katz v. United States*. The process of arguing before the Supreme Court is not a fluid presentation of facts and arguments. Counsel must always be cognizant of not only the time constraints, but also the direction of the Justices' questions.

[3] *Berger v. New York*

declared confidential."[4] The place to be searched, he suggested, was secondary to the problem of unreasonable searches.

In order to remove the focus on the constitutionally protected place, which was at the heart of most Fourth Amendment challenges, Schneider had to encourage the Court to reconsider precedents. *Olmstead,* which maintained that warrantless wire-tapping was permissible, set the initial standard for federal surveillance with the developing technologies. Both *Goldman*, concluding that no trespass occurred when a device did not enter a constitutionally protected place, and *Silverman*, concluding that trespass occurred when the device entered a constitutionally protected place, had guided federal law enforcement's policies on surveillance. A significant limitation of these tests, which ultimately led to the increase in requests for relief, was the determination of what constitutes a protected location.[5] Schneider also rejected Justice Holmes' 1924 statement in *Hester* that "an open field is not entitled to Fourth Amendment protections," arguing instead that the location was unnecessary to determine the constitutionality.[6] The focus should be on construed confidentiality of the communication, not its location.

Schneider thus concluded that a test for Fourth Amendment protections be based on the reasonable person test of tort law. Tort law uses the reasonable person approach to determine negligence as an objective test. It looks at whether a reasonable person, in

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[4] *Katz v. United States*

[5] *Goldman v. United States*, 316 U.S. 129 (1942); *Silverman v. United States*, 365 U.S. 505 (1961)

[6] *Hester v. United States*, 265 U.S. 57 (1924)

similar circumstances, produces the same type of behavior as the defendant.[7] Schneider made minor modifications to this approach, but explained how this test could provide an objective measure to determine the prudent person's expectation of privacy in a given situation. Although Schneider argued that a constitutionally protected place should not be the focus of the Court's interpretation, he proposed that the location should be taken into consideration as part of the situation, allowing the Court to then determine "whether or not a third person objectively looking at the entire scene could reasonably...say, that the communicator intended his communications to be confidential."[8] This line of reasoning would allow the Court to interpret the Fourth Amendment more broadly, granting a person's expectation of privacy to become the lynchpin of the Amendment. After stating his argument, Schneider reserved time for rebuttal, then turned over the oral arguments to the government.

John Martin, Jr., the Assistant to the Solicitor General, replaced Harvey Schneider at the podium to argue for the government. Martin immediately asserted that if the Court followed the path introduced by the petitioner's counsel, granting a right to privacy no matter the location, the Fourth Amendment would significantly change. This reasonable person test would allow an expectation of privacy, no matter the location, "subject[ing]

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[7] Negligence - The Reasonable Person," Law Library - American Law and Legal Information, last modified 2020, accessed November 27, 2020, https://law.jrank.org/pages/8780/Negligence-Reasonable-Person.html#:~:text=A%20person%20has%20acted%20negligently,conduct%20of%20others%20is%20judged

[8] *Katz v. United States*

the Fourth Amendment to not only the matter of what is overheard, but to what is observed."[9] He continued that the Court consistently protected Fourth Amendment rights concerning privacy in constitutionally protected places, but not outside that realm. Martin argued that an extension into public places is beyond the scope of the Fourth Amendment, and that it would effectively change the directives that federal law enforcement operated under by legal precedent. A judicially-created test that incorporated a blanket expectation of privacy would not only ignore, or require setting aside, legal precedents, but would also push the Court into judicial activism, which blurs the legality of law enforcement operations. If the Court accepts Schneider's proposal, it would meet the five criteria of judicial activism by invalidating the actions by other branches, overruling the precedents that law enforcement used to determine legal procedures, legislating from the bench by adding a new test, removing the constitutionally protected place as the accepted methodology, and adding the right to privacy to the Fourth Amendment. The Fourth Amendment, Martin maintained, was designed to protect individuals from government intrusion in an area where they "have the right to withdraw and be free from government scrutiny."[10] Privacy, he suggested, is not always protected under the Fourth Amendment.

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[9] *Katz v. United States*

[10] *Katz*. Justice Black humorously mentioned with regard to Martin's argument, "You seem to be taking the position that a man's telephone booth is not his castle." Martin agreed.

Since the Fourth Amendment encompasses two separate statutes, the Court asked why law enforcement officers did not acquire a warrant since both sides maintained they likely had probable cause to persuade a magistrate. Martin remarked that under the Federal Rules for Criminal Procedures, Rule 41, it was questionable "whether or not you could get a warrant for seizure of words. [As the rule states], warrants shall issue for the seizure of property."[11] Property, as defined by Rule 41, "includes documents, books, papers, any other tangible objects, and information,"[12] thus leaving law enforcement questioning whether they could seize something as intangible as words. Law enforcement used caution and followed the guidelines set forth by legal precedents, which did not require a warrant for words. The right to be secure against unreasonable searches and seizures thus depended on a constitutionally protected place. Martin then stepped away from the podium for Burton Marks, the second counsel for the petitioner, to approach for rebuttal.[13]

Marks, knowing that rebuttal time was limited, quickly rehashed Schneider's contention that rights to privacy exist beyond the constitutionally protected place. He claimed that "the laws of trespass and the property laws, which were conceived...in

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[11] *Katz v. United States*

[12] Cornell Law School, "Rule 41: Search and Seizure," Legal Information Institute, last modified 2016, accessed February 2, 2021, https://www.law.cornell.edu/rules/frcrmp/rule_41. This rule in 1967 was heavily focused on tangible property, which still exists in the rule today. However, this rule has been amended various times in the past fifty years to reflect changing technologies and criminal procedures.

[13] *Katz*

common law, are anachronistic,"[14] and the Court must ensure that the Fourth Amendment protects individual's privacy increasingly seized by changing technology. Marks agreed that searches could take place, but warrants should be obtained. Marks supported the reasonable person test proposed by his colleague. The Court's responsibility under the Fourth Amendment, he concluded, was to ensure that what an individual intends to be private, remains private and free from governmental interception. Wrapping up oral arguments, the counsel for Charles Katz stepped away from the podium to allow the next case to begin oral arguments.

According to Supreme Court protocols, the Justices gather twice weekly to consider new petitions as well as oral arguments of cases heard since the previous Justices' Conference. Only the Justices are permitted in the conference room for these private sessions, allowing for open discussion. Each Justice is given an equal opportunity to state his opinion uninterrupted on the arguments beginning with, in this case, Chief Justice Earl Warren, followed by each Associate Justice in decreasing order of seniority. Afterwards, an initial vote is taken to decide the case. When there is not a unanimous vote, the majority becomes the majority opinion in the case. In the *Katz* case, with the recusal of Justice Marshall, the Court had an even number of Justices, producing an initial vote that was evenly split, creating no majority. Abe Fortas's notes of the Justices' Conference stated that White, Stewart, Harlan, and Black voted to affirm the lower court

[14] *Katz v. United States*

decision, whereas Fortas, Brennan, Douglas, and "Chief" [Warren] voted to reverse.[15] Besides Stewart's vote to affirm the lower Court's decision, the divide almost matched the recent decision in *Berger v. New York* with White, Harlan, and Black voting in dissent. Although Stewart wrote a concurring opinion in *Berger*, he stated directly that he agreed with those in dissent on the constitutionality of the New York statute. More importantly, he added in his concurrence that "in order to hold this statute unconstitutional...we would have to either rewrite the statute or rewrite the Constitution. I can only conclude that the Court today seems to have rewritten both."[16]

According to Supreme Court procedures, in the event of a tie vote, the lower Court's ruling is upheld.[17] However, the Justices recognized the importance of this case to determine the constitutionality of procedures in light of changing technology and legal precedents. Although no formal records are kept during the secret conference sessions, Laurence Tribe, former law clerk for Justice Potter Stewart, recalled that Stewart requested a delay in the opinion, thus providing the Justices an opportunity to fully consider their colleague's points of view in the matter of *Katz*.[18] Clearly, the decision in

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[15] Box 57, Folder 1179, Abe Fortas Papers (MS 858), Manuscripts and Archives, Yale University Library

[16] *Berger v. New York*

[17] Administrative Office of the U.S. Courts, "Supreme Court Procedures," United States Courts, last modified March 16, 2019, accessed January 4, 2021, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1.

[18] David A. Sklansky, "A Postscript on Katz and Stonewall: Evidence from Justice Stewart's First Draft," *U. C. Davis Law Review* 45 (April 9, 2012): 1490, accessed

Berger was fresh in Stewart's mind when he initially voted to affirm the lower Court's decision and wanted time to evaluate the arguments.

The Supreme Court in 1967 under Earl Warren's leadership contained a diverse group of legal experts with various political and social ideologies. Although seven justices eventually joined the majority opinion, several concurring opinions were also added, which not only shows the separate reasoning behind their decisions, but also their underlying beliefs regarding the interpretation of the Constitution. This combination of ideologies paired with a society ripe for social change created the perfect environment for judicial activism.

Although not the longest serving member of the Court at the time of *Katz*, Earl Warren took precedence as the Chief Justice. Warren's initial vote to reverse the lower Court's decision was consistent with his record of supporting a judicially active Court. Warren started his career as a District Attorney in Alameda County, California, later rising to become the Attorney General and then Governor of California from 1943 to 1953. During World War II, Warren followed President Eisenhower's Executive Order 9066, recommending the internment of Japanese Americans. He later regretted his actions noting "it was not in keeping with our American concept of freedom and the rights of citizens."[19] Warren served several terms as the Governor of California, mostly

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March 6, 2021, https://lawreview.law.ucdavis.edu/issues/45/4/Articles/45-4_Sklansky.pdf.

[19] Earl Warren, *The Memoirs of Earl Warren* (Garden City, N.Y.: Doubleday, 1977), 149.

for his centrist, fiscally conservative, but socially progressive policies. He sought the Republican nomination for President in 1952; however, Eisenhower received the nomination with support of the junior Senator from California, Richard Nixon. President Eisenhower subsequently made Richard Nixon his Vice President and granted Warren a recess appointment to the Supreme Court in 1953, upon the death of Chief Justice Fred Vinson.[20] Many claim that Warren's political and ideological philosophy transitioned toward a more liberal focus while on the Court, although Warren insisted that his "views and actions in later years are but an outgrowth of the earlier ones."[21] This growth, however, in a time of social turmoil of the 1960s, allowed for sweeping changes to Constitutional law. Although many are critical of this activism, Francis X. Beytagh, Jr., a former law clerk for the Chief Justice, explained that it was one of Warren's best qualities. He maintained that the "combination of moral strength and liberal open-mindedness is an extraordinary one, and Warren's sense of morality - his instinct for the rightness of things- was surely not lost on those who sat on the bench and decided cases with him."[22] Regardless of the opinions of his legacy, as Chief Justice, Warren definitely

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[20] Alden Whitman, "Earl Warren, 83, Who Led High Court in Time of Vast Social Change, Is Dead," *New York Times* (New York City, NY), July 10, 1974, Obituary, accessed December 27, 2020, https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/bday/0319.html.

[21] Warren, *The Memoirs,* 5.

[22] Francis X. Beytagh, Jr., "On Earl Warren's Retirement: A Reply to Professor Kurland," *Michigan Law Review* 67, no. 8 (June 1969): 1481, accessed December 26, 2020, https://www.jstor.org/stable/1287480.

guided the Supreme Court in a more activist role during his tenure. Although many scholars claim that Warren's leadership pushed the Court toward activism, it was not so much in his overt authority, but his consistency toward supporting opinions that legislate from the bench. Following his retirement from the bench in 1969, the New York Times reported that both sides of the political spectrum agreed on the functioning and role of the Warren Court. "It has been said on both sides that the Supreme Court acted too much like a legislature and not enough like a court – that it translated its own notion of wise policy into constitutional dogma."[23] Warren's support of reversal did not falter from his initial vote.

The next to vote was Hugo Black, the Justice with the most seniority during the Warren Era. Black's initial vote created the first even split, as he voted to affirm the lower Court's decision. He joined the Court in controversy in 1937, and served until his retirement in 1971. A Senator from Alabama, former member of the Ku Klux Klan (KKK),[24]and a supporter of President Roosevelt's New Deal and Court Packing policies, Roosevelt rewarded Black's loyalty with his first nomination to the Supreme Court. Although his KKK activities caused outrage after confirmation by the Senate, Black gave

[23] Fred P. Graham, "Warren Era Ends Today after 16 Years of Reform," *New York Times* (New York, NY), June 23, 1969, 24, accessed May 29, 2021.

[24] Thad Morgan, How an Ex-KKK Member Made His Way Onto the U.S. Supreme Court, History.com, last modified October 28, 2018, accessed January 3, 2021, https://www.history.com/news/kkk-supreme-court-hugo-black-fdr.

an "unprecedented" radio address[25] to explain the reasoning for his misguided membership in the KKK and subsequent resignation. Regardless of KKK participation, most of his Supreme Court decisions reflected his support for civil rights. However, at times, Black stood separate from his judicial brothers as he differed ideologically in his literal interpretation of the Constitution.[26] His focus on the actual words of the Constitution and the limitations it imposes was the foundation to his disagreements with both liberal and conservative Justices. Black "unhesitatingly sets himself against federal judicial intervention whenever he is unable to find in the Constitution or valid legislative authority the basis for such action."[27] Most of his dissents, including *Katz,* reflected his focus on judicial restraint and rejection of judicially-created legislation. Justice Harlan, one of Black's ideological opponents during the Warren era, best emphasized Black's philosophy when he expressed, at his thirtieth anniversary on the Court that "[n]o Justice, whether coming from the political arena or otherwise, has worn his judicial robes with a keener sense of the limitations that go with them."[28] Black remained the lone vote to

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[25] Performed by Hugo L. Black, aired January 2, 2021 (first broadcast October 1, 1937), accessed January 2, 2021, https://shows.acast.com/ipse-dixit/episodes/from-the-archives-92-hugo-black-radio-address-1937.

[26] Brian P. Smentkowski, ed., "Hugo Black: American Jurist," Encyclopedia Britannica, last modified September 21, 2020, accessed December 27, 2020, https://www.britannica.com/biography/Hugo-L-Black.

[27] John M. Harlan, "Mr. Justice Black. Remarks of a Colleague," *Harvard Law Review* 81, no. 1 (November 1967): 2, accessed January 3, 2021, https://www.jstor.org/stable/1339216?seq=1.

[28] Harlan, "Mr. Justice Black," 2.

affirm the lower Court's decision in *Katz*, basing his decision on what the Fourth Amendment does not specifically include.

Next in line to vote was William O. Douglas, another Justice who served prior to Warren's appointment as Chief Justice. Douglas joined Warren in his initial vote to reverse the decision. He was President Roosevelt's fourth nomination to the Supreme Court following Hugo Black, Stanley Reed, and Felix Frankfurter. Both Reed and Frankfurter served during the Warren Era, but retired prior to *Katz*. Douglas had served as a private attorney, part of the faculty of Columbia and Yale Law Schools, and as a political appointee to the Securities and Exchange Commission (SEC). A keen supporter of Roosevelt's New Deal policies earned him the nomination to the Supreme Court. He heavily promoted civil rights and individual liberties.[29] Christopher Tomlins argues in *The United States Supreme Court: The Pursuit of Justice* that Douglas's decisions focused on the "social, political, and economic context,"[30] with little attention to determining legality based on precedent. His 1965 majority opinion in *Griswold v. Connecticut*, for example, determined that the guarantees of the Bill of Rights established a right to privacy.[31] Although Douglas often voted in line with Justice Black, especially on civil rights, the right to privacy was an area of contention between them, made evident

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[29] "William O. Douglas," Oyez, accessed January 8, 2021, https://www.oyez.org/justices/william_o_douglas.

[30] Christopher L. Tomlins, *The United States Supreme Court: The Pursuit of Justice* (Boston: Houghton Mifflin, 2005), 476.

[31] *Griswold v. Connecticut* 381 US 479 (1965)

in the rulings beyond *Griswold*, such as *Katz*. Douglas's final vote in *Katz* upheld his strong belief that electronic surveillance is fundamentally intrusive of an individual's right to privacy and must be heavily scrutinized.

Next in seniority was John Marshall Harlan, who brought the Court back to a tie in voting to affirm the lower Court's decision. Harlan was President Eisenhower's second nomination to the Supreme Court, following Earl Warren. Harlan's grandfather, of the same name, served on the Supreme Court around the turn of the century, causing most to refer to the younger Justice as John Marshall Harlan II. Harlan had previously served as a private attorney, an Assistant United States Attorney for the Southern District of New York, a military officer during World War II, and a judge on the United States Court of Appeals for the Second Circuit. Harlan was not free from controversy as he was an original director of the Pioneer Fund, which had its origins in the popular Eugenics movement in the early part of the 20th century.[32] Regardless, Harlan's conservative jurisprudence appealed to Eisenhower and allowed him to start the transition of the Supreme Court away from Roosevelt's and Truman's packed liberal mechanism.[33] Harlan relied on original intent and judicial restraint, believing that change should be handled by the elected representatives. He argued that "the Constitution is not a panacea

[32] J. Philippe Rushton, "The Pioneer Fund and the Scientific Study of Human Differences," *Albany Law Review* 66 (2002): 213, 215, accessed 2002, https://philipperushton.net/wp-content/uploads/2015/02/The-Pioneer-Fund-and-the-Scientific-Study-of-Human-Differences-2002-by-John-Philippe-Rushton.pdf.

[33] "John M. Harlan II," Oyez, accessed January 2, 2021, https://www.oyez.org/justices/john_m_harlan2.

for every blot upon the public welfare nor should this court ... be thought of as a general haven of reform movements."[34] At his more moderate stance, Harlan joined the majority on securing civil rights; however, he tended to reject limits on police procedures. This dichotomy is apparent in his concurring opinion in *Katz.* He was one of three, joining Stewart and White, who switched from affirming the lower Court's decision to joining the decision for reversal. Most of Harlan's previous opinions focused on precedents and allowing the elected legislatures to revamp policies; however, he created a concurring opinion in *Katz* that not only changed the actual meaning of the Fourth Amendment, but also instituted a judicially-created law.

William J. Brennan, Jr., Eisenhower's nomination for Associate Justice in 1956, initially voted with Warren and Douglas to reverse the lower Court's decision. Eisenhower nominated Brennan to draw votes away from the Democratic party in his reelection bid. Eisenhower based his strategy on expectations that Democrats would reward his willingness to nominate a candidate with Brennan's personal characteristics, a liberal and a Catholic, with their vote.[35] Brennan had a solid resume prior to his nomination. Following his graduation from Harvard Law School, he served as a private attorney, an officer in the Army during World War II, and an Associate Justice of the

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[34] Educational Broadcasting, "John Marshall Harlan," The Supreme Court, last modified 2007, accessed February 8, 2021, https://www.thirteen.org/wnet/supremecourt/rights/print/robes_harlan.html.

[35] Stephan J. Wermiel, "The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record," *University of Minnesota Law School Scholarship Repository* 11 (1995): 516, accessed February 2, 2021, https://core.ac.uk/download/pdf/217203783.pdf.

New Jersey Supreme Court.[36] Ultimately, his nomination did little to help Eisenhower build a more conservative Supreme Court, as Brennan helped usher in a new liberalism which looked beyond judicial precedents and rule in favor of individual rights. Although Brennan embodied judicial activism throughout his tenure, especially during the Warren Era, he noted in his 1988 dissent in *Boyle v. United Technologies Corporation* that he "would leave that exercise of legislative power to Congress, where our Constitution places it."[37] These comments come in response to a shift in the Supreme Court's ideology when more conservative principles steadily replaced Brennan's judicial activism.

Joining Black and Harlan in affirming the lower Court's decision, Eisenhower's final appointment, Potter Stewart, brought the initial vote back to a tie. Following Stewart's graduation from Yale Law School, he served as a defense counsel in the Naval Reserves during World War II, as an attorney in private practice, an elected official on the Cincinnati City Council, and as a Justice on the United States Court of Appeals for the Sixth Circuit.[38] Although Stewart normally followed a policy of judicial restraint, he tried to avoid being labelled as a conservative or liberal. He believed that the labels limited Justices in their judicial duties. He remarked that he would "like to be thought of

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[36] "William J. Brennan, Jr.," Oyez, accessed February 1, 2021, https://www.oyez.org/justices/william_j_brennan_jr.

[37] *Boyle v. United Technologies Corporation* 487 US 500 (1988)

[38] "Potter Stewart," Oyez, accessed January 2021, https://www.oyez.org/justices/potter_stewart.

as a lawyer—a good lawyer, looking at every case under the Constitution and the law."[39] Stewart's law clerk at the time of *Katz* agreed that Stewart's political philosophy was not far from his liberal ideology in that Stewart viewed that "electronic surveillance would be treated as a search…[however, he] thought that [the Court was] stuck with the precedent [of invading a constitutionally protected place], and he was very much somebody who believed in precedent."[40] While on the Supreme Court, Stewart pushed for "sound judicial administration [at the federal level]...minimizing the mandatory docket of this Court."[41] Stewart's interpretation of the constitution in *Katz* breaks from his reliance on following precedent; however, it fulfilled his goal of addressing the requests for relief at the federal level. Stewart eventually authored the majority opinion for reversal in *Katz*, after initially voting to affirm the lower Court's decision.

Bryon White, President Kennedy's 1962 nominee, voted with Black, Harlan, and Stewart to push the Court toward affirming the lower Court's decision. White was one of

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[39] Robert Bendiner, "The Law and Potter Stewart: An Interview with Justice Potter Stewart," American Heritage, last modified December 1983, accessed December 30, 2020, https://www.americanheritage.com/law-and-potter-stewart-interview-justice-potter-stewart.

[40] Christina Pazzanese, "Interview with Laurence Tribe," The Harvard Gazette, last modified June 24, 2020, accessed February 8, 2021, https://news.harvard.edu/gazette/story/2020/06/laurence-tribe-speaks-on-his-career-in-constitutional-law/.

[41] James A. Gazell, "Comment: Justice Potter Stewart's Philosophy of Federal Judicial Administration," *Case Western Reserve Law Review* 32, no. 2 (1982): 442, accessed February 2, 2021, https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2371&context=caselrev.

two Supreme Court nominations that Kennedy made while in office. His other nomination, Arthur Goldberg, served for only three years before stepping down to become the Ambassador to the United Nations. White brought a varied experience to the Supreme Court. Following graduation from the University of Colorado and finishing as runner up to the Heisman Trophy, White was drafted into the National Football League (NFL). While still in the NFL, White attended Yale Law School. He served as an intelligence officer during World War II and then finished his law degree following release after the war. White, like most future Justices, spent time as an attorney in private practice. Supporting Kennedy's bid for presidency, White was rewarded with an appointment as the United States Deputy Attorney General. He then ascended into the Supreme Court.[42] He was a bitter opponent of substantive due process, an ideal to respect the civil rights of individuals, even if not directly mentioned in the Constitution, which may account for his initial vote for affirmation in *Katz* and his dissenting opinion in *Berger*. White maintained that substantive due process created "judge-made constitutional law."[43] Although White's philosophy is normally categorized as a judicial pragmatist, he focused on social contexts. Considering the social revolution of the 1960s, relying on social contexts led White to several unpredictable concurring decisions, including his change to reverse the lower Court's decision in *Katz.*

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[42] "Byron R. White," Oyez, accessed January 2021, https://www.oyez.org/justices/byron_r_white.

[43] Lyle Dennison, "Justice Byron White: A Retrospective," Constitution Daily, last modified October 16, 2020, accessed February 4, 2021, https://constitutioncenter.org/blog/justice-byron-white-a-retrospective.

The last to vote was Abe Fortas, who brought the Court back into a tie by siding with Warren, Douglas, and Brennan. In 1965 Lyndon B. Johnson nominated his friend, Abe Fortas, to the Supreme Court. Fortas's individual successes prior to his appointment are noteworthy. After graduating from Yale, he accepted a highly coveted teaching position at the University. He later worked within politically appointed positions in the Public Works Administration, the SEC, and the Department of the Interior.[44] Most notably, during his time as a trial lawyer, he defended Clarence Earl Gideon in 1963, winning the landmark case guaranteeing a right to counsel in *Gideon v. Wainwright.*[45] This unanimous case was decided by the seven Justices who would eventually serve as Fortas's colleagues following his confirmation to the Supreme Court in 1965. Fortas's philosophy heavily supported a liberal activism, especially in extending constitutional protections to juveniles. He would only serve on the Supreme Court for four years. [46]

The final member of the Court at the time of *Katz* was Thurgood Marshall. Marshall, who resigned from the Office of the Solicitor General to accept the nomination and become the first African-American to serve on the Supreme Court, recused himself

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[44] "Abe Fortas," Oyez, accessed February 9, 2021, https://www.oyez.org/justices/abe_fortas.

[45] *Gideon v. Wainwright* 2 US 335 (1963)

[46] Linda Greenhouse, "Ex-Justice Abe Fortas Dies at 71; Shaped Historic Rulings on Rights," *New York Times*, April 7, 1982, sec. A, accessed February 2, 2021, https://www.nytimes.com/1982/04/07/obituaries/ex-justice-abe-fortas-dies-at-71-shaped-historic-rulings-on-rights.html. Fortas' resignation came as a result of increasing concerns regarding conflicts of interest, which could have led to impeachment proceedings.

from *Katz*. His recusal is significant, not in the reasoning behind it, but in how the decision-making body was relegated to an even number of eight Justices. The diversity of the ideologies on the Court left a distinct possibility of the Court remaining split.

In the years leading up to *Katz*, the Warren Court had already started its quest into judicial activism. It tweaked constitutional interpretations and instituted judicially-created mandates regarding civil rights as well as various criminal procedures including a right against self-incrimination for individuals[47]and police,[48] due process for juveniles,[49] and privacy rights.[50] However, two cases, *Berger v. New York* and *Smayda v. United States,* set a foundation for the key issues presented in *Katz*, although *Smayda* had its Writ of Certiorari denied by the highest Court. The line of reasoning in these decisions guided the various opinions in *Katz*.

Berger v. New York, resolved in early 1967, involved the use of eavesdropping in an office to gather evidence of bribery. The Court ruled that New York's statute was too broad, which resulted in a trespass into a constitutionally protected area. In Justice Clark's majority opinion, the Warren Court extended the protections of the Fourth Amendment to include conversations, and mandated that any use of an electronic device

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[47] *Miranda v. Arizona* 384 U.S. 436

[48] *Garrity v. New Jersey* 385 U.S. 493

[49] *In re Gault* 387 U.S. 1

[50] *Griswold v. Connecticut*

to intercept conversations would be classified as a "search.[51] Three Justices dissented including Justices Black, Harlan, and White. Justice Black, an absolutist regarding the Constitution, disagreed with the majority because the "literal language [of the Fourth Amendment] imports tangible things, and it would require an expansion of the language used by the framers, in the interest of 'privacy' or some equally vague judge-made goal, to hold that it applies to the spoken word."[52] Additionally, Justice Harlan argued that the Court pushed judicial activism because "newly contrived constitutional rights have been established without any apparent concern for the empirical process that goes with legislative reform."[53] Conversely, Harlan replicated what he is so critical of in *Berger* in *Katz* by constructing his own version of constitutional rights. Justice White added that "the Court appears intent upon creating out of whole cloth new constitutionally mandated warrant procedures carefully tailored to make eavesdrop warrants unobtainable."[54] The addition of the intangible conversations to the protections of the Fourth Amendment significantly limited law enforcement's use of electronic devices in warrantless interceptions of criminal activity. The issues brought forth by both the concurring and dissenting opinions reappeared in the discussions on *Katz*.

In the year prior to *Katz*, a Writ of Certiorari was denied in the case of *Smayda v. United States*. The backgrounds of *Katz* and *Smayda* differ, as *Smayda* revolved around

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[51] *Berger v. New York*

[52] *Berger*

[53] *ibid.*

[54] *ibid.*

homosexual activity in a public bathroom and federal surveillance; however, the Fourth Amendment issues regarding federal policing and privacy were similar. In *Smayda*, the majority opinion determined that the petitioners do not have a right to privacy in a public restroom. Circuit Judge James Browning argued in his dissent that "the Fourth Amendment protects such privacy as a reasonable person would suppose to exist in given circumstances…[and] it was precisely this 'modicum of privacy' which the officers invaded."[55] Although this case was not argued before the Supreme Court, Browning's dissent plays a significant role.

As the initial vote in *Katz* was tied and the announcement of the decision was delayed, Justice Stewart discussed the points of law and opinions of the Justices at the Friday conference with his law clerk, Laurence Tribe. Stewart did not think it would be possible to design an opinion that would break the tie, but Tribe had confidence he could develop a position that would persuade the other Justices to reverse the lower Court's decision. Stewart tasked him to draft an opinion that could draw his colleagues into a consensus.[56] This assignment to draft a rough draft was not an unusual practice within the Supreme Court. Most Justices rely on clerks to produce their initial drafts, using the information and guidance from the Justices' Conference.[57] This initial draft is usually edited by the Justice prior to circulating to the other Justices for review. Once sent for

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[55] *Smayda v. United States*

[56] Pazzanese, "Interview with Laurence Tribe."

[57] Edward Lazarus, *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court*, penguin ed. (New York: Penguin Books, 1999), 271.

review, the Justices may offer suggestions for changes, choose to join the opinion, or dissent. Stewart broke from this as he circulated his opinion as a memorandum, "in which he only spoke for himself."[58]

Tribe produced a cohesive opinion that addressed the various points of contention in the case and redirected Stewart away from his initial conservative view to affirm the decision. Stewart's original copy of the first draft shows that he clarified several points on constitutionally protected places, a constitutional right to privacy, and the "erosion" of previous decisions in hand-written additions.[59] Although the basic structure of Tribe's draft stood, Stewart added a significant change to include the statement that "the Fourth Amendment protects people, not places."[60] What was removed in the circulated memorandum was a reference to *Smayda*. David Sklansky contends in his article "A Postscript on *Katz* and *Stonewall*: Evidence from Justice Stewart's First Draft" that Tribe borrowed heavily from Circuit Judge Browning's dissent in *Smayda* to address issues of privacy, not only parroting Browning's phrase about the reasonable expectation of privacy, but also using the citation as further evidence. However, Stewart indicated that he does not believe "the Constitution recognized a general right to privacy, but the Fourth Amendment encompasses larger protections beyond privacy."[61] It is unknown what

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[58] Sklansky, "A Postscript on Katz," 1490 (footnote 18).

[59] Box 48, Folder 423, Potter Stewart Papers (MS 1367), Manuscripts and Archives, Yale University Library

[60] Box 48, Folder 423, Potter Stewart Papers.

[61] Sklansky, "A Postscript on Katz," 1491.

Stewart's true reasoning for removing the connection to *Smayda*, whether he took issue to its connection to homosexual activity or its heavy emphasis on constitutional rights to privacy. Regardless, Sklansky maintains that even though the Court may have denied the Writ of Certiorari for *Smayda*, the opinion in *Katz* addressed the key concerns. Stewart may have specifically deleted the reference to *Smayda*, but his focus on the Fourth Amendment protecting people was significant.[62]

The memorandum circulated by Stewart received several suggestions for clarifications as well as comments on topics that some believed should be avoided in the opinion, in order to not "volunteer"[63] additional information. Although Justice Marshall took no part in the decision, he received Stewart's memorandum. He marked each page with the notation - "TM out."[64] However, his clerk, Peter Van Norden Lockwood, made an annotation on the document stating, "Although we are out of this case, I think this is an excellent opinion. It would be a shame if the intransigence of EW [Earl Warren], AF [Abe Fortas], WJB [William J. Brennan], and WOD [William O. Douglas] results in an affirmance by an equally divided court."[65] Referring to the practice that a tie vote affirms the lower court's decision, Lockwood was cognizant that persuasion would be needed to break the deadlock and prevent a default to the lower-case ruling. Compromise would be

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[62] Sklansky, "A Postscript on Katz," 1489, 1492.

[63] Box 57, Folder 1179, Abe Fortas Papers

[64] Box 41, Folder 1, Thurgood Marshall Papers, Manuscript Division, Library of Congress

[65] Box 41, Folder 1, Thurgood Marshall Papers.

a necessary component. Some scholars argue that this type of persuasion is typical in a judicially active Court. Lockwood's remarks indicate that the Court engaged in "individualistic, ends-oriented, and pragmatic deal making that…[was] a new form of legislating from the bench."[66]

The critique of Stewart's memorandum pertained to three main areas for clarification or elimination. Justice Stewart, as the author of the opinion, could choose to incorporate or ignore suggestions. The three discordant issues centered on the process of giving credence to the government's contentions regarding the facts of the case, Stewart's word choice rejecting a constitutional right to privacy. and when a warrant is required. The first two issues were easily remedied within the editing process. However, colleagues noted that providing traction to the government's arguments about when a warrant is required could "establish probable cause [which] could invite seriously mistaken conclusions by the Solicitor General, the Department of Justice, and the FBI,"[67] The warrant question was an area where several Justices disagreed.

One of the main topics presented in the oral arguments concerned whether a warrant would have been obtainable, which would mitigate the government's warrant requirements under the Fourth Amendment. Martin mentioned that it was not clear

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[66] Bruce G. Peabody, "Legislating from the Bench: A Definition and a Defense," *Lewis and Clark Law Review* 11, no. 185: 208, accessed June 1, 2021, https://law.lclark.edu/live/files/9581-lcb111peabodypdf.

[67] Box 48, Folder 424, Potter Stewart Papers (MS 1367), Manuscripts and Archives, Yale University Library

whether a warrant could have been issued based on the definition of property, even though *Berger* ultimately protected conversations. David Levitt, Abe Fortas's law clerk, wrote his thoughts on the circulated copy of the opinion concerning the inconsistencies in rules concerning warrants. He noted, "I'm not sure... that a warrant could have [been] issued under *Berger*, but I haven't gone into that question very deeply."[68] Reviewing the multiple revisions to Stewart's draft, it is clear he purposely avoided stating whether a warrant could have been obtained in accordance with *Berger* and Rule 41 that may have provided an exception for future law enforcement to acquire warrants.

Further, Fortas wrote a memo to Stewart in support of Byron White's suggestion to include a warrant exception for national security. He noted that it would be beneficial to "insert something reserving national security cases in which maybe the Constitution would permit electronic espionage on authorization by the President or Attorney General."[69] In an attempt to find consensus, Stewart buried his reluctance to provide decisive guidance on the national security issue in a footnote. Footnote 23 states, "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving national security is a question not presented by this case."[70] As Stewart did not directly create policy on national security within the

[68] Box 57, Folder 1179, Abe Fortas Papers (MS 858)

[69] Box 57, Folders 1179, Abe Fortas Papers

[70] *Katz v. United States*

majority opinion, this omission led to two concurring opinions by Justice White and Justice Douglas.

Justice White's original draft of his opinion, concurring in part and dissenting in part. His dissenting section, that was scrapped in his final version to create just a concurring opinion, stated, "I would not erect an impenetrable constitutional barrier to eavesdropping or wiretapping without a judicial warrant."[71] This is evidence of White's concerns that Stewart had created a mandated requirement for warrants, and likely one of the reasons White initially voted to affirm the lower Court's ruling. However, in his opinion, White interpreted footnote 23 as not applicable to national security concerns as it had traditionally been authorized by Presidents.[72] This opinion by White ultimately could provide a constitutional authorization for distinctions on the requirement for warrants depending upon the crime. Justice Douglas's concurring opinion notes that it agreed with the majority opinion, but found fault with Justice White's open authorization of warrantless espionage for national security. During the circulation of opinions, Douglas noticed White's focus on the national security issues and tasked his law clerk, William A. Reppy, Jr., to respond.[73] Douglas ultimately challenged the differentiation between crimes and argued that there is "no distinction under the Fourth Amendment between

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[71] Box 115, Folder 11, Byron White Papers, Manuscript Division, Library of Congress

[72] *Katz v. United States*

[73] Box 1414, Folder 1, William O. Douglas Papers, Manuscript Division, Library of Congress.

types of crimes. Article III, § 3, gives 'treason' a very narrow definition, and puts restrictions on its proof. But the Fourth Amendment draws no lines between various substantive offenses."[74] Douglas noted that national security concerns should be held to the same standards as any other type of crime.

Justice Harlan's concurring opinion did not follow the path of his colleagues relating to national security, but created a test to determine what is protected. This new creation is in direct conflict with his dissenting opinion in *Berger* where he noted that it is not the responsibility of the Court to legislate. Although not the majority opinion, Harlan's concurrence became the key takeaway of the case. Citing the majority opinion's protection of "people, not places,"[75] Harlan recognized that without the constitutionally protected place as a norm, it would be difficult to determine what protections are guaranteed or violated. Harlan created a two-part test that includes an individual's expectation of privacy and whether society would agree that the individual's expectation was reasonable. In fact, Harlan actually foreshadowed the impact of this judicially-created rule in his opinion. He noted that "under the Fourth Amendment, warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptions. It will be time enough to consider any such exceptions when an appropriate occasion presents itself."[76] In an effort to create a test to provide consistency, Harlan

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[74] *Katz v. United States*

[75] *Katz*.

[76] *ibid*. Harlan's test is similar to Schneider's proposal during oral arguments. Schneider noted in his interview with the author (Aug 2020) that Harlan's test provided a subjective individual's expectation of privacy and then the objective view by society.

ultimately placed the Supreme Court in the role of constantly evaluating different situations to determine if the actions meet the test's requirements.

Justice Black submitted a dissenting opinion in the case, which Fortas's law clerk described as "interesting, though wrong."[77] Black's reasoning is not surprising as it mirrors his dissent in *Berger* earlier in the year. Most significantly, Black argued that he did "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."[78] He referred to the initial construction of the Amendment to protect against government intrusion into private spaces and seizing property, *tangible* property. The majority ruling moved beyond that and granted broad protections to individual privacy rights. Black's initial draft made a significant statement that was left out of the final version. He noted that "I do not say that privacy in some places, at some times, and in some circumstances is not worth protecting...What is needed in solving the many complicated problems in this area is resourceful and imaginative legislation which can provide flexible responses rather than strict Constitutional doctrine changeable in effect

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Schneider stated, "I never thought that this is correct. My view is that the subjective part of the test is not founded. Everybody would say their communication is intended to be private if asked. I advocated a completely objective test. Harlan still put in both. I never thought the subjective portion of the test was meaningful."

[77] Box 57, Folder 1180, Abe Fortas Papers (MS 858), Manuscripts and Archives, Yale University Library

[78] *Katz v. United States*

only by this Court."[79] Although deleted, the significance of this statement is not lost in his final version as it was modified to not only reject the Court's reliance on altering the meaning of the words of the Fourth Amendment, but also to dismiss its continuous use of legislating from the bench. Black was critical of his colleagues' reading into the Amendment and providing new meaning.

From an initial equally-divided split among Justices, *Katz* was decided with a 7-1 majority, with only Justice Black in dissent, reversing the lower Court's decision. This ruling completely ignored precedents and expanded the scope of the Fourth Amendment. Historically, the Fourth Amendment safeguarded against government trespass into protected places. Stewart's statement that the Fourth Amendment "protects people, not places"[80] revised the protections of the Fourth Amendment to include a protection for privacy as well as combining the separate statutes of the Fourth Amendment to require warrants. The actions of this judicially-active majority softened the lines of authority and responsibility between the branches and created new, yet not unambiguous, standards for criminal procedures.

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[79] Box 460, Folder 5, Hugo L. Black Papers, Manuscript Division, Library of Congress.

[80] *Katz v. United States*

Conclusion
The Impact of a Broad Expectation of Privacy

The decision in *Katz* brought about substantial changes regarding personal liberties and police procedures. The opinion directly overruled the trespass doctrine from *Olmstead*, noting that Fourth Amendment protections did not rely on constitutionally protected places. The meaning of the amendment was reinterpreted to include a protected right to privacy, to be measured by Harlan's Reasonable Expectation of Privacy test. Also, the Court had combined the separate clauses of the Fourth Amendment, thus requiring that any type of electronic surveillance required a properly authorized warrant. It did not completely forbid the use of electronic surveillance, to the dismay of social libertarians, but changed the way law enforcement operated. The Warren Court undoubtably engaged in judicial activism by invalidating legal actions of other branches, overruling precedents by reinterpreting the Constitution, legislating from the bench by designating a different test for applicability, removing the clear measures of trespass, and adding new protection for privacy. However, these actions produced unexpected results which neither satisfied the social desire for more individual freedoms nor reduced the number of requests for relief concerning the constantly changing electronic and digital technologies.

Following *Katz*, several broadened protections under the Fourth Amendment became embedded into the fabric of American society and jurisprudence including a limitation on police processes and an increase of protections under a subjective expectation of privacy. The use of judicial activism had immediate and continuing impacts on the American social and political environments. In an effort to rectify

turbulent cultural conditions, the Warren Court legislated social justice from the bench, transformed federalism, and changed legal doctrines under the auspices of a living Constitution in order to achieve social change. In the extensive coverage immediately following the announcement of the decision, James C. Millstone, a Washington correspondent of *the St. Louis Post-Dispatch* summed up the concerns of society about the numerous opinions among the Justices. He noted, "The wide range of viewpoints among the seven Justices who made up the majority suggests that the *Katz* decision amounted to a compromise and may have been a deliberate effort to give the eavesdropping debate a new direction in keeping today's pressures."[1]

Although the social response to the decision was initially positive, some felt that the ruling overly limited law enforcement while others believed it facilitated increased leniency in warrant requirements. In a hand-written letter to Justice Black, the lone dissenter in the case, Mrs. Charles Molander of California stated that the Court "seems to be helping the criminals. We certainly need some stiffer laws or a better interpretation of the present laws."[2] This attitude, although likely ignoring the Court's need to deal with the changing technologies, reflected both a desire to see criminals punished and a need for the laws to be comprehensible to the general public. Additionally, several newspapers across the nation identified that "the Court's ruling is a strong suggestion to state

[1] James Millstone, "3 Supreme Court Decisions Tend to Sanction Some Police Bugging," *St. Louis Post - Dispatch* (St. Louis, MO), December 24, 1967, 21, accessed May 13, 2021.

[2] Box 460, Folder 5, Hugo L. Black Papers

legislatures and the Congress to enact legislation permitting the Courts to approve electronic eavesdropping."[3]

One of the key issues left unresolved in *Katz* concerned national security. Stewart's opinion determined that the case did not warrant a response on national security, and both White and Douglas disagreed on the use of electronic surveillance with regard to national security matters. Congress immediately enacted legislation in June 1968, passing the Omnibus Crime Control and Safe Streets Act of 1968. As part of Public Law 90-351, it identified the procedures for wire-tapping to protect domestic affairs and ensuring the powers of the President were not impeded.[4] By 1972, challenges finally reached the Supreme Court regarding exceptions to wire-tapping procedures. The Court decided in *United States v. United States District Court* that the government was required to obtain warrants for domestic electronic surveillance.[5]

These concerns are still echoed in modern society as the transition of the Fourth Amendment from protecting property in a location to protecting the privacy of a person created more complexities as technology improved. It was clear that the Warren Court needed to provide direction for standards, but by creating a test and not permitting the legislatures to make the laws, the Court convoluted the principle and the legislatures

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[3] "THE LAW: Landmark Decision on Bugging," *Los Angeles Times* (Los Angeles, CA), December 24, 1967, 25, PDF.

[4] "Public Law 90-351: Omnibus Crime Control and Safe Streets Act of 1968." (82 Stat.197; Date: 6/19/1968). Text from: United States Public Laws. Available from: LexisNexis® Congressional; Accessed: 5/13/21.

[5] United States v. United States District Court, 407 U.S. 297 (1972)

became reactive to the changes. The Court's attempt at reframing the Amendment as a "value judgment about the level of privacy that is necessary for a society to be free" struggled to keep up with the ability to handle changing technologies.[6]

The Court's efforts in the 1960s increased a social liberalism that expanded protections under the Constitution and promoted civil rights, but at the same time, heavily restrained both federal and state government agencies through unclear guidance. The biggest failure in the decision made in *Katz* is that the employment of judicial activism did not alleviate the issues associated with new technologies, but put the decision-making ability firmly in the hands of the judiciary. Harlan's test removed a measurable standard that could be administered by law enforcement regarding electronic surveillance and inserted a subjective assessment that ultimately leaves it up to a "judge to decide what qualifies as a 'reasonable expectation of privacy.'"[7] Subsequent and contemporary Supreme Courts struggle to administer justice under the ambiguous tests and subjective standards.

The Justices of the Warren era probably did not foresee the long-term impacts of its judicial activism in *Katz* or the scope of future technological change. By dismissing the constitutionally protected place test, the Warren Court created an environment that

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[6] Michael Vitiello, "Katz v. United States: Back to the Future?," *University of Richmond Law Review* 52 (January 27, 2018): 426, accessed May 13, 2021, https://lawreview.richmond.edu/files/2018/01/Vitiello-522.pdf.

[7] Daniel Woislaw, "With 5G Arriving, the Supreme Court Needs to Rule on What Digital Privacy Means," Pacific Legal Foundation, last modified January 1, 2020, accessed May 7, 2021, https://pacificlegal.org/with-5g-arriving-the-supreme-court-needs-to-rule-on-what-digital-privacy-means/.

would require exceptions as well as assured an increase in challenges to the rule. The Supreme Court saw a substantial influx of Fourth Amendment challenges in the years following the ruling in *Katz*. The common thread from each decision in the subsequent cases was the inability by law enforcement and the public to know what actually constitutes a reasonable expectation of privacy without Supreme Court oversight. In each case, whether it included some type of eavesdropping by law enforcement or third parties, the Supreme Court served as an adjudicator for various situations to decide what actually constituted the right to privacy.[8] The Court remains divided over what constitutes a right to privacy, as shown in the 2018 *Carpenter v. United States*. In a 5-4 split, the Court attempted to explain what constitutes privacy in context with searches in the digital age.[9] Technology creates new spaces. The Supreme Court accepted *Katz* to discontinue its reliance on a constitutionally protected place as a measure for Fourth Amendment violations, but the broad nature of Harlan's test coupled with advances in the digital world conclusively increased the Court's judicial review responsibilities.

One wonders if Harlan anticipated the complexity of his test. Access to his notes, however, proved problematic in a pandemic year. Not only did the Covid-19 pandemic of 2020 limit access to institutional research materials, but Princeton University renovated

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[8] *United States v. White,* 401 U.S. 745 (1971); Justice Black concurred in *United States v. White* for the same reasons he dissented in *Katz*. Justice Harlan dissented noting that "reasonableness must in the first instance be judged in a detached realm." *United States v. Miller*, 425 U.S. 435 (1976); *Smith v. Maryland,* 442 U.S. 735 (1979). *Miller* and *Smith* together developed the third-party doctrine where people have, as quoted in *Smith*, "no legitimate expectation of privacy."

[9] *Carpenter v. United States,* 585 U.S. ___ (2018).

the Seeley G. Mudd Manuscript Library, which houses Justice Harlan's papers, making his personal papers unavailable for research. Assessment of his notes on the case and comments about the development of the two-prong test may yet provide clarity on Harlan's expectations on how to apply the test without the standard of a constitutionally protected place. Research that evaluates Supreme Court search and seizures cases beyond the ruling in *Katz* could also find a solution to the inconsistencies and exceptions initiated by the 1967 decision, a decision that reconstructed the Fourth Amendment to emphasize the privacy of people, not places, creating an on-going need for judicial review to clarify what constitutes a reasonable expectation of privacy in an increasingly complex technological world.

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Chimel v. California, 395 U.S. 752 (1969)

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