The Changing Definition of Search or Seizure

Interpretations of the Fourth Amendment have changed over the last century

by Tom McInnis

There is constant tug-of-war over the interpretation of the Fourth Amendment and its prohibition on unreasonable search and seizures. Questions exist, and the answers have real-life consequences for citizens. One of the most crucial and interesting questions is: What constitutes a search or seizure under the Fourth Amendment? The answer has evolved over time and is dependent on the decisions of the Supreme Court. Put simply, the Fourth Amendment has meant different things at different points in our history. This can clearly be illustrated by comparing two cases dealing with wiretapping, decided almost four decades apart, *Olmstead v. United States*, 277 U.S. 448 (1928), and *Katz v. United States*, 389 U.S. 347 (1967).

**Search and Seizure Under Olmstead v. United States**

*Olmstead v. United States* (1928) came to the Court due to the United States government’s desire to prosecute Roy Olmstead and his associates for violation of the National Prohibition Act. Olmstead was not a small-time bootlegger. He employed fifty people, used two sea-going vessels, multiple smaller boats, and had storage facilities throughout Seattle, Washington. The operation brought in about two million dollars a year, which today would be the equivalent of about twenty-five million dollars. The government had difficulty gathering evidence against the conspirators and, in 1924, resorted to tapping into phone lines between Olmstead’s home and the business enterprises he managed. When Olmstead was placed on trial, he unsuccessfully objected to use of the evidence that was gathered through wiretaps claiming, in part, that it violated the Fourth Amendment. After his conviction, Olmstead successfully appealed to the U.S. Supreme Court.

In a 5-4 decision, with the majority opinion written by Chief Justice William Howard Taft, the Court ruled there was no violation of the Fourth Amendment. Chief Justice Taft explained that while letters posted in the U.S. mail were protected by the Fourth Amendment, phone conversations were not, for two main reasons. First, letters were specifically implied in the language of the amendment, as papers, and were carried by the U.S. government, which was bound by the amendment. Phone conversations, on the other hand, were not covered by the language of the amendment. Chief Justice Taft also pointed out that telephone and telegraph lines are not controlled by the government. Furthermore, since there was no trespass onto the property of Olmstead and evidence was gathered through the sense of hearing, which was not forbidden by the Constitution, there was no search or seizure, so the Fourth Amendment did not limit the government’s actions.

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Tom N. McInnis is a professor of political science at the University of Central Arkansas where he teaches and researches in the American judiciary. He is the author of *The Christian Burial Case: An Introduction to Criminal and Judicial Procedure* (Praeger, 2001) and *The Evolution of the Fourth Amendment* (Lexington Books, 2009).
Justice Louis Brandeis wrote a dissent in Olmstead, which suggested a very different approach to interpreting the Fourth Amendment. Brandeis believed that the purpose of the amendment was to secure those conditions favorable to the pursuit of happiness. For that reason he argued that the amendment created zones of privacy, which the government could not intrude upon without probable cause. He believed in a flexible Constitution that could be adapted to a changing society. Justice Brandeis was concerned that, if unchecked by the Fourth Amendment, the government might, in the future, develop the psychic and related sciences to the extent that it could discover the unexpressed thoughts of people. He pointed out that the Court had not been shy in expanding the powers of Congress to meet the needs of contemporary society and thought that the same should be done to protect civil liberties. For Brandeis, a search or seizure took place anytime the government initiates a process by which it attempts to gather evidence to be used against an individual.

After Olmstead, a search or seizure regulated by the Fourth Amendment involved a two-part inquiry. First, had the government intruded upon an area which was protected by the Constitution? Second, if it had, did the intrusion involve a physical invasion or trespass which was constitutionally impermissible? Olmstead's claim failed on both parts. Phone conversations were not protected by the Constitution, and the government had not trespassed on Olmstead’s property to gain access to them so there was no search or seizure.

Changing Interpretations: Katz v. United States

In Katz v. United States (1967) the Court, under the leadership of Chief Justice Earl Warren, reexamined the issue as to whether a physical trespass of a constitutionally protected area was required to trigger the Fourth Amendment. This was an important question because technology was increasingly allowing governmental intrusion into people’s lives without physical trespass. Katz came before the Court due to the efforts of officers who bugged a phone booth that Charles Katz used in his gambling business. The bug was placed on top of a phone booth that government agents knew was used by Katz. When the recorded conversation was introduced at trial, Katz objected to no avail and was convicted.

In an 8-1 decision, the Court overruled the precedent established in Olmstead v. United States by declaring that evidence that was gained through electronic surveillance of a phone conversation without a warrant violated the Fourth Amendment. Justice Potter Stewart's majority opinion rejected both the constitutionally protected area and trespass approach to the Fourth Amendment which had existed since announced by Chief Justice Taft in Olmstead. Instead, he favored an approach closer to Justice Brandeis’s dissent from Olmstead, which argued that the Fourth Amendment protected zones of privacy surrounding individuals. Justice Stewart’s opinion declared that the Constitution protects people, not places, and made it clear that the Court desired to expand the protections of the Fourth Amendment beyond a literal interpretation of the words. Justice Stewart explained that those things which a person knowingly exposes to the public are not protected by the Fourth Amendment, but that those activities which a person seeks to

Federal agents pour alcohol down a sewer following a search during Prohibition in 1921. Photo courtesy of the Library of Congress.
preserve as private, even in an area accessible to the public, may be protected by the Constitution. Stewart explained that, even though Katz could be seen in the phone booth, the fact that he shut the door meant that he expected privacy. The Court went on and ruled that future use of wiretaps would be unreasonable without a warrant unless the circumstances fit into one of the established exceptions for a warrant.

Justice Stewart’s majority opinion provided little analysis as to how later courts should determine when a person’s individual privacy should be protected against governmental intrusion under the Fourth Amendment. Justice John Harlan’s concurring opinion in Katz has, as a result, proven to be more influential to later courts, which have applied Katz to other factual situations. Justice Harlan reasoned that the Fourth Amendment would provide a person protection from unreasonable search and seizure when two requirements were met. The first was that the person had to demonstrate an actual (subjective) expectation of privacy in their activity. Second, society had to be willing to accept the privacy expectation as reasonable. Beyond this statement, Justice Harlan left open the precise methods by which the Court should determine when a person had developed an expectation of privacy or how it would be determined if society would recognize that expectation as reasonable.

The Warren Court, which was well known for its support of civil liberties, willingly rejected past precedent and used Katz to enlarge what constituted a search or seizure under the Fourth Amendment. As a result, wiretapping was now considered a search. Katz’s change in approach had the potential to enlarge the protections of the Fourth Amendment beyond those things specifically mentioned or directly implied in the amendment to include a wide variety of other human activities. Under Katz, when a person’s actions have a privacy interest that the Court finds society is willing to accept as reasonable and the government engages in activity to discover those actions, it is a search under the Fourth Amendment requiring a warrant unless it fits into one of the exceptions to the warrant requirement.

**Effects of Katz v. United States**

Scholars agree that Katz was meant to expand the boundaries of the Fourth Amendment and make it more flexible for purposes of protecting citizens against ever-increasing and invasive methods of surveillance. It seemed that the Court had embraced the spirit of Justice Brandeis’s dissent in Olmstead. Today, scholars are in agreement that Katz has not lived up to its potential of dramatically expanding the protections of the Fourth Amendment. The essential holding of Katz, that wiretapping is illegal without a warrant, still stands.

Despite this, the post–Warren Courts have used Justice Harlan’s concurring opinion to halt the expansion of the protections of the Fourth Amendment. Justice Harlan instructed the Court to ask two questions regarding whether an activity was protected by the Fourth Amendment: (1) Did the person have an actual expectation of privacy in their activity; and (2) Was that expectation one that society would recognize as reasonable? This determination is supposed objective, but without a standardized method for determining what personal expectations of privacy society is willing to accept, the conclusion has been dependent on the shifting social and political views of the members of the Court. Due to their desire to prevent crime through more aggressive police tactics and their dislike of the exclusionary rule, which prevents illegally gathered evidence from being used at trial, the Burger and Rehnquist Courts relied on the language of Katz to actively narrow the scope of the Fourth Amendment.

The post–Warren Courts have applied the reasoning and language of Katz to enlarge the area of permissible...
governmental activity and narrow what constitutes a search or seizure under the Fourth Amendment by using two primary methods. First, by ruling that even though a person has an expectation of privacy, it is not reasonable for society to respect that expectation. The Court has found a number of reasons to explain why it is not reasonable for society to respect an individual’s expectation of privacy. One has been to declare that the individual took on an assumption of risk by exposing his or her activities to others. In *United States v. Miller*, 425 U.S. 435 (1976), the Court ruled that because a person willingly shares bank records with their bank, individuals assume the risks that the bank will not share the records with others, so those records are not protected by the Fourth Amendment. The Court has also found that society would not be willing to respect a person’s expectation of privacy when the emerging technology under scrutiny merely enhances the government’s ability to observe what is already visible to the government and others. An example is *California v. Ciraolo*, 467 U.S. 207 (1986), when the Court ruled that aerial surveillance does not violate the Constitution because anyone can look down from an airplane, therefore the government should not be banned from such activity. In another case involving aerial surveillance, *Dow Chemical Co. v. United States*, 358 U.S. 307 (1986), the Court held that surveillance techniques that do not reveal intimate details about a person’s life, in this case use of highly detailed cameras, do not interfere with a person’s subjective expectation of privacy. In all these scenarios it has become increasingly clear that the Court’s view of the societal reasonableness prong of *Katz* is quite narrow. Expectations of privacy will only be deemed reasonable to the extent to which persons do not expose their activities to other people. In the post–Warren Court era, it does not matter how unlikely it is that a third party would actually engage in the same activity as law enforcement; the mere possibility has been enough for the Court to find a person’s expectation of privacy to be unreasonable and thus rule that no search as regulated by the Fourth Amendment occurred.

The second method by which the framework from *Katz* has been used to enlarge the legitimacy of governmental activity is by linking the definition of whether a search occurred to the nature of the item that is the object of the search. In this regard, the Court has ruled that there is no legitimate expectation of privacy with regard to contraband items. As a result, in *United States v. Place*, 462 U.S. 696 (1983), the Court ruled that even though a person may have an expectation of privacy in luggage, use of drug-sniffing dogs to determine if luggage contained illegal drugs is not a search under the Fourth Amendment because it merely disclosed whether a person was in possession of drugs in which they could have no legitimate expectation of privacy. The end result is that now under *Katz* a search occurs only when individuals have a reasonable and legitimate expectation of privacy in their activities. Therefore, inspections...continued on page 28
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that merely determine if an item is contraband are not defined as a search.

The lesson learned by examining this area of Fourth Amendment jurisprudence is that the meaning of the Fourth Amendment and what constitutes a search and seizure is still evolving and the tug of war continues. The Warren Court, fearing new forms of surveillance, expanded the definition of a search under the Fourth Amendment, whereas, the post–Warren Courts, due to their concerns about crime control, have limited the protection of the Fourth Amendment by narrowing what constitutes a search or seizure. As it has in the past, the debate over the interpretation of the Fourth Amendment will continue to be a point of contention and be subject to change based on the shifting social and political views of the members of the Supreme Court.

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Fourth Amendment Cases from *Olmstead* to *Katz* and Beyond

1928  
*Olmstead v. United States*  
Court rules that phone calls are not protected by the Fourth Amendment.

1949  
*Wolf v. Colorado*  
Fourth Amendment is “incorporated,” and applies to state as well as federal government actions.

1961  
*Mapp v. Ohio*  
Exclusionary Rule is incorporated, and evidence obtained in an illegal search and seizure is not admissible at a state or a federal trial.

1967  
*Katz v. United States*  
Court rules that Fourth Amendment rights were violated when, without a warrant, police wiretapped a public phone booth used by the defendant, Katz.

1968  
*Terry v. Ohio*  
Court recognizes that police, without a warrant, may “stop and frisk” the outside of a suspect’s clothing and search for weapons when they have a reasonable suspicion of illegal activity.

1969  
*Chimel v. California*  
Court rules that when arresting a person in their home, officers may not search the entire home without a warrant, but only the immediate area around the arrestee.

1976  
*United States v. Martinez-Fuerte*  
Court decides that law enforcement officers may conduct immigration checkpoints without obtaining warrants.

1984  
*United States v. Leon*  
Court recognizes a “good faith” exception to the Exclusionary Rule, allowing police to use evidence that was obtained with a warrant issued in good faith, but later found to be invalid.

1985  
*New Jersey v. T.L.O.*  
Court determines that school searches of students are constitutional so long as the search is justified at its inception, and is related in scope to those circumstances.

1986  
*Cirillo v. California*  
Aerial surveillance of property, the Court rules, does not violate the Fourth Amendment.

1990  
*Michigan v. Sitz*  
Court decides that sobriety check-points that briefly detain motorists are constitutional.

2001  
*Kyllo v. United States*  
Court holds that use of a thermal imaging device to monitor radiation of heat from a person’s home requires a warrant.

2002  
*Veronia School District v. Acton*  
Court rules that a school district’s policy requiring students who participate in interscholastic sports to consent to random drug testing does not violate the Fourth Amendment.

2009  
*Safford Unified School District v. Redding*  
School officials, according to the Court, violated defendant Redding’s Fourth Amendment rights when they strip searched her for prescription drugs.

2009  
*Arizona v. Gant*  
Court rules that police may search a vehicle after a recent occupant’s arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search, or that the vehicle contains evidence of the offense of arrest.

2010  
*City of Ontario v. Quon*  
Court holds that the search of a police officer’s text messages sent with a government-issued pager to private parties was reasonable, and did not violate the defendant’s Fourth Amendment rights.
In the end, the historical record does illustrate that the Framers were principally concerned with the abuse of general warrants and writs of assistance by British customs officials. And, we know that the use of specific warrants, based on probable cause on evidence presented under oath before a magistrate and particularly listing the places to be searched and items seized, were not opposed at the founding. However, less is known about the Framers’ concerns about warrantless searches, which did take place when the Fourth Amendment was proposed, although the lack of a professionalized police force—law enforcement consisted primarily of night watchmen and privately paid, part time constables who relied on the assistance of bystanders—tells us something about their frequency and purpose. As a result, our original understanding of the Fourth Amendment only goes so far in shedding light on its applicability to twenty-first century controversies involving government power and individual liberty. ■

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