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Case Brief: Katz v. United States, 389 U.S. 347 (1967)

Charles Katz was indicted by the Federal Government and charged with eight counts of transmitting wagering information from Los Angeles to Miami and Boston. This violated federal law (specifically 18 U.S.C. 1084, "Transmission of wagering information"). At trial, the prosecution introduced recordings of Katz's conversations with others. These recordings were made by the Federal Bureau of Investigation (FBI) using a recording device attached to the outside of the phone booth. The defense objected to the introduction of these conversations, arguing that Katz's Fourth Amendment rights were violated by the attachment of a recording device to the outside of the phone booth. Katz was convicted in district court (the District Court for the Southern District of California), appealed his conviction to the Ninth Circuit Court of Appeals (which upheld his conviction) and then appealed to the United States Supreme Court.

Katz and his legal counsel put two questions before the Supreme Court. The first question was: is a public telephone booth a "constitutionally protected area" in such a way that attaching an electronic recording device to the top of the phone booth violates the right to privacy of the person using the booth. The second question, as formulated by Katz and his attorneys, was: does a "constitutionally protected area" have to be "physically penetrated" before a search and seizure rises to the level of a Fourth Amendment violation. The second question in particular held great significance, as the Court had previously ruled (in *Olmstead v. United States* (1928)) that physical penetration of a constitutionally protected area was required for a Fourth Amendment violation. In *Olmstead*, the Court held that the wiretapping of conversations in that case did not violate the Fourth Amendment, since the eavesdropping took place outside of the defendant's homes or places of business.

The Supreme Court ruled 7-1 in favor of Katz, in the process discarding the doctrine established in *Olmstead*. Justice Stewart wrote the court's majority opinion, in which he was joined by Justices Brennan, Douglas, Fortas, Harlan, Warren, and White. Justice Douglas wrote a separate concurring opinion, in which he was joined by Justice Brennan. Justices Harlan and White also wrote separate concurring opinions. Justice Black, the court's lone dissenter, wrote a separate opinion expressing his dissent from the majority ruling. (Justice Marshall did not participate in hearing the case, and did not cast a vote.)

The majority opinion first asserts that Katz had a justifiable "right to privacy" when using a phone booth; therefore, the government's actions in this case constituted a search and seizure within the scope of the Fourth Amendment. Next, the opinion asserts that the Fourth Amendment does not just protect "tangible objects", things you can touch and feel and pick up, but also intangible objects; for example, the recording of oral statements or phone conversations. Thirdly, the Court rules that "Because the Fourth Amendment protects people rather than places, its reach cannot turn on the presence or absence of a physical intrusion into any given enclosure." The Court goes on to specifically discard the doctrine in *Olmstead*, and that of *Goldman v. United States* (which held that audio amplification devices were a permissible form of surveillance as long as they were only held to a wall, not drilled into one). Finally, the Court suggests that the surveillance of Katz may very well have been "so narrowly circumscribed" that law enforcement could have obtained a warrant; however, since they did not, Katz's Fourth Amendment protections were violated, and the court reversed the conviction.

Justice Stewart, in his majority opinion, first outlines the facts of the case and the questions Katz and counsel put before the court. Justice Stewart rejects the formulation of these questions. First, Justice Stewart says, the phrase “constitutionally protected area” is not a set of magic words that solves all Fourth Amendment problems. Secondly, Justice Stewart rejects the idea that the Fourth Amendment specifically conveys a “right to privacy”, suggesting that protection of “a person's general right to privacy - his right to be let alone by other people” should be left to the States.

Justice Stewart believed that both sides had focused excessively on the “constitutionally protected area” idea, and that this was misleading. Rather, the key point for Justice Stewart was that “the Fourth Amendment protects people, not places”. Things that a person may knowingly expose to the public, even if they are in the privacy of his or her own homes or offices, are not subject to Fourth Amendment protection. “But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” The prosecution argued that Katz lacked a reasonable expectation of privacy since the phone booth had glass doors, and Katz could be observed inside the booth. Justice Stewart rejected this idea: “But what he sought to exclude when he entered the booth was not the intruding eye - it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen.”

Justice Stewart then goes on to consider the prosecution’s argument that their conduct, since it did not involve “physical penetration” of the phone booth, was not a Fourth Amendment violation. He acknowledges the decision (“by a closely divided Court”) in *Olmstead* that such physical penetration, and seizure of tangible objects, was required. However, Justice Stewart goes on to state that the Court’s views have evolved since *Olmstead*, that the Court has extended the protections of the Fourth Amendment to non-tangible objects, and, since the Fourth Amendment protects people (not places), it follows that the absence of “physical penetration” into a given enclosure is no longer sufficient to make a search and seizure Fourth Amendment compliant. He then goes on and specifically states the Court’s doctrines in *Olmstead* and *Goldman*, in the light of subsequent decisions by the Court, are no longer controlling. Further, the government’s activities in using an electronic monitoring device on the outside of the phone booth violated Katz’s privacy rights and constituted a “search and seizure” under the Fourth Amendment.

Having established this, Justice Stewart then moves on to the question of whether the “search and seizure” complied with constitutional standards. He agrees with the government’s assertion that the government had reason to believe there was a strong probability Katz was breaking the law, and that the search was limited in scope (in that the agents only monitored Katz, not other users of the phone booth) and duration. Justice Stewart suggests that there is a strong probability that, if the government had sought a search warrant, it would have been granted; indeed, Justice Stewart cites previous recent rulings of the Court that would have made such surveillance legal with proper judicial authorization. However, because the government did not seek judicial authorization (even though the agents were relying on the doctrines of *Olmstead* and *Goldman*), Justice Stewart holds that the government’s actions were unreasonable, and thus violated the Fourth Amendment. He further points out that none of the usual exceptions (such as a search incident to arrest) apply in this case, and that what the government wants is a brand new exemption to the Fourth Amendment. This, Justice Stewart respectfully declines to grant, believing that it is an unjustified and unwarranted intrusion on the Fourth Amendment.

Justice White, in his concurring opinion, agrees with the majority. However, he suggests that there is an exception to the Fourth Amendment's requirement for a warrant for "national security" cases. Specifically, "We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." Justice Douglas, in his concurring opinion (joined by Justice Brennan) responds specifically to Justice White and rejects the position that the President or Attorney General may authorize electronic surveillance without a warrant. "Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be."

Justice Harlan, in his concurrence, provides a nice summary of the decision:

- An enclosed phone booth is a place where a person has a reasonable expectation of privacy, much like a home and very much unlike an open field.
- Both physical and electronic intrusion into a place where a person has a reasonable expectation of privacy violate the Fourth Amendment.
- "...the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant."

Justice Harlan goes on to outline a two-part test for privacy that he believes expresses the judgment of the Court: a person has to have an actual expectation of privacy, and society has to view that expectation as "reasonable". A person has an actual expectation of privacy in their own home, and society views that as reasonable. On the other hand, a person may have an expectation of privacy standing out in an open field viewing pornography, but society would not view that as reasonable because that person is standing out in the open exposed to public view. Similarly, if a person, in their own home, exposes objects, statements, or other activities to the outside world, it is clear they have no actual expectation of privacy (since they have chosen to expose these things). Justice Harlan does suggest that there may be circumstances under which the Court would hold a warrant was not needed: "warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptions", but the Court can consider specific exceptions when they are presented to the Court.

Justice Black, in his dissent, rejects the idea that wiretapping of conversations constitutes a "search and seizure". It is his opinion that the Fourth Amendment's specification of "persons, houses, papers, and effects" implies that only tangible objects are protected, as does the statement "no warrants shall issue [but those] particularly describing the place to be searched, and the persons or things to be seized". Justice Black further suggests that there is no way to get a warrant "particularly describing the place to be searched, and the persons or things to be seized" for future conversations, since the content of those conversations is unknown; this leads him to the position that since conversations are not tangible objects, and that the Fourth Amendment only protects tangible objects, conversations are not protected. He further asserts that there is no difference between electronic wiretapping and "eavesdropping" (for example, standing under someone's window listening to a conversation) and if the framers of the Constitution had intended to ban eavesdropping, they would have. "Under these circumstances it strikes me as a charge against their scholarship, their common sense and their candor to give to the Fourth Amendment's language the eavesdropping meaning the Court imputes to it today." Justice Black goes on to argue that the Court's previous decisions in *Olmstead* and *Goldman* were proper, and should be given more deference than the current Court is willing to give. Finally, Justice Black makes it clear that he rejects the recent trend of the Court to construe the

Fourth Amendment as conveying a constitutional “right to privacy”. “The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of ‘persons, houses, papers, and effects.’ No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy.”

I fully agree with the majority decision in *Katz v. United States*. It does not strike me as being an unreasonable burden on legitimate law enforcement activity to require a warrant for electronic surveillance. I further reject the idea that conversations are somehow not “tangible” objects and are thus not subject to Fourth Amendment restrictions. Indeed, I completely reject Justice Black’s “intangible objects” position. If a machine was invented that could read and display a person’s thoughts (without invading their body), would Justice Black argue that “thoughts” are intangible objects, and not subject to Fourth Amendment protections? Further, I believe Justice Black’s suggestion that the Founders could have banned “eavesdropping” as a law enforcement tool somewhat questionable: did Justice Black believe that the Founders banned every law enforcement tool they believed was unreasonable, and therefore any tool not specifically mentioned is therefore allowed? Did Justice Black believe that, if new law enforcement tools were invented that the Founders did not foresee (for example, the hypothetical mind reading machine above) those tools were automatically exempted from the Fourth Amendment? Being polite, I will simply say that the reasoning of Justice Black baffles me. Justice White’s deference to the Executive Branch also baffles me somewhat, but this ruling was handed down in 1968: I would be curious to see if Justice White changed his mind after Watergate.