The Impact of Technology and Terrorism on Fourth Amendment Jurisprudence

An Honors Thesis in the Department of Government

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I.

Introduction
The Bill of Rights “is an enumeration of specific freedoms from governmental interference, protected by judicial guardianship.” At the heart of what has come to be judicially protected freedoms lies the Fourth Amendment, a safeguard against government intrusions until reasoning has been established that warrants a specific crime has been or is being committed. The Fourth Amendment affords the American people with not only a freedom but also the guardianship of that freedom:

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.

To what extent, however, is this freedom protected? This question arises from the ambiguity created by the wording of the Fourth Amendment. Such ambiguity has raised numerous questions. For example, are warrantless searches unreasonable? Can intangible items, such as words or images, be “seized?” And what constitutes probable cause? Law enforcement officers and common citizens have very different interpretations as to what level of reasonableness is needed to conduct a search and what level of probable cause is needed to issue a warrant. Following this same logic, the government may assert that different levels of probable cause are needed for surveillance of criminal activity and that involving matters of national security. It is no surprise then, that various interpretations have become a historical point of contention among scholars, lawyers, and, most importantly, judges. Ultimately, the judicial branch must provide interpretive guidance on the substance of the Fourth Amendment.

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2 Ibid.
The rationale behind the Framer’s use of such vague and pithy text in their construction of the Fourth Amendment was the understanding and anticipation of unforeseeable situations and circumstances. Essentially, this left the development of the Fourth Amendment to role of the courts.

The Supreme Court has encountered numerous claims challenging the Fourth Amendment in which the decision hinges solely on the interpretative standard of the text. There is little dispute that the Fourth Amendment was originally written in an era where searches where limited to physical searches; yet through technological advances, law enforcement officers and government officials are able to “search” and “seize” using a variety of innovative methods and machinery. For example, Alexander Bell’s invention of the telephone in 1876 and its continued development into the twenty-first century has provided law enforcement with an opportunity to wiretap telephone lines and other wireless transmissions and subsequently “seize” the words of individuals. Also, the development of the dictaphone and detectaphone allowed officers to amplify and record incriminating conversations without ever entering the target’s premises. Furthermore, if it were not for the distinguished physicist Robert Watson-Watt’s development of the military radar system in 1935, officers would not be able to detect heat emissions from an individual’s home. In sum, the development of technology has posed novel challenges for those who construe the meaning of the Fourth Amendment.

While the development of technology has provided U.S. citizens with easier, more practical methods of efficiency, it has subsequently created a greater potential for danger. For instance, in 1891, the destruction of Chicago’s Ashland Block would have required a large amount of explosive devices; today, all one would need is a backpack. As
demonstrated by September 11, 2001, the threat of technology in the hands of terrorist groups has shaken the foundation of public order and stability. The Bush administration has responded to this threat by passing the USA PATRIOT Act. Critics of the Act, both conservative and liberal, claim it jeopardizes civil liberties at the expense of national security.

Although Fourth Amendment protections have been tested by the development of technology and even more so by the threat of terrorism and the need for national security, its fundamental principles remain unchanged—the safeguard of individual liberty, personal privacy, and the rights of property against arbitrary governmental intrusion.³ The Framers’ awareness stemmed from observing the British government’s abuse of general warrants and writs of assistance to invade the privacy of her citizens. Given these intrusions among others, the Founders were determined to institute protective safeguards. Thus, when considering search and seizure challenges, the courts commonly consider the historical safeguards of the Fourth Amendment.⁴

To determine the context of these historical safeguards, the history of the Fourth Amendment must be reviewed and considered. Thus, in mostly chronological fashion, I will consult the constitutional record and historical scholarship to determine what the Fourth Amendment may have meant in 1791. From there, case law and relevant legislation will highlight emerging Fourth Amendment principles in response to technology-involved litigation.

Beginning with the Court’s first interpretation of the Fourth Amendment in *Boyd v. United States*, the justices held that evidence obtained in violation of the Fourth Amendment protections has shaken the foundation of public order and stability. The Bush administration has responded to this threat by passing the USA PATRIOT Act. Critics of the Act, both conservative and liberal, claim it jeopardizes civil liberties at the expense of national security.

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Beginning with the Court’s first interpretation of the Fourth Amendment in *Boyd v. United States*, the justices held that evidence obtained in violation of the Fourth

³ *Ibid* at 5.
⁴ *Ibid* at 16.
Amendment should be excluded at trial.\(^5\) Yet it was not until 1914 in *Weeks v. United States* that the Court made it a formal requirement.\(^6\) This holding is important because the admissibility of evidence at trial depends largely upon the legality of the search that uncovers that evidence. According to the rule, evidence obtained in an unlawful search is inadmissible at trial. Without the exclusionary rule, therefore, the Court would be far less motivated to litigate many of the following Fourth Amendment questions.

In *Olmstead v. United States* the Court decided that obtaining evidence through wiretapping was not in violation of the Fourth Amendment.\(^7\) In this ruling, which stood for nearly forty years, the Court permitted the warrantless use of a detectaphone to gather incriminating evidence yet struck down the use of a dictaphone because this device constituted “actual physical trespass.” *Olmstead* would not be overturned until 1967 in *Katz v. United States*, in which the justices invalidated the method of obtaining evidence through wiretaps.\(^8\) *Katz’s* theory, whether a “reasonable expectation of privacy” exists and whether society is willing to recognize that expectation as reasonable, has comprised the standard the Court applies when considering Fourth Amendment claims. To date, perhaps the most formidable technological challenge to the *Katz* standard, at least in run-of-the-mill criminal matters, occurred in *Kyllo v. United States*, in which the Court invalidated the use of radar-enhancing technology to conduct criminal surveillance.\(^9\)

It is important to note that the justices declined to extend their holding in *Katz* to issues involving national security, instead deferring to Congress and the president on

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\(^5\) 116 U.S. 616 (1886).
\(^6\) 232 U.S. 383 (1914).
\(^7\) 277 U.S. 438 (1928).
\(^8\) 389 U.S. 347 (1967).
such issues. In *United States v. United States District Court* \(^{10}\) however, the justices asserted that to comply with the strictures of the Fourth Amendment, executive branch officials needed judicial approval for foreign intelligence surveillance.\(^{11}\) The Court was careful to note that domestic security surveillance differed from that involving criminal surveillance. The invitation to distinguish between these two types of surveillances gave rise to the 1978 Foreign Intelligence Surveillance Act, upon which Congress expanded after the terrorist attacks on 9/11 in its passage of the USA PATRIOT Act.

The USA PATRIOT Act has illuminated the inherent tension between liberty and security. The historical progression of cases facing the Supreme Court, whether involving admissible evidence, criminal surveillance, or national security, has pinned the individual’s liberty and safeguard of that liberty against the government’s interest in intruding on that liberty. Technology, in essence, has “blurred the lines” by avoiding the “physical intrusion” prohibited by the Court yet still retaining even the most private details. The purpose of this thesis is to demonstrate how each of the historical cases has not only sculpted the Court’s modern interpretation of the Fourth Amendment, but further demonstrate how applicable these cases are to the Court’s struggle to uphold the Fourth Amendment in the age of innovative technology and heightened national security.

\(^{10}\) 407 U.S. 297 (1972)

II.

Origins of the Fourth Amendment
A. General Warrants, Writs of Assistance and the States’ Response

The delegates at the Constitutional Convention in 1787 had three primary objectives. The first was to distribute the powers between the states and national government. The second involved separating the power granted to the national government into three separate branches and subsequently implementing a system of checks and balances on each of those branches. The last sought to preserve individual rights by determining what limitations would be placed on national and state governments. The first two objectives aimed to “minimize the threat of tyranny from any one government or any single branch of the national government”; the latter “indicated the Framers’ highest ideals—protection of the liberty and property of the individuals.”

The Framers were mostly concerned with enumerating, allocating, and distributing power between the government and state. They only included a few individual rights in the original Constitution: the prohibition of religious tests for holding federal office, the writ of habeas corpus, and prohibitions against ex post facto laws and bills of attainder. The Framers were well aware that states had composed and adopted their own constitution which placed limitations on state and local level governments; thus, they clearly anticipated a minimal role on behalf of the national government and therefore did not feel the need for additional civil liberties. As it is widely known, the absence of a federal bill of rights drew stark criticism from the likes of Thomas Jefferson and Patrick Henry. Ultimately, a compromise was reached between the Federalists and Anti-

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12 Stephens and Glenn at 20.
13 Ibid at 22.
14 Ibid at 22-23.
15 Ibid at 23.
Federalists—the Anti-Federalists agreed to ratify the Constitution in exchange for the addition of a Bill of Rights—and by December 15, 1791, three-fourths of the states had ratified ten of the proposed twelve amendments.

Most of the individual safeguards featured in the Bill of Rights were deeply rooted in English common law long before America declared its independence; many were also found in the states’ bills of rights. The origins of Fourth Amendment limitations on search and seizure are derived from both the experiences of the English and the colonists prior to the American Revolution. In fact, the Fourth Amendment has been called “the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England.”

English political history marks the first stage in development of the Fourth Amendment. Relying on writs of assistance and general warrants, the British Crown retained uninhibited power to encroach upon the privacy of any individual. General warrants were widely used in the mid seventeenth century for “conducting searches for seditious material or as a means of gathering evidence for the prosecution of a wide array of offenses such as smuggling and tax evasion.” The justification behind general warrants stemmed from the notion that British people were merely “subjects” of the Crown, retaining only “limited” rights. Since citizens were property of the King, officers of the Crown did not need judicial approval nor specific warrants to search and seize. The Crown’s power was unbridled and unchecked, for the citizens belonged to the Crown. Thus, general warrants were also arbitrarily used to arrest people allegedly engaging in

16 Ibid at 29.
17 Ibid.
18 Ibid at 31.
seditious or libelous acts. By obtaining a general warrant, English authorities could forcibly enter anyone’s home suspected of obtaining seditious material and search the premises. As a result of this uncurbed power, many English citizens had their privacy intruded upon.19

The response to the Crown’s unchecked power came from English judges in the early eighteenth century through the implementation of policies limiting the lawful scope of searches and seizures. The basis for such policies stemmed from the principle that a man’s house was his castle.20 In 1763, Sir William Pitt emphasized the right to be left alone and free from government trespass in the sanctity of one’s home: “The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail — its roof may shake — the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement.”21 It was not until the 1760s, however, that judges actually began ruling against general warrants. This was the case in two landmark decisions, Wilkes v. Wood (1763)22 and Entick v. Carrington (1765).23

In the first case, under the authority of a general warrant, officers entered the house of John Wilkes, seized his papers, and subsequently authorized his arrest for his contributive efforts to the seditious publication, North Briton. Wilkes, however, refused to submit to Lord Halifax’s warrant; thus, Halifax’s messengers proceeded to search Wilkes’s house.

19 The view that the British were merely the King’s property dissolves with the Revolution and with the writings of Locke, Hobbes, et al.
20 Ibid at 32.
22 19 Howell’s State Trials 1153 (1763).
23 19 Howell’s State Trials 1029 (1765).
At his trial, Chief Justice Charles Pratt held the general warrant, in its entirety, to be illegal “as totally subversive of the liberty and the person and property of every man in this kingdom.”

The second important case actually occurred just before Lord Halifax had issued a warrant for Wilkes’s papers. Similar to Wilkes, John Entick was also an editor of a seditious publication called the *Monitor*, a publication which criticized the practices of the Crown. Entick, like Wilkes, had his papers and books seized under the authority of Halifax’s general warrant. After Entick learned of Wilkes’s success, he brought suit against Nathan Carrington, one of the kings’ messengers. Entick was granted 300 pounds. On appeal, Judge Pratt, recently promoted to the status of Lord Camden, affirmed Entick’s judgment and condemned the practice of issuing general warrants. Lord Camden expounded on his ruling stating that “to rule otherwise would be to throw open the secret cabinets and bureaus of every subject in this kingdom…whenever the secretary of state shall think to charge, or even to suspect, a person to be the author, printer or publisher of a seditious libel.” Both cases were highly publicized in England and ultimately led to Parliament’s exclusion of general warrants unless directly authorized by Parliament itself.

Early American colonists, like English citizens, also sustained intrusive violations of their privacy through “writs of assistance.” Writs of assistance, similar to general warrants, authorized customs officers to “search for any import on which a duty had not

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24 Wilkes would however, later go on and sue Robert Wood for supervising the execution of the warrant. Wood was awarded 1,000 pounds against Wood and would later obtain 4,000 pounds against Lord Halifax. Stephens and Glenn at 33.
27 19 Howell’s State Trials at 1063.
been paid.” Like general warrants, writs contained neither particularity nor specificity of what was to be searched. These writs were justified by the imposed commercial restrictions placed on the colonies by the British government “in an attempt to prevent them from trading with non-English industry.” Following the French and Indian War, Britain sought to impose more strict standards by authorizing officers and subjects of the Crown to assist in their execution. Merchants responded to these strict standards by smuggling illegal imports into the colonies. Writs, therefore, served as an arbitrary means for customs officers to search any house or business at their whim.

The legality of such writs was challenged in Boston in 1761, in what has been called the Writs of Assistance Case, or Paxton’s case. James Otis, who represented sixty-three Boston merchants, delivered a rousing four-hour speech in which he asserted the writs were “putting the liberty of every man in the hands of every petty officer.” He further assailed that the writs of assistance were “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that was ever found in an English lawbook.” Otis would eventually lose the case but the effects of his argument and passionate speech caught the attention of much of the colonial leadership, including John Adams who commented: “Mr. Otis’ oration…breathed into this nation the breath of life…. Every man…appeared to go away, as I did, ready to take up arms against

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28 Stephens and Glenn at 35.
29 Ibid at 34.
30 Ibid at 35.
the writs of assistance.\textsuperscript{33} The \textit{Writs of Assistance Case} has been widely characterized as a crucial event prefacing the American Revolution.\textsuperscript{34}

Writs of assistance largely engendered public disapproval in the pre-revolutionary American colonies. Such intense opposition is well illustrated in the “Malcom Affair” of 1766. Characterized as “the most famous search in colonial America,” Daniel Malcom’s house was searched by Benjamin Hallowell, the Boston Comptroller of Customs, using a writ of assistance after receiving a tip that Malcom had smuggled host of illegal liquors and brandies.\textsuperscript{35} Initially, Malcom complied with Hallowell’s search. When instructed to open a locked cellar door, Malcom erupted with anger and began to threaten Hallowell. When Hallowell’s assistants entered the house to break open the cellar, Malcom violently waived two pistols, threatening to kill the first person that touched the cellar door. This violent activity forced Hallowell and his assistants to withdraw temporarily from the house to obtain a specific warrant. By the time the officers returned to his home with the warrant, a large crowd had gathered outside of the residence in support of Malcom. Malcom had bolted the windows and doors shut, ignoring all entreaties to permit entrance into the house. Since the writ of assistance and specific warrant expired at nightfall, Hallowell and his men withdrew in frustration. Malcom rewarded the crowd who had gathered outside his home with buckets of wine.

The Malcom affair had two consequences. First, the legal doubt that Malcom could be prosecuted propelled Parliament to “reaffirm the authority for writs of assistance in no

\textsuperscript{33} \textit{Ibid} at 107.
\textsuperscript{34} Stephens and Glenn at 38.
\textsuperscript{35} \textit{Ibid} at 39.
uncertain terms in the highly controversial Townshend Revenue Act of 1767.”\textsuperscript{36} The British government also responded to the Malcom Affair by broadening its search and seizure power in Massachusetts as well as in other colonies, leading right up to the beginning of the American Revolution.\textsuperscript{37} The practice was found oppressive by the colonists and subsequently led to further resentment and resistance.

Such resistance was upheld and advocated by many judges. In fact, with the exception of Massachusetts and New Hampshire (who readily followed Massachusetts lead), judges in the majority of the colonies would rarely receive applications for writs, and more times than not, refrained from issuing them.\textsuperscript{38} These judges were notable for their display of courage in resisting the pressure to issue writs of assistance, for as Stephen and Glenn note, these judges “served at the pleasure of colonial governors.”\textsuperscript{39}

This widespread resistance by many judges, along with occasional colonial legislation and clear public disapproval, advanced colonists’ efforts to produce tangible evidence of American opposition to intrusive searches and seizures. Their objective was clear: the forbiddance of general, unspecified, and arbitrary warrants. For example, Maryland’s Declaration of Rights, which closely mirrored that of Virginia, “explicitly used the term ‘illegal’ to describe general warrants, as well as the terms ‘grievous and oppressive.’”\textsuperscript{40} This was also the case in Massachusetts’s constitution, formed in 1780, where the provisions not only condemned general warrants but also introduced the phrasing later

\textsuperscript{36} Ibid at 40.  
\textsuperscript{37} Ibid.  
\textsuperscript{38} Ibid at 41.  
\textsuperscript{39} Ibid.  
\textsuperscript{40} Ibid at 42.
found in the Fourth Amendment—“unreasonable search and seizures.” As it turned out, seven of the original thirteen states placed provisional limitations on searches and seizures in their post-1776 revolutionary state constitutions.

It must be emphasized that there is an important logical connection between these state constitutions, the Founders, and the Fourth Amendment. The first states to adopt new constitutions (i.e., Massachusetts, Virginia, Pennsylvania) largely relied on the historical experiences and exposure to general warrants in England and subsequently the disapproval of such warrants when constructing limitations on searches and seizures. Thus, when other state constitutions (i.e., North Carolina, New Hampshire) were drafted, Framers simply mirrored the provisions of those state constitutions that were already well-established. The result of this process was the assembly of a national consensus so that by the time the Fourth Amendment was drafted in 1789, there was little disagreement on “the importance of placing federal as well as state constitutional limitations on searches and seizures.”

Formal provisions, however, did not bring about an end to general warrants. In fact, during the Revolution, many states employed general warrants in order to control “military desertion and the activities of British loyalists....” and also “protect the interest of Southern slaveholders.” In this way, states had put aside “peacetime ideals of individual rights and reverted to self-defense against foreign and domestic threats during

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41 Ibid at 43.
42 Ibid at 44.
43 Ibid at 45.
44 Ibid.
45 Ibid.
a time of war.”\textsuperscript{46} Therefore, during the Revolution, general warrants were utilized to help the war effort and provide protection for the community. Although the use of general warrants during the Revolution was permitted, this does not suggest that the Framers upheld the legality of such warrants during peaceful times. This principle largely reflects the tension between claims of order and liberty, which has continued to exist even into modern day. That is, in times of relative peace, “American constitutional liberties tend to flourish, but these liberties are quickly curtailed in the face of a real or perceived threat to the safety and security of the country.”\textsuperscript{47}

It is important to note that while the Fourth Amendment contains two important clauses, the proposed version did not. When James Madison first drafted what would become the Fourth Amendment, it contained a single clause, which banned general warrants, yet did not address warrantless intrusions.\textsuperscript{48} Although Madison’s version was altered in legislative deliberation and subsequently was refined to include the two prongs that exist today, the importance of this change has been magnified in attempts to interpret the Framers’ words.\textsuperscript{49} Where the first version of the Fourth Amendment was tailored to forbid only those searches performed under general warrants, the final is much broader, arguably invalidating all unreasonable searches, regardless of whether accompanied by specific warrants.\textsuperscript{50}

Due to the Fourth Amendment’s vagueness and ambiguity, scholars, judges, and lawmakers have created multiple, contrasting interpretations of the Fourth Amendment.

\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid at 46.
\textsuperscript{48} Ibid at 48.
\textsuperscript{49} Ibid at 49.
\textsuperscript{50} Ibid.
The contemporary Supreme Court, for example, has been criticized for focusing on the reasonable requirement and treating the warrant clause as less important. Others argue that the Framers placed far greater emphasis on warrants standards. Irrespective of the likely “intent” of the Framers of the Fourth Amendment, “search and seizure requirements have become less stringent, reflecting the perceived needs of law enforcement and more recently, the public demand for safety and security in an age of terrorism.”

Regardless of these interpretations, it seems clear that the Fourth Amendment was designed to serve as a constitutional limit on the abuse of governmental power. The amendment, however, does not contain any enforcement provisions. It has therefore primarily been the role of the courts, particularly the Supreme Court, to implement the values expressed in the amendment. Thus, since the late nineteenth century, the Court has produced a vast body of case law interpreting the amendment. These decisions illustrate the preservation of “meaningful Fourth Amendment values” in light of contemporary problems and challenges.

**B. Early Constitutional Interpretation of the Fourth Amendment**

The first Supreme Court case of significance implicating the Fourth Amendment occurred in 1806 in *Ex Parte Burford*. In this case, Chief Justice John Marshall invalidated a warrant used to imprison John Burford. The unanimous Court asserted that

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51 Ibid at 60.
52 Ibid at 61.
53 Ibid.
54 7 U.S. 448 (1806).
the warrant did not state any offense and that it merely claimed Burford had been brought before a group of justices who had failed to find any “sureties for his good behavior.” The Court invalidated the use of the warrant and ordered Burford’s release from prison. Marshall assumed that the Fourth Amendment, which extended to “persons and things to be seized,” was designed to protect against imprisonment without a criminal conviction as well as arbitrary searches. Thus, although the Amendment does not make an explicit reference to arrests—it does make reference to seizures, which some have construed to include arrests—Marshall was of the opinion that this view of the amendment’s scope was self-evident. His conclusion follows then, that “in the absence of some good cause, certain, supported by oath”...the prisoner had been improperly committed.

The next Fourth Amendment case to reach the Supreme Court came in 1855, in *Murray v. Hoboken Land Company*. Here, a “warrant of distress” was issued to recover a debt without ever receiving an “oath or affirmation.” Writing for a unanimous Court, Justice Benjamin Curtis concluded that, “the Fourth Amendment had no reference to civil proceedings for the recovery of debts where no search warrant had been issued.”

Although the Court had ruled that the Amendment could not be applied to civil proceedings in *Murray*, the Court skirted around what could technically considered a “civil matter” in *Boyd v. United States*. In *Boyd*, the majority concluded that the “proceedings instituted for the purpose of declaring the forfeiture of a man’s property by

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55 Stephen and Glenn at 51.
56 7 U.S. 453.
57 Stephens and Glenn at 51.
58 7 U.S. 453.
59 59 U.S. 272 (1855).
60 Id.
61 Id at 285.
62 116 U.S. 616 (1886)
reasons of offenses committed by him” were quasi-criminal in nature, thus applicable under the Fourth Amendment.\textsuperscript{63} The significance of this case extends well beyond the application of the Fourth Amendment to some situations involving civil actions. For the value of the Court’s decision in \textit{Boyd} hinged on its anticipation of the development of modern search and seizure law.\textsuperscript{64}

The Boyd brothers, George and Edward, had contracted with the government to import small quantities of plate glass without paying customs fees. The government alleged that the Boyd brothers had imported more glass than the contract permitted. At their trial, the judge ordered the Boyds to produce as evidence an invoice specifying the value and quantity of an earlier shipment of twenty-nine cases of glass.\textsuperscript{65} The Boyds complied, although hesitantly, and were subsequently convicted. They did, however, challenge the constitutionality of the statute that enabled the judge to order them to produce the invoices.

The Supreme Court was confronted with three important questions. First, did the forced production of invoices constitute a search, even though it was distinctly different from the traditional notion of “invasion of privacy” relied upon by the Framers? Second, did this constitute an unreasonable search, and if so, was it permissible under the Fourth Amendment? Third, if the evidence were found to be competent, could it be introduced at the trial despite the fact that it was seized illegally?\textsuperscript{66}

The Court began by holding the statute’s “authorization of the forced invoices” to constitute a search largely for affecting “the sole object and purpose of search and

\textsuperscript{63} \textit{Id} at 633-634.
\textsuperscript{64} Stephens and Glenn at 56.
\textsuperscript{65} \textit{Ibid} at 53.
\textsuperscript{66} \textit{Ibid} at 53-54.
Next, the justices concluded that the law’s allowance of unreasonable searches was consistent with the Constitution:

It is not breaking of [a man’s] 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….  

Finally, Justice Joseph Bradley concluded that the inclusion of illegally seized evidence was unconstitutional. This became known as the exclusionary rule, although it would not become a formal requirement and explicitly defined by the Court for another thirty years in Weeks v. United States (1914).

The Court’s decision in Boyd recognizes individual privacy as a constitutional value. Bradley largely relied on colonial antecedents such as the Wilkes and Etnick decisions, and James Otis’s argument in the Writs of Assistance Case to construct the position mentioned above. Conversely, the Court’s ruling in this case, coinciding with Justice Bradley’s analysis, propelled the Fourth Amendment into the public spotlight during a time when trial and appellate courts were receiving significant challenges to civil liberties posed by aggressive methods of law enforcement.

Constitutional challenges to the Fourth Amendment continued in Ex Parte Jackson (1878), in which the Supreme Court held that the post office could not open sealed mail without a warrant. The importance of this case lies in Justice Stephen Field’s dictum, which was influential in defining the scope of the Fourth Amendment: “No law of

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67 116 U.S. 622.
68 Id at 630.
69 232 U.S. 383 (1914).
70 Stephens and Glenn at 55.
71 96 U.S. 727 (1878).
congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and...sealed packages in the mail: and in all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.”

C. Application of the Fourth Amendment to the States

When the Bill of Rights, including the Fourth Amendment, was adopted in 1791, it was widely accepted that these rights would only apply to actions of federal officers or persons acting under the authority of the federal government. The question of whether the Bill of Rights could also be applied to the states was first addressed in Barron v. Baltimore (1833), in which the Court held that the Fifth Amendment’s Just Compensation Clause was not applicable to the states. The justices remained consistent with this interpretation in Smith v. Maryland (1855), asserting that the Fourth Amendment did not afford protection against searches conducted by state officers.

The adoption of the Fourteenth Amendment in 1868 “fundamentally changed the constitutional relationship between the national government and the states by placing broad limitations on the states” so as no to deprive “any person of life, liberty, or property without due process of law.” The author of the Fourteenth Amendment claimed that the Due Process clause encompassed all of the individual guarantees contained in the first

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72 96 U.S. at 733.
73 32 U.S 243 (1833).
74 59 U.S. 71 (1855).
75 Stephens and Glenn at 57.
eight amendments, and therefore, these should apply to the states.\textsuperscript{76} The Supreme Court, however, rejected the total incorporation theory and instead adopted the method of “selective incorporation” which extended only to the states those freedoms deemed essential to the preservation of a “scheme of ordered liberty.”\textsuperscript{77}

These cases will be revisited later, but it is important to note that it was not until 1949, in \textit{Wolf v. Colorado}, that the Court selectively absorbed the “core of the Fourth Amendment.”\textsuperscript{78} The remainder of the Fourth Amendment, or the amendment’s exclusionary rule, was not made applicable to the states until the Court’s ruling in \textit{Mapp v. Ohio} (1961), some twelve years later.\textsuperscript{79} Even after the Fourth Amendment was subsequently incorporated, states retained the freedom to provide “broader protections” against unreasonable searches and seizures than those afforded by the Supreme Court’s interpretation of the Fourth Amendment.\textsuperscript{80} The importance, therefore, of the Fourth Amendment’s “incorporation” is that it has cemented a standard of basic protection against unreasonable search and seizures with which the states must comply.\textsuperscript{81}

\begin{footnotes}
\item[76] Ibid.
\item[77] \textit{Palko v. Connecticut} 392 U.S. 319 (1937).
\item[78] 388 U.S. 25 (1949).
\item[80] Stephens and Glenn at 58.
\item[81] Ibid.
\end{footnotes}
III.

The Fourth Amendment on the Eve

of *Olmstead v. United States*
A. Importance of *Boyd* Decision

The 1886 decision of *Boyd v. United States* serves as a landmark for Fourth Amendment jurisprudence. In Justice Bradley’s analysis of the *1874 Act to Amend the Customs Revenue Laws*, he concluded the terms of the Act did not equate to “entry into a man’s house and searching among his papers,” yet found “compulsory production of man’s private papers to establish a criminal charge against him…within the scope of the Fourth Amendment.”

Bradley also looked to the intended purpose of the Amendment to determine what made a search “unreasonable.” In his opinion, “the compulsory extortion of man’s own testimony, or of his private papers to be used as evidence to convict him of [a] crime, or to forfeit his goods, violates one’s right.”

Bradley also crafted what some scholars have branded as the “*Boyd* legacy”—the interplay between the Fourth and the Fifth Amendments. That is, the notion of either forcing an individual to produce documents or evidence that confirms his guilt or the refusal to produce such documentation standing as an admittance of one’s guilt can be equated to forcible incrimination. Bradley foresaw the potentiality of such danger—non-forcible search and seizures developing into an acceptable legal standard. He therefore urged future justices to consider a liberal interpretation of Fourth Amendment provisions, for in his opinion, it was the Court’s duty “to ensure the rights of individual citizens were assured in perpetuity.”

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83 Id at 630.
84 Id at 633.
85 Id at 635.
As previously noted, the *Boyd* decision is symbolic for introducing the concept of the Fourth Amendment as a means of safeguarding individual liberties. Although many modern judges conclude that this case was wrongly decided,\(^{86}\) this holding stood as precedent for the next eighteen years and has proved to be the foundation upon which all future search and seizures opinions would build. In sum, the *Boyd* decision serves as the Supreme Court’s first attempt to add some substance to the Fourth Amendment. As Erwin Griswold points out, “Until the onset of the twentieth-century, the Supreme Court decided virtually no search and seizure cases and no penalties were prescribed for a violation of the Amendment.”\(^{87}\) The Fourth Amendment was therefore poised for development at the beginning of the twentieth century, as the Supreme Court moved to make the exclusionary principle articulated in *Boyd* a formal requirement.\(^{88}\)

**B. Adams v. New York (1904): Untying the Court’s decision in Boyd.**

In *Adams v. New York* (1904), state officers executed a warrant to seize Adams’ “slips” which were used in an illegal gambling game called “policy.”\(^ {89}\) Yet while they were seizing his policy slips, the officers subsequently took other papers, which were later admitted at Adams’ trial in order to identify his handwriting on the policy slips. Adams argued that the evidence had been unlawfully seized and was thus a violation of

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\(^ {86}\) Justice Bradley’s opinion was consistent with the eighteenth and nineteenth century opinion on the subject of the legitimate reach of the power of the state in relation to private property. Modern search and seizure law provides no exemption for a person’s private papers as long as the search requirement is satisfied.


\(^ {89}\) 192 U.S. 587 (1904).
his Fourth Amendment rights. The trial court rejected his claim and he was subsequently convicted.

The Supreme Court, led by Justice William Day, rejected Adams’ claim, noting “evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular, or even an illegal manner.” The majority further asserted that the admission of an individual’s private papers constituted “a violation neither of his right to be secure from unreasonable searches and seizures nor of his privilege against compulsory self-incrimination.”

This decision stood in opposition to the Court’s previous holding in Boyd. In fact, Day advocated the return to traditional rules for admittance of evidence: “though papers and other subjects of evidence have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue.” He further elaborated that it is the “consideration of materiality, relevance, and competency determined the question of admissibility, not the legality of the search and seizure.”

In essence, the Court’s decision in Adams vacated its previous decision in Boyd. Thus, as of 1904, Fourth Amendment jurisprudence was in flux. The Court’s ruling in

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90 Id.
91 Id. at 596.
95 In terms of jurisdiction, the Court refrained from addressing whether the Fourth Amendment is made binding on the states through the Fourteenth Amendment. The justices reasoned that since no violation of constitutional restrictions had occurred, in terms of an unreasonable search and seizure, it was not worth addressing.
Adams had restored it to virtually the same position it was before Boyd. Such disarray would continue until ten years later in *Weeks v. United States* (1914), where the Court turned its back on the holding in Adams.

**C. Weeks v. United States (1914): Creation of the Exclusionary Rule**

In *Weeks v. United States* (1914), the Court was once again faced with a search and the “physical” seizure of one’s papers.96 This time, however, authorities lacked a warrant when they executed the search. Fremont Weeks was suspected of transporting lottery tickets through the mail. He was arrested by a police officer, without warrant, at the Union Railroad Station in Kansas City, Missouri, where he was employed by an express company. After receiving notice from Fremont’s neighbors that he hid a key to his house beneath the entry mat, police officers entered his home without a warrant. Once inside, the officers seized various sorts of papers and articles, which were afterward turned over to a U.S. marshal. Later that day, after receiving such papers, the United States marshal re-entered Fremont’s home and further seized his letters and envelopes hidden in his dresser drawer.97 The seized documents were then introduced at Fremont’s trial and subsequently used to convict him. He argued that his Fourth Amendment rights had been violated because police had forcibly entered his house without a warrant and seized his papers; the evidence, therefore, should be inadmissible.

In a unanimous decision, the U.S. Supreme Court held the evidence obtained by police had violated Weeks’ Fourth Amendment rights, and could not subsequently be used against him in a federal trial. This holding was the formal adoption of what has been

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96 232 U.S. 383 (1914).
97 *Id.*
dubbed “the exclusionary rule.” The theory behind this legal doctrine is that since police lacked the authority to seize such evidence, the prosecution lacked the right to introduce the evidence at trial.

Speaking for the majority, Justice William Day, who also authored the Court’s opinion in *Adams*, distinguished the two cases:

*Adams* case affords no authority for the action of the Court in this case, when applied to in due season for the return of papers seized in violation of the constitutional Amendment. The decision in that case rest upon incidental seizure made in the execution of a legal warrant, and in the application of the doctrine that a collateral issue will not be raise to ascertain the source from which testimony, competent in a criminal case, comes.\(^98\)

As such, the Court rejected the government’s argument that the question of admissibility of relevant evidence was moot regardless if it was seized in a manner that violated one’s Fourth Amendment rights.\(^99\)

The majority’s construction of the exclusionary rule expressed the Court’s disapproval of illegal police conduct, a need to deter it, and recognition of the need to preserve the integrity of the judicial system. Day asserted that if the evidence were to be suppressed, further police misconduct may be deterred: “The tendency of those who execute the criminal law of the country to obtain conviction by means of unlawful seizures and enforce confessions…should find no sanction in the judges of the courts…charged at all time with the support of the Constitution.”\(^100\)

Prior to this holding, the only remedy afforded to criminal defendants whose Fourth Amendment rights had been violated was to file a suit in civil court against the alleged

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\(^98\) *Id* at 396.  
\(^99\) *Id* at 394.  
\(^100\) *Id* at 391-392.
violator. The Court’s holding in *Weeks*, however subsequently reversed the defendant’s criminal conviction on the basis of the violation of the Fourth Amendment alone.\textsuperscript{101} The impact of the *Weeks* decision was thus not only to carve out a suppression of evidence doctrine that not previously existed in the common law, but to cement the goal of the exclusionary rule—deter future police misconduct and compel compliance with the Fourth Amendment. Additionally, as Kenneth Murchinson explains, “the *Weeks* decision protected two values that were deeply rooted in Anglo-American property tradition—the sanctity of an individual’s home as a sanctuary from government intrusion and the personal character of an individual’s papers.”\textsuperscript{102}

Almost a hundred years since the holding in *Weeks*, justices continue to divide over the meaning of the exclusionary rule. Some argue it was created to deter police conduct, others believe it exists to preserve judicial integrity. Still others find the rule to be a “judicially created remedy applicable only in those situations in which the exclusion of evidence would deter further police misconduct.”\textsuperscript{103} This last interpretation has consistently been the one chosen by the modern Supreme Court.

Equally important, the majority’s decision in *Weeks* explicitly asserted that exclusionary rule did not apply to those searches conducted by state police officers.\textsuperscript{104} As a result, states were not required to exclude evidence obtained by an unreasonable search and seizure. Some states opted to do so, others did not.

\textsuperscript{102} Murchinson at 47-48.
\textsuperscript{103} Stephens and Glenn at 161.
\textsuperscript{104} *Ibid* at 162.
In *Wolf v. Colorado* (1949), the Court chose only to apply “the core of the Fourth Amendment” against the states through the Due Process of the Fourteenth Amendment. The justices, however, once again specifically rejected the idea that the exclusionary rule should be held binding on the states. In his opinion for the majority, Justice Felix Frankfurter opined that the rule was “judicial implication” without foundation in the Fourth Amendment. It therefore remained true that in state criminal proceedings, states retained the freedom to either adopt or ignore the exclusionary rule. The majority’s decision in *Wolf* was further significant because it indicated that the primary purpose of the exclusionary rule was the deterrence of police misconduct.

The Supreme Court overturned *Wolf* in *Mapp v. Ohio* (1961) and extended the federal exclusionary rule to state criminal prosecutions. In a five-to-four decision, the majority was “compelled” to reach this holding since the remedies implemented after *Wolf* had failed to “secure compliance with constitutional provisions on the part of police officers and the courts had been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.” Justice Tom Clark asserted that the exclusionary rule was an “essential ingredient” in deterring police misconduct and preserving judicial integrity. To hold otherwise, “would be to grant the right but in reality...withhold its privilege and enjoyment.” Accordingly, any evidence obtained through a search that violated the Fourth Amendment was subsequently inadmissible in state criminal trials. In essence, *Mapp* “constitutionalized” the exclusionary rule.

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106 Stephens and Glenn at 162.
107 Ibid.
109 Stephens and Glenn at 162.
110 367 U.S. at 656.
D. *Hester v. United States* (1924): Open Field Exception to the Fourth Amendment

In the years leading up to the Supreme Court’s decision in *Olmstead v. United States,* the Fourth Amendment underwent major changes in its doctrinal landscape.¹¹¹ Until the early 1920s, the justices remained consistent with its liberal interpretation of Fourth Amendment rights. As Murchinson explains however “the first prohibition decisions reversed that pattern and upheld searches against Fourth Amendment challenges.”¹¹² Such decisions exploited the Court’s newly adopted pro-government approach, which largely paralleled the political conflict over prohibition; in doing so, the Court displayed far more sensitivity to changing social attitudes than conventional wisdom.¹¹³

The expansion of federal criminal law under the Volstead Act produced hundreds of appellate decisions addressing search and seizure law.¹¹⁴ The Supreme Court alone issued twenty opinions addressing such issues between 1920 and 1933.¹¹⁵ It is through these cases that “the Supreme Court established the conceptual framework that has continued to guide the development of Fourth Amendment doctrine.”¹¹⁶

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¹¹¹ *Id* at 48.
¹¹² *Id* at 49.
¹¹³ *Id* at 18.
¹¹⁴ *Id* at 48. The Volstead Act, technically named the National Prohibition Act, was an enforcement statute passed by Congress after the Eighteenth Amendment had been ratified but before its effect date…It added a number of offenses to the list of federal crimes, prohibiting the manufacturing, sale, barter, transportation importation, exportation furnishing or possession of any intoxicating liquor in violation of the act. (Murchinson, p. 8)
¹¹⁵ *Id.*
¹¹⁶ *Id.*
The Supreme Court’s first prohibition opinion addressing Fourth Amendment issues occurred in 1924 in *Hester v. United States*. The facts of the case are as follows: Revenue agents hid themselves approximately one-hundred yards from Hester’s house after receiving “sufficient information” that Hester was engaged in illegal activities. From their location, agents observed Hester approach a car and hand the man in the vehicle a quart-bottle. Upon seeing the exchange, the agents moved in, arrested Hester, and examined the liquid in the quart-bottle as well as the contents of both a jug Hester extracted from a nearby car and a jar lying on the ground near the house. According to the testimony of the agents, each container contained whiskey.

In a unanimous decision, the Court held that officials had not breached Hester’s Fourth Amendment rights. The Court reasoned that “open fields” surrounding a house were not constitutionally protected areas; thus, the lawful observation did not constitute a search. Justice Oliver Wendell Holmes, in a brief opinion distinguished searches covered by the amendment from permissible police surveillance, noted:

> [The agents’] testimony was not obtained by an illegal search or seizure, for [Hester’s] own acts and those of his associates disclosed the jug bar and the bottle…there was no seizure in the sense of the law when the officers examined the contents.

Holmes also concluded that the examination of a jar that had been thrown out and broken, also containing whiskey, did not constitute a search.

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117 265 U.S. 57 (1924).
118 *Id* at 51.
119 *Id*.
120 265 U.S. 58 (1924).
121 Murchinson at 52.
The exclusion of “open fields” from constitutionally protected areas marked the sudden transformation from the pre-prohibition liberal construction of the protections afforded by the Fourth Amendment to a much narrow interpretation of its scope. For example, in his opinion, Holmes made it clear that the Fourth Amendment only offered protection to one’s “persons, houses, papers and effects.” He concluded, that the “the distinction between the open fields and the house is as old as the common law.”\textsuperscript{122} Not only did such a narrow interpretation discard traditional property rights of landowners, but, more importantly, it provided prohibition agents with an easy method of observing criminal behavior without ever having to obtain a warrant.

\textbf{E. Carroll v. United States (1925): The Court’s Adaptive Approach to the Automobile.}

The technological development of the automobile industry had begun to impact American at the turn of the century; the growth of the industry, however, flourished in the 1920s. For example, the number of automobiles registered in 1900 was eight thousand, in 1920, over nine million and by the end of the decade twenty-seven million Americans had registered automobiles.\textsuperscript{123} The roaring twenties propelled the automobile industry to the elite class of profitable industries, manufacturing six million cars annually by 1929.\textsuperscript{124} The innovative strategy of mass production and consumer credit provided Americans with jobs and opportunities to purchase things that had never been previously available to

\textsuperscript{122} 265 U.S. 59.
\textsuperscript{123} Murchinson at 69.
\textsuperscript{124} Ibid.
them. Moreover, the automotive industry had created, in essence, a ripple effect—cultivating the steel, concrete, and construction industries.\textsuperscript{125}

The legal profession embraced the emergence of automobiles with various statutory and judicial developments. As Kenneth Murchinson points out, “it is hardly surprising that automobiles also required special treatment in the law of search and seizure.”\textsuperscript{126} The availability and easy-accessibility of automobiles through the 1920s presented bootleggers with ripe opportunity. For instance, bootleggers were able to transport alcoholic beverages in larger amounts over a shorter period of time. Even more importantly, automobiles made the use of search warrants much more difficult since automobiles could change locations or discard their shipments before officers had an opportunity to seize the cargo. Accordingly, in 1925 in the case of \textit{Carroll v. United States},\textsuperscript{127} “the Court granted its imprimatur to a new exception to the warrant requirement.”\textsuperscript{128}

George Carroll and John Kiro were suspected of engaging in bootlegging activities. Disguised as an employee of the Michigan Chair Company, A Federal Prohibition agent devised a plan to inculpate Carroll and Kiro by agreeing to purchase whiskey from them. When prohibition agents spotted Carroll’s vehicle en route to pick up the whiskey, they pulled it over and conducted a search. Agents found sixty-eight bottles of liquor behind the back of the seat cushion. Carroll and Kiro were arrested and the agents seized the liquor.

\textsuperscript{125} \textit{Ibid.}
\textsuperscript{126} \textit{Ibid} at 70.
\textsuperscript{127} 267 U.S. 132 (1925)
\textsuperscript{128} Murchinson at 70.
In a seven-to-two decision, the Court made the clear distinction between “the necessity for a search warrant in the searching of private dwelling and that of automobile and other road vehicles.” In other words, requiring a warrant to search an automobile was not practicable because the automobile could quickly moved out of the locality or jurisdiction in which the warrant was issued. Chief Justice William Taft reasoned that this distinction was permissible since the Fourth Amendment did not “denounce search and seizures, but only such as are unreasonable…if the search and seizure without a warrant are made upon probable cause…the search and seizure are valid.” Chief Justice Taft was careful, however, to clarify that the newly-created “automobile exception” did not allow enforcement officers “to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the indignity and inconvenience of such a search.”

Both *Hester* and *Carroll* demonstrate the Supreme Court’s recognition of exceptions to the general rules of search and seizure law. *Hester* carved out an open field exception and *Carroll* carved out an exception for automobiles. The Court would later, in 1972, also carve out an exception for national security. These exceptions not only illustrate the adaptive approach used by the Court to remain consistent with technological developments but further solidify the principle that the Fourth Amendment is not absolute.

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129 267 U.S. 147 (1925).
130 Stephens and Glenn at 252.
131 267 U.S. 147,149.
132 *Id* at 154.
IV.

Olmstead v. United States:

The Court’s Response to Wiretapping
Wiretapping’s development coincided with the invention of the telegraph in 1844, and has posed novel challenges to the Fourth Amendment. Following the invention of the telephone, microphone, and other technologies, wiretapping became exceedingly prevalent and easier to implement. It was not until the passage of the Federal Communications Act of 1934 that wiretapping was statutorily prohibited. It is no surprise then that, absent legislation and given the Supreme Court’s pro-government approach to Fourth Amendment issues, prohibition agents would employ such innovative, technological instruments to capture notorious bootlegger Roy Olmstead.

Roy Olmstead was indicted and convicted in federal district court of illegally importing and selling liquor in violation of the National Prohibition Act. Agents had tapped Olmstead’s telephone lines for months learning of his methods for transportation, whom he employed, his income, and his clientele. At Olmstead’s trial, his attorney’s filed a motion to suppress the wiretapping evidence. Judge Netere, however, quickly denied the request, reasoning:

Wiretapping is not a national offense, nor made so by the statute of the state of Washington; even so, it would not violate any constitutional right of the defendants to receive the testimony. The conversation is not a property right.

The jury subsequently convicted Roy Olmstead and his accomplices.

Olmstead appealed the jury’s finding to the United States Court of Appeals for the Ninth Circuit. He challenged the constitutionality of using evidence on the grounds that it

135 Ibid at 30.
was obtained in violation of the Fourth Amendment’s guarantee against unreasonable search and seizures and Fifth Amendment’s guarantee against being compelled to testify against oneself. By a vote of two-to-one, the Court of Appeals affirmed all the convictions.

In a five-to-four decision, the Court held the “use of evidence obtained through a warrantless wiretap in federal criminal trial did not violate the Fourth Amendment’s guarantee against unreasonable searches and seizures.”\(^{136}\) It also concluded that absent a Fourth Amendment violation, the Fifth Amendment claim was inapplicable.

Chief Justice William Howard Taft, writing for the majority, asserted that the interception of telephone conversations had occurred without physical trespass of private property.\(^{137}\) Furthermore, he noted that no search was conducted of a constitutionally protected area: persons, houses, papers, effects."\(^{138}\) Taft stated: “The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only.”\(^{139}\) Taft further noted that Fourth Amendment protection was not meant to include telephone wires extending to the entire world: “The intervening wires are not part of his house or office, any more than tare the highways along which they are stretched…the reasonable view is that one who installs in his house a telephone instrument with connecting wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment.”\(^{140}\)

\(^{136}\) 277 U.S. 438 (1928).
\(^{137}\) Ibid.
\(^{138}\) Ibid.
\(^{139}\) 277 U.S. 464.
\(^{140}\) 277 U.S. 465.
Justice Louis Brandeis, filed a profound dissenting opinion, arguing against the narrow interpretation of the Fourth Amendment and acknowledging the necessity that the amendment be interpreted in light of technological advancements:

Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. The progress of science in furnishing the government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. 141

Justice Brandeis understood the danger technology posed in the hands of government officials uninhibited by constitutional safeguards. He also recognized and emphasized the amendment “to bestow upon each individual a general right of privacy, one not confined to traditional categories of searches involving actual trespass on private property or seizures of tangible items.” 142

Justice Pierce Butler also dissented but on different grounds. He was of the opinion that the government may not have its officers whenever they see fit, tap wires, listen to, take down, and report the private message and conversation transmitted by telephones. 143 Butler largely viewed telephone communications as a proprietary interest, something belonging to the parties exchanging communication. Wiretapping and listening by officers, in his opinion, literally equated to a search for evidence.

In sum, Chief Justice Taft’s strict construction and application of the underlying property principles of the Fourth Amendment established the trespass doctrine, which

141 277 U.S. 474-475
142 Stephens and Glenn at 281.
143 277 U.S. 486.
states, “for a search to occur, government officials must trespass on private property.” Taft further concluded that conversations were not tangible things that could be seized. Thus, unless something tangible is taken, no seizure can occur. Justice Butler, however, found proprietary interests in the wire that were violated by the tap. Whereas Justice Brandeis, sought to advance both a liberal construction and application of the Fourth Amendment through the assertion that constitutionally protected privacy interests should not be narrowly limited to traditional categories of searches involving physical trespass and seizures of tangible materials.

The *Olmstead* decision proved to be a slim victory the narrow interpretation of the Fourth Amendment. Traditional property rights were, again, left unprotected—except this time from new, invasive technology. The majority’s holding in *Olmstead* would stand for almost thirty years. Meanwhile, the court was able to avoid ruling on the constitutionality of wiretaps because of the Federal Communications Act of 1934, which Congress has passed in response to the Court’s holding in *Olmstead*. As we will see, the Court, however, would extend the *Olmstead*’s trespass theory to other cases involving technological surveillance.

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144 Stephens and Glenn at 146.
145 The Federal Communications Act of 1934 invalidated the interception and divulgence of telephone and telegraph communications: no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person.
V.

The Federal Communications Act of 1934 to the *Katz* Standard: Application and Abandonment of *Olmstead’s* “Trespass Theory”
A. Section 605 of the Federal Communications Act to Nardone

Shortly after the Court’s ruling in *Olmstead*, six years to be exact, the Seventy-Third Congress enacted the Communications Act of 1934, which explicitly invalidated wiretapping. The headlining features of the Act was the creation of the Federal Communications Commission (FCC), which largely replaced the Federal Radio Commission, in addition to the transfer of regulation of interstate telephone services from the Interstate Commerce Commission to the newly established FCC. More importantly, the Act served as a Congressional response for the issues highlighted in *Olmstead*—the legality of intrusive wiretapping methods used to intercept conversations.

Section 605 of the Federal Communication Act states:

No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, purport, effect, or meaning of such intercepted communication to any person…. No person, who as an employee, had to do with the sending or receiving of any interstate communication by wire shall divulge or publish it or its substance to anyone other than the addressee or his authorized representative or to authorized fellow employees, save in response to a subpoena issued by a court of competent jurisdiction or on demand of other lawful authority.\(^\text{146}\)

Accordingly, Section 605 developed two important, distinct interpretations: the first one being the Act’s actual forbiddance of wiretapping, and the second position interpreted the act to forbid only the disclosure of information gathered through wiretapping. The Supreme Court, largely evading a ruling on the constitutionality of wiretapping, preferred to provide a statutory interpretation of §605, in order to clarify the contrasting interpretations.

\(^{146}\) Ch. 652, 48 Stat. 1064, 1103; U.S.C. Tit. 47 § 605 (1934). In Section 501, the Act provided a fine and/or imprisonment for those who willfully and knowingly violate such conditions. (*Id* at U.S.C. Tit. 47, § 501)
interpretations. This interpretation would ultimately decide whether evidence obtained by law enforcement officers by tapping telephone wires and intercepting messages were admissible in a criminal trial. It is no surprise then, that the Court granted certiorari in the case of *Nardone v. United States* (1937) soon after the passage of the Act.\textsuperscript{147}

Frank Nardone was accused and convicted of running a bootlegging operation. His conviction relied solely on evidence police officers had gathered using warrantless wiretaps. The government’s position rested on the claim that “Congress did not intend to prohibit tapping wires to procure evidence.”\textsuperscript{148} Citing *Olmstead*, the government claimed the Court “held such evidence admissible at a common law despite the fact that a state statute made wire-tapping a crime.”\textsuperscript{149} It advanced their argument on the grounds that since the *Olmstead* decision, the federal government, with the Congress’s knowledge, has permitted agents to tap wires to gather evidence of criminal activity.\textsuperscript{150}

The Court, however, in an opinion authored by Justice Owen Roberts, gave a generous interpretation to §605, holding that “the plains words [of §605] forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that ‘no person’ shall divulge or publish the message or its substance to ‘any person.’”\textsuperscript{151} Based on the Court’s literal reading, the introduction of testimonial evidence obtained through wiretapping was equivalent to “divulging a message,” which the FCA Act prohibited.

\textsuperscript{147} 302 U.S. 379 (1937).
\textsuperscript{148} *Id* at 381.
\textsuperscript{149} *Id*.
\textsuperscript{150} *Id*.
\textsuperscript{151} *Id*.
Roberts noted that the Court was “without contemporary legislative history relevant to the passage of the statute.”152 The justices further noted that after Olmstead, Congressional committees performed an investigation of the wire-tapping methods used by federal officer. Several bills were introduced to prohibit the practice; each bill failed.153

Nardone illustrates the justices’ broad interpretation of §605 by nullifying the admissibility of “derivative evidence,” or evidence obtained through a wiretap. The Court, however, preferred a narrow interpretation of §605 when considering the testimonial admittance by a witness using exploited wiretapped information. In Goldstein v. United States (1942), the Court held that §605 did not afford protection to information obtained through wiretapped phone conversations that concerned someone who was not a party to the conversation.154 Both cases illustrate the Court’s effort to provide statutory interpretation of the Federal Communications Act while averting a holding to determine the constitutionality of wiretapping.

Accordingly, in Goldman v. United States (1942), when confronted with a new method of electronic surveillance, justices weighed the intrusive aspects of the instrument against §605 and Olmstead’s trespass theory.155 For during this period, electronic surveillance for law enforcement purposes was considered to be outside the protection of

152 Id.
153 An Act of 1933 included a clause forbidding this method of procuring evidence of violations of the National Prohibition Act. (Id.)
154 316 U.S. 114 (1942).
155 316 U.S. 129 (1942).
the Fourth Amendment. As such, police conducting “nontrespassory electronic surveillance were virtually unencumbered by judicial oversight.”

B. Goldman v. United States (1942): The Detectaphone Case

Martin Goldman was a lead conspirator in a scheme that cheated creditors to net profitable gains. Once federal agents learned of his scheme, the entered his office without a warrant and planted a dictaphone, a listening apparatus from which the wires connected to it led to an office next door. The following afternoon, one of the agents returned to the room with a stenographer; after connecting the apparatus, however, the device failed to work properly. Fortunately, the agent had brought along a detectaphone—a device placed against a wall that detects sounds on the other side. The agent placed the detectaphone up against the wall to amplify the sound waves coming from the suspect’s office. This device enabled the agents to overhear and transcribe incriminating conversations.

The evidence obtained from such technology was admitted in trial despite the objection that it violated the Fourth Amendment of the Constitution and, in reference to one of the suspect’s phone conversations, Section 605 of the Federal Communications Act. Goldman was indicted and convicted in federal court for conspiracy to violate the Bankruptcy Act. On appeal, the Court of Appeals for the Second Circuit affirmed.

The two problems facing the Supreme Court was whether the use of the detectaphone violated the Fourth Amendment and if overhearing and divulging information that was intended to be transmitted through the telephone violated §605. In a five-to-three decision, the justices asserted that the overhearing and divulgence of the telephone

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156 Stephens and Glenn at 147.
conversation was not a violation of §605; that what was heard by the detectaphone was not made illegal by trespass or unlawful entry; and the use of the detectaphone by government agents was not a violation of the Fourth Amendment.

Justice Owen Roberts began his opinion by nothing that the overheard phone conversation was “neither a ‘communication’ nor an ‘interception’ within the meaning of the act. The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation.” Roberts further asserted that the only thing that is protected is the message itself throughout the course of its transmission by the technological instrument. He explained, “words written by a person and intended ultimately to be carried as so written to a telegraph office do not constitute communication until they are handed to an agent of the telegraph company.”

The majority reasoned that the term “intercept” within the meaning of the [FCA] Act, meant “to seize before arrival at the destined place…it does not ordinarily connote obtaining of what is to be sent before, or at the moment, it leaves the possessions of the proposed sender, or after or at the moment it comes into the possession of intended receiver.”

Roberts rejected the government’s argument that Olmstead’s trespass theory should invalidate the use of the detectaphone. The majority asserted that although trespass occurred to install the dictaphone, the use of the detectaphone involved no physical

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158 Id.
159 Id at 133-134.
160 Id at 134.
trespass: “The relation between the trespass and the use of the detectophone was that of antecedent and consequent.”  

When addressing the contention that the detectophone violated the Fourth Amendment, the justices failed to find any “logical distinction between what federal agents did in the present case and state officers did in the Olmstead case.”  

The majority, in sum, was unwilling to overturn its decision in Olmstead.

In an emphatic dissent, Justice Frank Murphy opined that the under the circumstances, the use of the detectophone constituted an unreasonable search and seizure within the clear meaning of the Fourth Amendment. Much like Justice Louis Brandeis fifteen years earlier, Murphy scolded the majority for taking such a narrow interpretation of the Amendment. His contention was “the conditions of modern life have greatly expanded the range and character of those activities which require protection from intrusive action by Government officials if men and women are to enjoy the full benefit for that privacy which the Fourth Amendment was intended to provide.”  

Thus, it was within the scope of Court’s responsibility to ensure that the historic provisions of the Fourth Amendment received a liberal and elastic interpretation to meet the needs of future generations.

This Court’s holding in this case is important when considering the development of its interpretation as to what constitutes trespass. In Olmstead, the Court held that wiretapping did not constitute physical trespass thus did not violate the Fourth

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161 Id at 134-135.
162 Id at 135.
163 Id at 136.
164 Id at 138.
165 Id.
Amendment. In this case, the justices concluded that a detectaphone also did not constitute a physical search, therefore, remaining consistent with *Olmstead*. Here, the Court noted that had the agents overheard and recorded conversations through the apparatus device planted in the office, it could have constituted trespass. The Court would, in 1961, address mechanical trespass in *Silverman v. United States* (1961).\(^{166}\)

**C. *Silverman v. United States* (1961): The “Spike-mike” Case**

In the spring of 1958, local police suspected that a row house in Washington, D.C., was serving as the headquarters of a gambling operation.\(^{167}\) After obtaining permission from the owner of the building directly adjacent to the alleged headquarters, officers entered the house and utilized a spike-microphone to amplify what was going on in the building next-door. The “spike-mike” was a microphone with a spike about a foot long attached to it, together with an amplifier, a power pack, and earphones.\(^{168}\) Police officers inserted the spike-mike under the baseboard of the second floor room of the vacant house and pushed into a crevice extending several inches into the wall until it made contact with the heating duct, turning the heating duct into a “conductor of sound,” amplifying every conversation that took place in the house. The device enabled officers to overhear several incriminating conversations.

These conversations were introduced in federal trial and led to Silverman’s conviction for violating the gambling provisions of the D.C. Crime’s Code. On appeal, the Court of Appeals for the D.C. Circuit affirmed.

\(^{166}\) 365 U.S. 505 (1961)
\(^{167}\) *Id* at 506.
\(^{168}\) *Id.*
The Supreme Court affirmed the Court of Appeals’ holding regarding the inapplicability of §605: “…while it is true that much of what the officers heard consisted of the petitioners’ share of telephone conversations, we cannot say that the officers intercepted these conversations within the meaning of the statute.”\textsuperscript{169} The justices, however, disagreed with the Court of Appeals when considering Fourth Amendment claims.

Justice Potter Stewart began his opinion by rejecting counsel’s claim that the holdings in \textit{Goldman} and \textit{Olmstead} must be considered in the context of recent technological advancements: “We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society. Nor do the circumstances here make necessary a re-examination of the Court’s previous decision in this area.”\textsuperscript{170}

Stewart opined that the facts clearly demonstrated eavesdropping occurred through the “physical trespass” of Silverman’s wall, subsequently placing this method of eavesdropping beyond the scope of those decisions in which the Court held that eavesdropping accomplished by other means did not violate Fourth Amendment rights.\textsuperscript{171} Citing \textit{Entick v. Carrington} (1765),\textsuperscript{172} the justices emphasized the Fourth Amendment’s long-standing history in securing one’s personal rights: “at the very core stands the right of a man to retreat into his own home and there be free form unreasonable governmental intrusion.”\textsuperscript{173}

\textsuperscript{169} \textit{Id} at 508.
\textsuperscript{170} \textit{Id} at 509.
\textsuperscript{171} \textit{Id} at 510.
\textsuperscript{172} 19 Howell’s State Trial 1066.
\textsuperscript{173} 365 U.S. 511 (1961)
Stewart also rejected the Court of Appeals’ view that there was no distinction between the detectaphone used in Goldman and the use of the spike-mike here: “[the] decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area.”\textsuperscript{174} He concluded his opinion by reciting Justice Bradley’s concern in Boyd that “illegitimate and unconstitutional practices get their first footing in the door, by silent approaches and slight deviations from legal modes of procedure.”\textsuperscript{175} In doing so, he suggested although the Court had been reluctant to revisit its holding in Goldman, they were unwilling to budge on this issue “even a fraction of an inch.”\textsuperscript{176}

The Court’s decision in Silverman serves an important decision in Fourth Amendment jurisprudence. This was the first time the Court held that police officers had used a technological instrument to encroach on constitutionally protected area. Additionally, although the Court has relied on Olmstead-Goldman’s trespass theory, the majority rejected Olmstead’s holding that conversations per se have no Fourth Amendment protection because they were not tangible objects that could be seized.


While wiretapping and the detectaphone may have been outside of the Supreme Court’s strict interpretation of what constituted a physical search and seizure, the

\textsuperscript{174} Id at 512.
\textsuperscript{175} 116 U.S. 635 (1886).
\textsuperscript{176} 365 U.S. 512 (1961).
emergence of electronic surveillance posed a much greater challenge, for it “involves an on-going intrusion in a protected sphere, unlike the traditional search warrant, which authorizes only on intrusion, not a series of searches or a continuous surveillance.”

Most traditional searches are conducted after securing a specific search warrant, to be executed during a designated time. If officers do not find anything, they must obtain a search warrant and return to the house at a later time, assuming they would want to return. As James Dempsey points out, “electronic surveillance continues around-the-clock for days or months…and depends on lack of notice to the suspect.” Another important distinction between traditional search, seizure, and electronic surveillance methods is the manner in which they are executed. The execution of a traditional search warrant is conducted upon the announcement of authority and purpose, so that the person whose privacy is in question can observe any violation within the scope of the search and subsequently seek a “judicial order to halt or remedy any violations.” In contrast, electronic surveillance is conducted in a furtive manner.

In 1967, the Supreme Court was confronted with two cases involving electronic surveillance, in Berger v. New York and Katz v. United States. In both cases the Court held that electronic surveillance amounted to a search and seizure triggering Fourth Amendment protection. These holdings produced a public outcry from federal and state

178 Ibid.  
179 Ibid.  
law enforcement agencies, ultimately persuading Congress to respond by implementing the so-called “Federal Wiretap Law.”


Ralph Berger played the role as the middleman in a conspiracy involving the issuance of liquor licenses. Based on the information already obtained from eavesdropping, a judge of the New York Supreme Court ordered a listening device to be installed in an office. The justice was acting pursuant to a New York statute which authorized such orders if the judge should satisfy himself of the existence of reasonable grounds for granting an application for such recording. After portions of the conversations were admitted as evidence at the trial and played to the jury in a bribery prosecution in the New York Supreme Court, Berger was convicted. The Appellate Division of New York affirmed the conviction and the Court of Appeals for the Second Circuit confirmed.

Here, the Supreme Court was faced with determining the constitutionality of New York’s eavesdropping statute. In a five-four decision, the Court reversed. The majority found the New York statute in violation of the Fourth and the Fourteenth Amendments because it contained too broad a grant of permission to eavesdrop without adequate judicial supervision or protective procedures.

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183 NY Criminal Procedure § 813-a: an ex parte order for eavesdropping…may be issued by any justice of the Supreme Court or judge of a county court or of the court of general session of the county of New York upon oath or affirmation of a district attorney…that there is reasonable ground to believe that evidence of a crime may be thus obtained, and particularly describing the persons or persons who communication, conversations or discussion are to be overheard or recorded and the purpose therefore, and in the case of telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved.
In a lengthy majority opinion, Justice Tom Clark explored the history and development of electronic surveillance, concluding that wiretapping “on the whole is outlawed, except for permissive use by law enforcement officials in some states; while electronic eavesdropping is...permitted both officially and privately.”\(^\text{184}\) He asserted, however, that the law had been unable to keep pace with rapid, technological advancements. Clark then focused on the exact language of the Fourth Amendment to draw a comparison highlighting the inadequacies of the New York Statute, which render it unconstitutional.

The statute, he began, authorized eavesdropping, which lacked any specific description that a particular offense had been or was being committed; nor did it specify what property was being sought, or the even the conversation being described.\(^\text{185}\) The Fourth Amendment, in contrast, required probable cause to preclude law enforcement officers from entering areas until there was sufficient reason to believe that a crime was or was to be committed. Next, Clark suggested that the statute’s allowance of continual eavesdropping was essentially a grant for continual search and seizure using the original means of probable cause. Additionally, the statute placed complete determination of the termination of the eavesdropping at the discretion of the officer. And finally, Clark opined that the statutory procedure relied on complete secrecy, lacking the “notice requirement” inherent in conventional warrants.

\(^{184}\) 388 U.S. 48-49.
\(^{185}\) Id at 58-59.
The Court rejected New York’s argument that electronic eavesdropping served as its most effective means of detecting criminal activity and to outlaw it would be to “severely cripple crime detection.”¹⁸⁶

The majority, in sum, invalidated New York’s statute because it lacked particularization or specificity as to what may be searched and on what grounds. Furthermore, the justices explained that if a statute authorizing eavesdropping could not be drawn to meet Fourth Amendment requirements, than it logically followed that the “‘fruits of eavesdropping devices’ were barred under the Amendment.”¹⁸⁷ In the conclusion of his opinion, Justice Clark explained that the request that officers “comply with the basic command of the Fourth Amendment before the innermost secrets of one’s home or office are invaded” is not burdensome.¹⁸⁸ “Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices,” he noted.¹⁸⁹

*Katz v. United States (1967)*

Charles Katz was convicted in federal district court for using a telephone to transfer wagering information from Los Angeles to Miami and Boston, largely in violation of a Federal Statute.¹⁹⁰ The evidence used to convict Katz was collected by FBI agents, acting without a warrant, through an electronic and recording listening device which was

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¹⁸⁶ *Id.* ¹⁸⁷ *Id* at 63. ¹⁸⁸ *Id.* ¹⁸⁹ *Id.* ¹⁹⁰ 18 USC §1084 states, “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 of 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 not more than $10,000.00 or imprisoned not more than two years, or both.”
attached to the outside of the public telephone booth that Katz used to make his calls. At his trial, Katz claimed the evidence was inadmissible because it had been unlawfully obtained and subsequently violated the Fourth Amendment’s guarantee against unreasonable searches and seizures. The trial judge dismissed the motion and the Court of Appeals affirmed his conviction.

The Supreme Court, however, finally expanded its narrow interpretation of Fourth Amendment protections. Justice Potter Stewart, writing for the majority, asserted that a search could occur without the physical intrusion of a constitutionally protected area: “The Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even if in an area accessible to the public, may be constitutionally protected.” As such, when occupying a telephone booth, people are entitled to a protection that the words they utter in the booth will not be broadcasted to the public. This expansive interpretation was exactly what Justice Brandeis had called for in his dissent in Olmstead.

The majority also concluded that the holdings in Olmstead and Silverman “have been so eroded by our subsequent decision that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.” Accordingly, protection afforded by the Fourth Amendment cannot rely solely on the mere existence of physical intrusion, for search and seizure was meant to encompass more than actual presence and confiscation.

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192 389 U.S. 351.
193 Id.
194 Id at 353.
The important issue the Court had to consider here was whether the government had intruded on the privacy that Katz justifiably relied. As Richard Glenn points out, to make this determination, the Court had to consider the “nature of the privacy interest and the nature of the intrusion.”¹⁹⁵ This notion became “the touchstone of Fourth Amendment analysis.”¹⁹⁶ That is, when confronting Fourth Amendment claims, the Court must consider the individual’s constitutionally-protected reasonable expectation of privacy against intrusive invasion of such privacy.¹⁹⁷

The other important part of the Court’s decision in Katz was Justice John Harlan’s concurring opinion. Harlan attempted to add clarity and substance by constructing a two-pronged standard: first, “that a person have exhibited an actual expectation of privacy and second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”¹⁹⁸ In determining the second prong, it only need be shown that the “government’s intrusion infringed upon the personal and societal values” safeguard by the Fourth Amendment.¹⁹⁹ Since this decision, Harlan’s concurring opinion has been the basis for determining the validity of a search lacking any presence of physical intrusion.²⁰⁰

The Court’s holdings from Olmstead to Katz demonstrate that to be effective, the Fourth Amendment must be adaptable. Katz’s broad construction replaced the Court’s narrow Fourth Amendment construction used in Olmstead “only after the justices realized that a Fourth Amendment jurisprudence that failed to consider developing

¹⁹⁵ Stephens and Glenn at 151.
¹⁹⁶ Ibid.
¹⁹⁷ Ibid.
¹⁹⁸ 389 U.S. 361.
¹⁹⁹ Stephens and Glenn at 151.
²⁰⁰ Ibid.
technology would leave the amendment either obsolete or irrelevant.” The reasonable expectations of privacy test, in essence, changes with the ebb and flow of society’s expectation as to what is reasonable—“a positive response cloaks the expectation of privacy with constitutional protection…a negative response denies constitutional protection to the expectation of privacy.” Although the Katz standard has received minimal criticism and consistently relied upon, its application has often become a point of contention. The division between the justices in many of the cases discussed above and in the following cases illustrates the inherent difficulties when applying Fourth Amendment principles to modern conditions.

**Implications of the 1967 Decisions**

In light of the Court’s decisions in Berger and Katz, and after receiving severe pressure from law enforcement agencies, arguing wiretapping was their most vital weapon in fighting crime, Congress responded. In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act. This was Congress’s attempt to permit law enforcement officers to use wiretapping, but under a narrowly constructed system that avoided the intrusive aspects of electronic surveillance. According to the Senate report, the Federal Wiretap Act was enacted for two purposes: first, to protect “the privacy of wire and oral communications”; and second, to delineate “on a uniform basis the

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201 *Ibid* at 158,
202 *Ibid*.
203 *Ibid*.
204 Dempsey at 71.
circumstances and conditions under which the interception of wire and oral communications may be authorized. ²⁰⁵

The Act established specified procedures for Court authorized surveillance.²⁰⁶ The process normally proceeds when the government submits an affidavit specifying what or who will be surveyed and for how long. Next, a judge, assuming probable cause that a crime has been, is being, or will occur, authorizes the wiretapping. This safeguard serves not only to prevent crime but also to protect citizens. Through wiretapping, the government is not only made aware that a crime is going to occur but it can then take sufficient precautions to prevent the crime from occurring.

The decisions in Berger and Katz were crucial to the implementation of Congressional legislation. As previously stated the Court has relied upon the Katz analysis to “determine what constitutes a search within the meaning of the Fourth Amendment.”²⁰⁷ In these cases, the Court has determined that Fourth Amendment protections “extends to any place or any thing in which an individual has a reasonable expectation of privacy.”²⁰⁸ Thus, in the years following these 1967 decisions, the Court considered if individuals had an reasonable expectation of privacy in other areas: hotel rooms, offices, automobiles, sealed letters, suitcases, and electronic mail, for example.

²⁰⁷ Stephens and Glenn at 152.
²⁰⁸ Ibid.
VI.

Application of the \textit{Katz} Standard
Katz has proved to be one of the most influential holdings of the twentieth century regarding Fourth Amendment jurisprudence. It remains the standard employed by the Supreme Court. Given the subjective nature of the test, the justices have considered the context of each warrantless search to determine if a reasonable expectation of privacy exists and whether society is willing to recognize that expectation as reasonable. The courts have applied the standard to invasive methods of uncovering criminal activity.

The Katz analysis has solidified itself as the standard for determining what constitutes a search within the context of the Fourth Amendment. While courts have been willing to extend Fourth Amendment protection to such things as garages, offices, and electronic mail, they have refused to extend such protection to the curtilage of one’s home, especially when it is observable to the public.\textsuperscript{209}

The following cases illustrate some instances where the Court failed to find a reasonable expectation of privacy. In Oliver v. United States (1984), the Court determined that an individual growing marijuana in an open field did not possess a reasonable expectation of privacy in that field. Thus the Court permitted the warrantless search of the field by police officers.\textsuperscript{210} Two years later, in California v. Ciraolo (1986), the Court concluded that the warrantless, naked-eye aerial observation of an individual’s backyard was permissible because Ciraolo’s expectation of privacy from all observations of his backyard was not reasonable.\textsuperscript{211} In California v. Greenwood (1988), the majority concluded a homeowner did not possess a reasonable expectation of garbage left on their

\textsuperscript{209} Stephens and Glenn at 152.
\textsuperscript{210} 466 U.S. 170 (1984)
\textsuperscript{211} 476 U.S. 207 (1986)
Finally, in *Florida v. Riley* (1989), the justices upheld warrantless, helicopter surveillance of the interior of a residential backyard greenhouse.\textsuperscript{213}

By contrast, in a number of cases, the Court has ruled that a reasonable expectation of privacy exists. For example, in *O’Connor v. Ortega* (1987), the justices asserted that a public employee’s expectation of privacy in his office at the public hospital was reasonable.\textsuperscript{214} Also, in *Bond v. United States* (2000), the Court opined that an individual aboard a Greyhound bus engaging in a cross-country trip has a reasonable expectation that luggage would not be manipulated by police in an effort to discover contraband.\textsuperscript{215}

The lineage of such cases demonstrates how the Court has wrestled with applying the *Katz* standard. Certain intrusive activities are permissible if they involve only observation within plain-view. The line of permissibility turns murky when actual physical invasion occurs. Technology has provided a means of avoiding the physically intrusive aspect yet enables amplification of observable details and behaviors outside of plain view. Permissible use of such technology suggests a realization of the notorious, prophetic warning uttered by Justice Brandeis in *Olmstead v. United States*: “Ways may some day be developed by which the Government without ever coming in the home, will be enabled to expose to a jury the most intimate occurrence of the home.”\textsuperscript{216} In the case of *Kyllo v. United States* (2001),\textsuperscript{217} the Court confronted the clash between technology’s power to “shrink the realm of guaranteed privacy” and Fourth Amendment protection.\textsuperscript{218}

\begin{footnotesize}
\begin{tabular}{l}
\textsuperscript{212} 486 U.S. 35 (1988). \\
\textsuperscript{213} 488 U.S. 445 (1989). \\
\textsuperscript{214} 480 U.S. 709 (1987). \\
\textsuperscript{215} 529 U.S. 334 (2000). \\
\textsuperscript{216} 277 U.S. 474 (1928). \\
\textsuperscript{217} 533 U.S. 27 (2001). \\
\textsuperscript{218} Stephens and Glenn at 156. \\
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\end{footnotesize}
Danny Kyllo was suspected by law enforcement agents of growing marijuana plants in his triplex home. The agents obtained a thermal imaging device and, without a warrant, used the device to determine if the amount of heat emanating from Kyllo’s home correlated with the light emitted from high-intensity lamps typically used for indoor marijuana growth. After scanning Kyllo’s garage roof and the side of his wall with the thermal imaging device from a distance away, the agents noticed these areas were particularly warmer than the rest of his home and substantially warmer than the neighboring units. Given their findings, agents obtained a warrant from a federal magistrate judge, entered Kyllo’s home, and found marijuana growth. At his trial, Kyllo’s motion to suppress the evidence seized from his home was denied and he subsequently entered a conditional guilty plea. The Ninth Circuit ultimately affirmed this decision.

The Ninth Circuit held was that Kyllo did not possess a reasonable expectation of privacy. The thermal imaging technology had not revealed the most intimate details of his life and the heat emissions from his house placed it within the scope of outside observation. Additionally, the judges noted that Kyllo made no effort to hide or conceal the heat radiating from his home. The judges compared thermal scanning to “the use of trained police dogs to detect the odor of illegal drugs, the nonintrusive outside observation by law enforcement officers of activities taking place within a home, and police searches of garbage left on the curb for pick-up--all of which had been upheld by the high Court.”

In a five-to-four decision, the Supreme Court reversed the Ninth Circuit’s decision and found the government’s use of a thermal imaging device not readily-accessible to the

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219 Ibid at 235.
public, aimed at a private home from a public street to detect relative amounts of heat, constituted a search within the meaning of the Fourth Amendment.\textsuperscript{220} In an opinion authored by Justice Antonin Scalia (joined by the unusual alignment of Justices David Souter, Clarence Thomas, Ruth Bader Ginsburg and Stephen Breyer), the Court reinforced the heightened expectation of privacy in one’s home: “In the case of the search of a home’s interior...there is a ready criterion of the minimal expectation of privacy that exists and that is acknowledged to be reasonable.”\textsuperscript{221} Justice Scalia reasoned that obtaining information of something from the interior of the home through sense-enhancing technology, that is not available to the public, and could not otherwise have been obtained without physically intruding on a constitutionally protected area, was the “functional equivalent” to a search.\textsuperscript{222}

Scalia rejected the government’s arguments that thermal imagining only detected heat radiating from the home’s “external surface” and therefore was constitutional because it did not detect “intimate details.” The majority refuted such claims based on \textit{Katz}’s rejection of the mechanical interpretation of the Fourth Amendment. The justices emphasized that by overturning \textit{Katz}, the homeowner would be subject to the mercy of advancing technology.\textsuperscript{223} As for government’s claim denying the revealing of intimate details, Justice Scalia rejected this claim on the grounds, that within the home, all details are considered intimate:

The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many

\textsuperscript{220} 533 U.S. 31 (2001).
\textsuperscript{221} \textit{Id} at 34.
\textsuperscript{222} \textit{Id}.
\textsuperscript{223} \textit{Id} at 35-36.
would consider intimate; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on.  

The majority, in sum, contended that this technology, unavailable to the public, used “through-the-wall” surveillance to reveal the intimate details of one’s home, which was the function equivalent to a search and an intrusive encroachment of privacy.

The dissenters, led by Justice Stevens and joined by Chief Justice Rehnquist and Justices Sandra Day O’Connor and Anthony Kennedy, drew a bold distinction between surveillance recording observations “off the wall” and “through the wall.” Here, evidence obtained was off-the-wall, the device picking up only heat emissions coming from the home.

Stevens commenced his dissent by claiming that in this case, no physical invasion of a constitutional protected area had actually occurred. He argued that the information obtained from the search could have been just as easily obtained though observation of outside curtilage or more specifically, the melting of snow or evaporation of rainwater. The dissenters further argued that the subjective reasonable expectation of privacy defined by the majority was “implausible” and society was unwilling to recognize such an expectation as reasonable.

The dissenters also attacked the majority’s application of the *Katz* standard because it treated “the mental process of analyzing data obtained from external sources as the equivalent of a physical intrusion into the home.” Stevens suggested a new standard for evaluating warrantless electronic surveillance: Whether the technology offered the

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224 *Id* at 38.
225 Stephens and Glenn at 235.
226 533 U.S. at 44.
227 *Id* at 49.
“functional equivalent of actual presence” in the searched area.\textsuperscript{228} Using this standard, the dissenters distinguished thermal technology from wiretapping: “In \textit{Katz} the electronic listening device [was] the functional equivalent of actual presence.”\textsuperscript{229} The thermal imager was not, since it disclosed only the relative amounts of heat radiating from the home; “it would be as if, in \textit{Katz}, the listening device disclosed only the relative volume of sound leaving the [phone] booth.”\textsuperscript{230} The dissenters warned that the majority’s standard would dissipate as soon as the technology became widely available for public use. Justice Stevens concluded his dissent by stating his preference for judicial restraint. He found it “far wiser to give legislators an unimpeded opportunity to grapple with these emerging issues rather than to shackle them with prematurely devised constitutional constraints.”\textsuperscript{231}

The substantial divide in this case illuminates the struggle the Court has faced when applying the \textit{Katz} standard to invasive uses of technology. The case further signifies the Court’s heightened protection of one’s home, and its unwillingness to permit police use of advancing technology, when that technology permits information that could not be obtained without physical intrusion into a constitutionally protected area.

The application of the \textit{Katz} standard has been, and continues to be, a source of division among the justices of the Court. In certain cases, the justices determined a reasonable expectation of privacy did not exist. In other cases, however, the Court concluded that the defendants \textit{did} have a reasonable expectation of privacy. The Court’s

\begin{itemize}
\item \textsuperscript{228} \textit{Id} at 44.
\item \textsuperscript{229} \textit{Id} at 49-50.
\item \textsuperscript{230} \textit{Id}.
\item \textsuperscript{231} \textit{Id} at 51.
\end{itemize}
five-to-four decision in *Kyllo* in 2002, further illustrates that application of the *Katz*
standard remains a source of contention between the justices.
VII.

United States District Court to the

USA PATRIOT Act: The Fourth

Amendment in the Age of Terrorism

In 1972, the Court was reluctant to apply the Katz standard to those circumstances involving foreign intelligence surveillance and national security, preferring instead to defer such matters to the discretion of the president and Congress. In light of the events of September 11, 2001, the Court has been encouraged by interest groups, lawmakers, and citizens to clarify the distinction between foreign intelligence surveillance and domestic surveillance used to uncover criminal activity.

When first confronted with the issue of a “national security exception” to the Fourth Amendment requirement that judges approve warrants for electronic surveillance in United States v. United States District Court (1972), the justices unanimously held that the only a single safeguard exists—the prior authorization by a magistrate.232

This particular case emerged from proceedings in the U.S. District Court for the Eastern District of Michigan. The United States charged three defendants with conspiracy to destroy government property and the court ordered the government to provide one of the defendants with complete disclosure of his conversations, which were overheard by electronic surveillance instituted without a search warrant. The district judge denied the government’s motion to vacate the disclosure order and the U.S. Court of Appeals for the Sixth Circuit denied the government’s petition for a writ of mandamus, finding the government’s search to be unconstitutional.

This case was important for it raised concerns about the government’s interest in protecting itself from potential terrorist attacks and the citizen’s right to be secure in his

privacy against unreasonable government intrusion. The Court, in effect, was clarifying when, if ever, the president, may “authorize electronic surveillance in internal security matters without prior judicial approval.”

The Nixon administration challenged the Court of Appeals’ holding on numerous grounds. First, it claimed that under Title III, §2511 (3) of the Omnibus Crime Control and Safe Streets Act, national security surveillances were exempt from the Act’s warrant requirement. Second, it claimed that technology and “sophistication of its use” has resulted in “new techniques for the planning, commission, and concealment of criminal activities.” Thus, by denying the government use of electronic surveillance, the Court would be contradicting the public’s interest since such techniques were employed against the government and its law-abiding citizens. Third, special circumstances—that is the need to gather intelligence as opposed to investigate crime—necessitated an exception to the warrant requirement. The government believed that a warrant requirement “would unduly frustrate the efforts to protect itself from acts of subversion and overthrow directed against it…thus, [obstructing] the President in the discharge of his constitutional duty to protect domestic security.” And finally, the administration asserted that the courts lacked the ability to keep matters of intelligence “secret” and the necessary knowledge to consider effectively legal questions involving national security.

In a unanimous opinion authored by Justice Lewis Powell, the Court rejected each of the Nixon administration’s claims. First, Powell dismissed the Title III claim, holding that Title III did not limit nor disturb any powers the president had under the

233 Id at 299.
234 Id at 311.
235 Id at 315, 318.
Constitution. Therefore, the justices took no position on the authority to wiretap agents of a foreign power.\footnote{Id at 308.} Moreover, that was not the case here. Instead, the justices focused on the constitutional powers of the President.

Powell acknowledged the President’s authority to employ “electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government.”\footnote{Id at 309-310.} But while such surveillance had been used regularly by various presidents and attorney generals since 1945, the justices were unwilling to “make the employment by government of electronic surveillance a welcomed development—even when employed with restraint and under judicial supervision.” Their unease stemmed from the government’s capability to intrude on one’s “cherished privacy.” Such intrusion, the majority feared, could target those citizens whose political views are inconsistent with the governments and those engaged in lawful public dissent.

Justice Powell further argued: “Fourth Amendment freedoms cannot be guaranteed if domestic security surveillances may be conducted solely within the Executive Branch.”\footnote{Id at 316-317.} The executive officers of the Government do not constitute a neutral, judicial magistrate. The prior review by a neutral and detached magistrate serves as the “time-tested means of effectuating Fourth Amendment rights.”\footnote{Beck v. Ohio, 379 U.S. 89, 96 (1964).}

As for the government’s claim that the special circumstances necessitated an exception to the warrant requirement, Powell noted that such surveillance, “whether its purpose be criminal investigation or ongoing intelligence gathering,” risked infringement
of constitutionally protected rights. If nothing else, prior judicial approval served as a means of assuring the public that indiscriminate wiretapping would not occur. The Court, in short, was unwilling to allow other political actors to eliminate the traditional role of the judiciary in protecting individual rights.

In response to the government’s claim that the courts lack the knowledge to determine probable cause in so sensitive of cases, Powell explained, “courts regularly deal with the most difficult issues in society.” Additionally, the justices explain that if the threat’s complexity makes it difficult to convey its significance to a court, one must question there is probable cause for surveillance. As such, the justices also rejected the contention that prior judicial approval fractures the secrecy essential to intelligence gathering. The majority asserted that judges could be counted on to be especially conscious of security requirements.

It is important to emphasize that while the Court rejected the use of electronic surveillance for “domestic groups plotting sabotage and other illegal acts,” they were neither willing to address nor express an opinion on issues pertaining to the activities of foreign powers or their agents. That type of surveillance remained undisturbed in United States v. United States District Court. Furthermore, the majority acknowledged that policy and practical considerations for domestic security surveillance may very well differ from the surveillance of ordinary crimes. Thus, “different standards may be compatible with the Fourth Amendment if they are reasonable in relation to the legitimate

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241 Id at 321.
242 Id at 320.
243 Id.
244 Id at 321.
245 Id at 322.
need of government for intelligence gathering and the protected rights of our citizens.”246 The justices even suggested Congress consider and develop distinct protective standards for surveillance concerning national security and criminal activity.247 Congress acted on this invitation to distinguish “between foreign intelligence surveillance and criminal investigation and its subsequent abuses by the Nixon administration” in 1978 by enacting the Foreign Intelligence Surveillance Act (FISA).248

B. The Foreign Intelligence Surveillance Act (FISA)

The Foreign Intelligence Surveillance Act (FISA) sought to achieve a proper balance between the government’s need for national security and an individual’s constitutional rights. FISA constructed procedures to be followed by the government “when conducting surveillance in foreign intelligence investigations.”249

In terms of probable cause, FISA mandated a different standard than used in normal criminal investigations. It authorized the “wiretapping of permanent residents in the United States on a showing of probable cause to believe that the target of the investigation was a ‘foreign power’ or an ‘agent of a foreign power’ and that the acquisition of such information was ‘necessary to national defense or security or the conduct of foreign affairs.’”250 These standards did not require the “showing of criminal activity on behalf of the target of the surveillance, unless the communications intercepted

246 Id at 322-323.
247 Stephens and Glenn at 151-152.
248 Glenn at 20.
249 Ibid.
250 Stephens and Glenn at 190.
belonged to a ‘United States person.’”251 In the event that a “United States person” was involved, the courts only required a minimal level of probable cause that the person be engaged in an activity that might constitute a criminal violation.252

Procedurally, FISA created a separate court called the Foreign Intelligence Surveillance Court (FISC), which heard applications for foreign intelligence surveillance orders and warrants. The Court was comprised of seven (now eleven) district judges, and has considered over 15,000 applications and approved almost all of the requests, denying not a single warrant application until May 2002.253 On the small chance that an application was denied, it would go immediately to the Foreign Intelligence Surveillance Court of Review (FISCR), comprised of three judges. The government could appeal the finding of this appeals’ panel to the Supreme Court. The FISC’s first rejection occurred in 2002 when the judges unanimously denied Attorney General John Ashcroft’s request “for expanded power to conduct surveillance under the PATRIOT Act.”254 Six months later, however, the FISCR reversed this decision.

Although the constitutionality of FISA has been challenged several times, courts have repeatedly upheld the statute on the grounds it sufficiently balances individual liberty and national security.255 Courts have also allowed evidence obtained through foreign intelligence surveillance to be admitted in criminal proceedings, so long as the primary purpose of the surveillance was genuinely for national security purposes.256

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251 Ibid at 191.
252 Ibid.
253 Glenn at 22.
254 Ibid.
255 Ibid.
256 Ibid.
C. The USA PATRIOT Act and its Renewal

FISA governed foreign intelligence surveillance for nearly twenty-five years until the terrorist attacks occurred on September 11, 2001. Shortly after the attacks, Congress passed the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism), which amended FISA by relaxing the level of probable cause and expanding FISA’s reach.257

Section 214 of the PATRIOT Act expanded the government’s power to screen private telephone conversations, E-mail, and Internet communications.258 As Stephens and Glenn emphasize, “this expanded surveillance authority does not require the government to establish probable cause, and in fact, imposes only minimal warrant requirements.”259 Under the PATRIOT Act, the FBI is authorized to obtain an order from the FISC requiring the production of “any tangible things sought for an investigation…to protect against international terrorism or clandestine intelligence activities.”260 Probable cause is not required. The FBI merely needs to demonstrate that the item requested are “sought for an authorized investigation.”261 The individual targeted by the investigation need not even be suspected of ordinary criminal activity. For these searches are not confined to “foreign powers and their agents,” anyone including United States citizens and resident legal aliens can be targeted for investigation.262

258 Ibid.
259 Ibid at 193.
260 Ibid.
261 Ibid at 22.
262 Ibid.
Challenges to the constitutionality of the PATRIOT Act have been filed in federal court. In July 2003, in *Muslim Community Associations et. al v. Ashcroft and Mueller*, the American Civil Liberties Union (ACLU) filed a complaint alleging §215 violated petitioner’s freedom of speech, right to privacy and right to be free from unreasonable searches and seizures. Further, petitioners claimed that without meaningful judicial oversight, §215 nullified Fourth Amendment protections of civil liberties.\(^{263}\)

The specific arguments challenging the constitutionality of the First Amendment begin with the assertion that mere threat of government surveillance of various expressive activities essentially discourages people from speaking freely on matters of public concern.\(^{264}\) Second, §215 authorizes the FBI to “obtain records and personal belongings of U.S. citizens and permanent residents based in part on expressive activities protected by the First Amendment.”\(^{265}\) And third, the USA PATRIOT Act requires those served with §215 orders to remain silent about the FBI’s demand for information.

Additionally, the ACLU asserts §215 violates the Fourth Amendment because it eliminates judicial discretion. Under the PATRIOT Act, the FISA Court does not have the authority to determine independently whether probable cause exists; instead, it must grant the order if the applications “meets less-than-rigorous §215 requirements.”\(^{266}\) The result of this is unchecked power for the FBI, allowing them to search and seize without ever retaining a warrant or demonstrating probable cause or even notifying people of the searches.

\(^{264}\) Glenn at 25.
\(^{265}\) *Ibid.*
\(^{266}\) *Ibid.*
The ACLU further contends that §215 violates privacy interests. The government, in sum, is granted unfettered power to monitor personal activities. Additionally, under §215, the government may obtain among other things, genetic information and educational records.\textsuperscript{267}

To date, the government has not publicly published a brief in response to these allegations. In fact, as of Spring 2006, Judge Denise Page Hood of the Eastern District of Michigan, where the \textit{MCA} case was filed, was still considering a motion made by the Department of Justice in 2003 to dismiss the case.

Recently, several provisions of the PATRIOT Act were set to expire. In fact, §215 was only days away from expiration, but Congress extended the Act in monthly increments until March 2006, when Republican senators successfully defeated a filibuster and mustered enough votes to renew the USA PATRIOT Act. President George W. Bush signed USA PATRIOT Act II into effect on March 9\textsuperscript{th}, 2006. Many of the provisions were either renewed or made permanent.

Specifically, §215 was renewed for another four-years, including the provisions permitting wiretapping “without requiring the government to identify the target of surveillance” and “‘rove wiretaps’ under the FISA to non-United States citizens who are not connected to foreign powers or terrorists.”\textsuperscript{268}

There were some changes to §215 provisions. First, under the new provisions, those of received court-approved subpoenas for information in terrorist investigations obtain the right to challenge the requirement that they must remain silent. Second, two new

\begin{footnotesize}
\textsuperscript{267} \textit{Ibid.}
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procedural hurdles were imposed on FBI agents who apply for a §215 order to search bookstore library records: they must obtain permission from one of the following top officials—the director or deputy of the FBI or the Executive Assistant Director of National security, and FBI agents must justify the relevance of their request to the FISC.269 Third, parties who are served with a §215 order now retain the right to consult an attorney and challenge the order in the FISA court. Finally, the government claims that the public will be made aware of §215 abuses. That is, the Inspector General of the Justice Department is now required to conduct a review of the use of §215 since 2001 and regularly publicly publish reports highlighting any abuses that may have occurred.270 Additionally, the Inspector General assures that the government will publish an annual report on the number of bookstores and library searches that have occurred under §215.271

The positive aspect of the revisions aside, the ACLU purports that the renewed USA PATRIOT Act give the government “unprecedented powers to violate our civil liberties and tap deep into the private lives of innocent Americans.”272 The ACLU contends the renewed Act allows the government, using a broad definition of terrorism, to subject organizations using protest tactics to criminal wiretapping and other electronic surveillance, essentially terminating court-approved limits on police spying.273 The new act, they argue, also permits the government to share sensitive personal information with local and state law enforcement, gaining secret access to credit reports without requiring

270 Ibid.
271 Ibid.
273 Ibid.
consent of the judicial process.\textsuperscript{274} Furthermore, the Act permits the government to “sample and catalogue innocent American’s genetic information without court order and without consent.”\textsuperscript{275}

The renewal of the Patriot Act has drawn criticism from the political left and the political right. For example, Republican James Sensenbrenner (R-WI), Chair of the House Judiciary Committee was quoted in the \textit{Milwaukee Journal Sentinel}, “It was ‘way premature’ for Congress to consider the PATRIOT Act II.”\textsuperscript{276} Similarly, Christopher Pyle, former U.S. Army intelligence officer stated on ABCNEWS.com, “I don’t think the Fourth Amendment exists anymore. I think it’s been buried by the PATRIOT Act and some of the court rulings that have been handed down. We need a requiem mass for the Fourth Amendment, because it’s gone.”\textsuperscript{277} Well-known conservative television pundit, Bill O’ Reilly of Fox News, has even spoken out against the PATRIOT Act’s renewal:

Now the wiretap. This is another thing. Now—and believe me, I’m kind of with you in the sense that I want government to have the tools to protect us. I mean, I’m not the ACLU poster boy, as you know, OK? But now they want to have a window where they don’t have to explain to anybody why they’re wiretapping anybody else…the president should have [emergency powers], as Abraham Lincoln had during the Civil War, in times of emergency stress or emergency to make these things happen. Just to give it to the attorney general, no. I mean, look, Janet Reno was the attorney general, John Mitchell was the attorney general. I don’t want these people to have this power. And this guy Ashcroft is throwing sheets over statues.\textsuperscript{278}

Despite harsh criticism from both partisan sides, President George W. Bush has defended the need for the renewed USA PATRIOT Act, “The enemy has not gone

\textsuperscript{274} Ibid.
\textsuperscript{275} Ibid.
\textsuperscript{277} Ibid.
\textsuperscript{278} Ibid.
away—they’re still there. And I expect Congress to understand that we’re still at war and they’ve got to give us the tools necessary to win this war.”

The USA PATRIOT Act’s renewal has cemented itself as the greatest current threat to Fourth Amendment freedom due to its statutory expansion of surveillance and searches. Advocates of the Act assert that it “provides executive agencies with the tools that are necessary to combat terrorism and the ability to adapt those tools as technology evolves.” One cannot help but feel threatened by the potential danger of government-monitored surveillance encroaching upon our “constitutionally-protected areas.” As the ACLU points out, the FBI can without any judicial approval whatsoever, simply demand a book of Islamic fundamentalists from a bookstore, medical records from hospitals, lists of members of a church, mosque or synagogue, and names of people who visit specific Internet websites. These are the people who then become the targets of official surveillance “suspected of unorthodoxy in their political beliefs.”

To date, there is not a Fourth Amendment challenge to the USA PATRIOT Act on the Supreme Court’s docket. That is not to say that the Court will not grant certiorari to a Fourth Amendment claim challenging the Act. Other recent constitutional challenges to the government’s power during a time of war have reached the Court in *Hamdi v. Rumsfeld* (2004) and *Rasul v. Bush* (2004). Such cases demonstrate the Court’s willingness to weigh the government’s power in light of detained enemy combatants as

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280 Glenn at 20.
281 *Ibid* at 25.
282 *Ibid*.
well as military commissions. It is, therefore, not unreasonable to speculate that the Court may ultimately confront the issue of “constitutionality of Fourth Amendment restrictions embodied in the USA PATRIOT Act.”

D. Presidential Powers under the National Security Agency Wiretapping Program

The National Security Agency wiretapping program, secretly authorized by President George W. Bush in the wake of the September 11, 2001, terrorist attacks, authorizes the National Security Agency “to intercept international e-mails and telephone conversations between U.S. residents and overseas associates.” The Justice Department asserts that the president’s power to execute warrantless wiretaps is derived from Article II, Section II, of the Constitution, that as Commander-in-Chief, the president retains full responsibility for prosecuting any war in which the United States is involved. As part of this duty, the president is responsible for gathering and collecting enemy intelligence. The NSA wiretaps, therefore, are a method of gathering intelligence on foreign enemies and thus, are within the inherent constitutional authority of the president. The Justice Department further contends that Congress, by passing the resolution authorizing force

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285 Stephens and Glenn at 195.
287 Lyle Jones. “NSA Inherent Constitutional Authority.” Historical Documents. 
<www.historicaldocuments.com/article.htm?id=189&NSA_Wiretaps__Inherent_Constitutional_Authority>.
against al-Qaeda, confirmed this power immediately following September 11. So, the president claims his power is both statutory and constitutional.

To affirm this authority, Attorney General Alberto Gonzales has cited previous examples where former presidents have exercised this unique executive power. He cited Woodrow Wilson’s authorization of the interception of all cables to and from Europe during World War I. He referenced Franklin D. Roosevelt’s authorizing the detainment of over 100,000 Japanese and Japanese-American citizens during World War II. Gonzales also indicated that he would consult this “legal framework to decide whether intercepting purely domestic communications without a warrant was legally permissible.”

Similar to the USA PATRIOT Act, the NSA warrantless wiretaps have drawn severe criticism from Democrats and Republicans for the abuse of civil liberties and for depriving Congress of information about the program. These critics also contend that the NSA program should fall within the jurisdiction of the 1978 Foreign Intelligence Surveillance Act. Most importantly, Congress has criticized the Bush administration for completely undermining the principles of federalism and separation of powers. As Senator Patrick Leahy (D-VT) stated, “Under our Constitution, Congress is the co-equal branch of government to make the law. If you believe you need new laws, come and tell us.” Similarly, Representative Adam B. Schiff (D-CA) added, “No on in Congress

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290 Jones, supra at 287.
291 Ibid.
would deny the need to tap certain calls under court order...but if the administrations believes it can tap purely domestic phone calls between Americans without court approval, there is no limit to executive power. This is contrary to settled law and the most basic constitutional principles of the separation of powers.”  

A number of prominent Republicans have also criticized the Bush Administration for the NSA wiretaps program. Senator John McCain (R-AZ) denounced President Bush and the wiretapping without Court warrants “as a violation of the law and basic civil liberties.” Additionally, Bruce Fein, a lawyer who worked under President Reagan in the Justice Department, recently wrote in the *The Washington Times* that, “Bush should face possible impeachment if the practice is not stopped.”

The Justice Department has responded to such criticism by asserting that the NSA does not engage in “indiscriminate domestic spying” nor does “it intercept the private conversations of random individuals in hopes of ferreting out suspicious behavior.” It is also of the belief that given the President’s powers under Article II, the NSA terrorist-surveillance program does not supplant FISA; rather, it derives its authority outside of it. Gonzales stressed that the nature of FISA was a “peacetime-statute”, and suggestions to amend the act would “reveal information potentially vital for maintaining national security.”

When it comes to collecting foreign intelligence and maintaining foreign relations, the Bush administration asserts that the President is charged to do whatever is necessary

293 Lichtblau, *supra* at 289.
295 *Ibid*.
296 Stewart, *supra* at 288.
297 *Ibid*. 

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to protect American citizens.\textsuperscript{298} Administrative officials further argue that the NSA’s program is unsuited for FISA because it “requires the government to develop a reasonable basis to believe that a specific individual or a source is an agent of a foreign power, and then apply to a special court for authorization to pursue that target.”\textsuperscript{299}

While the use of secret intelligence is vital for efficient and effective national security, should a constitutional violation occur, it would be extremely difficult to discover the violation. And although prosecutors would be reluctant to introduce secret evidence in criminal trials due to the defendant’s Fourth Amendment rights, defendants would no doubt request the government to disclose whether illegal surveillance occurred.\textsuperscript{300} This action has persuaded released detainees to file civil suits challenging the government’s use of unlawful surveillance.

Should the issue reach the Supreme Court, it is difficult to conclude how the Court will interpret the expanded role of executive presidential power. The recent additions of Chief Justice John Roberts and Justice Samuel Alito most likely operate “under the influence of an expansive conception of presidential power.”\textsuperscript{301} For as the Noah Feldman highlights in the \textit{New York Times} article, “Both are products of a conservative movement that has provided the legal justification for various aspects of the Bush revolution, and both held intensely political jobs in previous Republican administrations.”\textsuperscript{302} Chief Justice Roberts, a former assistant attorney general in the Department of Justice, supported a broad interpretation of presidential power in the Reagan administration.

\textsuperscript{298} \textit{Ibid.}
\textsuperscript{300} Noah Feldman. “Who can check the President?” \textit{New York Times} 6,1: 8 Jan 2006, 52.
\textsuperscript{301} \textit{Ibid.}
\textsuperscript{302} \textit{Ibid.}
Similarly, when asked, in his Senate confirmation hearings, about his tenure as deputy assistant attorney general in the Office of Legal Counsel in the Reagan administration, Justice Alito stated, “We were strong proponents of the theory of the unitary executive, that all federal executive power is vested by the Constitution in the president. And I thought then, and I still think, that this theory best captures the meaning of the Constitution's text and structure.”  

The Court, ultimately, will be asked to consider the constitutionality of presidential power and foreign intelligence surveillance, a matter they chose to defer to Congress in United States v. United States District Court (1972). The Court’s deference to Congress on this issue led to FISA, but President Bush is acting with authority, he claims, that is outside of FISA’s jurisdiction. Although implied, the Bush administration contends that the Congress authorized the program, and even if Congress had not agreed, the President asserts he may authorize the NSA wiretaps under his inherent executive powers present in the Constitution. It should be noted that President Bush’s claims mirror those made by President Nixon in 1972, in which the Court, in a unanimous decision, asserted that while the President had a vast amount of executive power, that power was circumscribed by certain constitutional and common law principles. Ultimately, the constitutionality of the NSA wiretap program will be a question will boil down to the Court’s interpretation on presidential power during this time of war.

And, as the Court has done so many times before, the justices will delicately balance the competing interests. These interests—the nation’s responsibility to protect individual freedoms while concurrently protecting itself, which may, at times, require intrusions into

those freedoms—have been complicated by modern realities. Technology and domestic terrorism have made it so that, “citizens of the United States may soon have to choose between civil liberties and more intrusive forms of protection.”

The United States is therefore left with the challenge of figuring out a way to protect itself from threats to national security—without knowing when the next attack will occur—while striving to preserve our civil liberties.

As recent as Monday, April 24, 2006, the American Civil Liberties Union filed a complaint against the National Security Agency in the District Court for the Eastern District of Michigan. The ACLU asked a federal judge to issue a summary judgment, which would permanently block the NSA program from continuing. The suit contends that the NSA program violates the First and Fourth Amendments and also violates the constitutional principle of separation of powers, since it was authorized by President Bush in excess of his Executive authority and contrary to limits imposed by Congress.

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305 ACLU v. NSA (2006).
VIII.

Conclusion
The historical record, case law, Congressional legislation, and modern challenges have been prominent factors in the development of modern Fourth Amendment jurisprudence. Constitutional challenges dating from the early nineteenth century through 2006, illustrate that Fourth Amendment guarantees are not absolute. The justices of the Supreme Court have adapted the Fourth Amendment to society’s progression, which has brought about new challenges to the Fourth Amendment through innovative technological developments and subsequently the threat of terrorism.

The construction of the Fourth Amendment was tailored to protect and prevent unlawful intrusions by the government. This was the Framers remedy to the Crown’s abuse of writs of assistance and general warrants in Britain and in the American colonies. Nearly one-hundred years later in *Boyd* (1886), the Supreme Court held that any evidence obtained through an unlawful search, was to be excluded in criminal trial.

The twentieth century brought about the greatest expansion of Fourth Amendment rights. Beginning in 1914 in *Weeks*, the Court adopted the exclusionary rule constructed in *Boyd*. This formal requirement was important because without which, all violations of the Fourth Amendment would essentially become meaningless, and evidence obtained unlawfully would still be able to be introduced in Court. *Boyd* and *Weeks* have subsequently given courts a reason to litigate Fourth Amendment violations.

In addition to the expansion of Fourth Amendment rights, the Court has also indicated that the Fourth Amendment is not absolute, and there are exceptions. In 1924 for example, in *Hester*, the Supreme Court carved out an exception for open-field searches. One year later, in *Carroll*, the justices created another exception for automobiles in the formal requirements for searches and seizures. Later, in 1972, in
United States District Court, the Court was also willing to carve out an exception for national security. These cases further illustrate that the Court is unwilling to view the Fourth Amendment as rigid and willing to consider those circumstances that warrant exceptions.

Olmstead highlighted the Courts reluctance to invalidate invasive techniques not engaging in traditional, mechanical trespass. The justices upheld the use of wiretapping because no physical trespass occurred. More importantly, Olmstead introduced the “trespass theory,” mandating that physical trespass take place for a search or seizure to occur. The Supreme Court upheld and applied Olmstead’s trespass theory for nearly forty years until Katz, in which the justices finally validated what Justice Louis Brandeis had uttered in his dissent thirty-nine years earlier in Olmstead, “The progress of science in furnishing the government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.” Therefore, in Katz, the justices determined that physical trespass was not a precondition for Fourth Amendment violations. This holding, perhaps the most influential Fourth Amendment holding of the twentieth century, created the Katz standard, which mandates the justices consider the context of each claim to determine if a reasonable expectation of privacy exists and furthermore, if society is willing to recognize that expectation as reasonable.

The Court has used the Katz standard for the past thirty-eight years. The subjectivity of the test has and continues to divide the justices of the Court. The Court’s decision in

307 277 U.S. 474 (1928).
Kyllo in 2002, illustrates that technology has only made application of the Katz standard as controversial as ever. In this decision, the justices split on whether the defendant had a reasonable expectation of privacy in the heat emissions from his home, in a case where FBI agents used image-enhancing technology to gather information for a warrant application. There is no doubt that technology has aided law enforcement officers with an efficient means to detect criminal activity while avoiding traditional notions of mechanical trespass. It is up to the Supreme Court, therefore, to examine the context of these situations to determine if a reasonable expectation of privacy exists.

While technology has made it difficult for the justices to apply the Katz standard, or rather seek continuity in their decision, it has subsequently provided terrorists with a more effective, less-detectable method to cause destruction. Following the terrorist attacks on September 11, 2001, the government responded with the USA PATRIOT Act and NSA wiretapping programs, which it contends are essential not only to combat terrorism but also to provide the president with the requisite latitude to protect our nation.

The USA PATRIOT Act and the NSA program currently pose the greatest threat to Fourth Amendment values. The need for security and the press to fight terrorism has threatened the very thing the government is sworn to protect—our preservation of Fourth Amendment principles. The constitutionality of both the PATRIOT Act and the NSA program rests in the hand of the Supreme Court. And just as the Court weighs law enforcement’s use of technology to uncover criminal activity against our civil liberties, so to will they consider the government’s need to protect itself while securing the fundamental liberties guaranteed in the Bill of Rights.
This exercise has undoubtedly illustrated the importance and applicability of Fourth Amendment jurisprudence in the twenty-first century. The justices of the Supreme Court continue to wrestle with the application of the Katz standard, the foundation of which, can be traced back to Justice Louis Brandeis dissenting opinion in Olmstead. Looking to the future, as more technological instruments become prevalent and widely-available, the justices will continue to look at the context of the situation to determine if a reasonable expectation of privacy exists.

Furthermore, the arguments made by President Nixon in 1972 in United States District Court are the same arguments made by Attorney General Alberto Gonzales and President George W. Bush in defense of the NSA wiretapping program. In 1972, the justices unanimously concluded that there were certain restraints on Presidential power. As of this week, the ACLU has challenged the NSA in district court citing a violation of constitutional powers and the Fourth Amendment. We will await the progression of this case with great interest, but with confidence that should the case reach the Supreme Court, the justices would strike the proper balance between liberty and order.

The Supreme Court has found away to address the concerns of the growing technological age by using an adaptive approach to Fourth Amendment challenges. From wiretaps in Olmstead to image-enhancing technology in Kyllo, the historical progression of Fourth Amendment case law has demonstrated this approach. As we take steps toward the future, it remains to be seen whether the Supreme Court will continue to use an adaptive approach ensuring the Fourth Amendment’s survival, or whether an alternative approach be constructed to protect individuals against unreasonable searches and seizure in the twenty-first century.
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