Chapter 1

THE "THRESHOLD" OF THE FOURTH AMENDMENT RIGHT TO BE SECURE AGAINST SEARCHES

INTRODUCTORY NOTE

By its terms, the Fourth Amendment applies only to official "searches and seizures." Accordingly, when an individual challenges government conduct on Fourth Amendment grounds, there may be a "threshold" question — whether that conduct constitutes a "search" or a "seizure." Although the Court has devoted some attention to the issues of when persons or property have been "seized," the body of doctrine spawned by the threshold "seizure" question is modest compared to that engendered by the issue of whether a "search" has occurred. The important question of when a person has been "seized" for Fourth Amendment purposes is treated in Chapter Five (see infra Chapter 5, subsection [A](1)). The more complex inquiry into whether a "search" has occurred is the central concern of all of the cases in this chapter.

Over the years, the Supreme Court has endorsed different criteria for resolving threshold "search" issues. It first addressed the question in the earliest Fourth Amendment landmark case, Boyd v United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). At issue in Boyd was an order requiring an individual to produce business invoices. The Court concluded that the order to produce the documents qualified as a search because it was "a material ingredient and effect[ed] the sole object and purpose of" a search, which was "forcing from a party evidence against himself."

Forty-two years later, in Olmstead v United States, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), the Court changed its approach. A majority concluded that wiretapping from outside a building did not constitute a search because, unlike the quintessential searches known to our Constitution's Framers, there was no "actual physical invasion" and no trespass upon a protected location. Without such an invasion, there could be no Fourth Amendment search.

In three cases between 1952 and 1966, the Court addressed situations involving the government's use of undercover agents (also known as "false friends") to obtain inculpatory statements from suspects. Each of the suspects claimed that the government had crossed the border of Fourth Amendment territory. In On Lee v United States, 343 U.S. 747, 72 S. Ct. 967, 96 L. Ed. 1270 (1952), the Court rejected the claim that an informant's electronic transmission of statements to a nearby law enforcement officer amounted to a search. The Court reasoned that the Fourth
Amendment did not govern the situation because the speaker's consent to the presence of the informant precluded a trespass, and, additionally, because the speaker was "talking confidentially and indiscreetly with one he trusted, and he was overheard." In *Lopez v United States*, 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963), the Court declared that a known Internal Revenue Service agent's recording of a bribe offer was outside the borders of the Fourth Amendment because the suspect had consented to the agent's presence in his office, and had taken the risk of recording and reproduction in court by willingly speaking to the agent. Finally, in *Hoffa v United States*, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966), the Court concluded that an informant who listened to, reported, and testified about Hoffa's incriminatory remarks did not "search" within the meaning of the Fourth Amendment because "no interest legitimately protected by the Fourth Amendment [was] involved." According to the Court, Hoffa had not relied "upon the security of his hotel room," for he had allowed the informant to enter and listen. Rather, he had relied "upon his misplaced confidence that [the informant] would not reveal his . . . voluntarily confide[d] wrongdoing."

Between 1942 and 1964, the Court decided three electronic eavesdropping cases that did not involve "undercover agents." In *Goldman v United States*, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1942), the Court held that the government did not trigger Fourth Amendment coverage by placing a "detectaphone" against an outer wall and listening to conversations inside a building. In *Silverman v United States*, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 784 (1961), however, law enforcement agents did tread upon Fourth Amendment territory by inserting a "spike mike" into a "party wall" and picking up conversations passing through heating ducts. The physical intrusion was deemed sufficient to cross the constitutional threshold, even though it did not effect a technical "trespass." Finally, in *Clinton v Virginia*, 377 U.S. 158, 84 S. Ct. 1186, 12 L. Ed. 2d 213 (1964), the Court found that when the government attached a listening device to a wall by means that caused a "thumbtack-sized" penetration, it had "searched" within the meaning of the Fourth Amendment. Although *Olmstead's* physical intrusion requirement still survived, the Court proved that it had been serious in *Silverman* when it had "decline[d] to go beyond [the physical intrusion boundary] by even a fraction of an inch." By 1964, the *Olmstead* criterion for resolving the threshold question had clearly become a fragile, tenuous barrier to Fourth Amendment regulation.

This historical sketch of cases and doctrine sets the stage for the revolutionary entrance of *Katz v United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the first case in this chapter. The majority and concurring opinions in *Katz* are the wellspring of all modern Fourth Amendment "search" doctrine. The remainder of the cases in this chapter are some of *Katz's* many descendants. Their task has been to develop, refine, and delimit the boundaries of the simple doctrine at the core of the landmark decision. Students should endeavor to identify the content of the contribution made by each of these cases. Moreover, they should consider whether that content is faithful to *Katz* and to the spirit of the Fourth Amendment.
KATZ v. UNITED STATES
United States Supreme Court
389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)

Mr. Justice STEWART delivered the opinion of the Court.

The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston in violation of a federal statute. At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment, because "[t]here was no physical entrance into the area occupied by [the petitioner]."

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

The petitioner has phrased those questions as follows:

A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

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

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4 "The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth . . . . And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home." Griswold v. State of Connecticut, 381 U.S. 479, 509, 85 S. Ct. 1678, 1695, 14 L. Ed. 2d 510 (dissenting opinion of Mr. Justice BLACK).

5 The First Amendment, for example, imposes limitations upon governmental abridgment of "freedom to associate and privacy in one's associations." NAACP v. Alabama, 357 U.S. 449, 462, 78 S. Ct. 1163, 1172, 2 L. Ed. 2d 1488. The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too "reflects the Constitution's concern for" the right of each individual "to a private enclave where he may lead a private life." Tinker v. Des Moines, 393 U.S. 503, 516, 86 S. Ct. 752, 15 L. Ed. 2d 924. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.
of his very life, left largely to the law of the individual States.

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a “constitutionally protected area.” The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given “area,” viewed in the abstract, is “constitutionally protected” deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend’s apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, [citing Olmstead and Goldman], for that Amendment was thought to limit only searches and seizures of tangible property. But “[t]he premise that property interests control the right of the Government to search and seize has been discredited.” Warden v Hayden, 387 U.S. 294, 304. Thus, although a closely divided Court supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any “technical trespass under . . . local property law.” Silverman v United States, 365 U.S. 605, 511, 81 S. Ct. 679, 682, 5 L. Ed. 2d 734. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people — and not simply “areas” — against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the “trespass” doctrine there enunciated
can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

[The Court then proceeded to the next stage of Fourth Amendment analysis and concluded that Mr. Katz had been searched unreasonably.]

[The concurrence of Justice Douglas is omitted.]

**MR. JUSTICE HARLAN, concurring.**

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

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

The critical fact in this case is that "[o]ne who occupies it [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume" that his conversation is not being intercepted. The point is not that the booth is "accessible to the public" at other times, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable.

In *Silverman v. United States*, 365 U.S. 505, we held that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the Fourth Amendment. That case established that interception of conversations reasonably intended to be private could constitute a "search and seizure," and that the examination or taking of physical property was not required. In *Silverman* we found it unnecessary to re-examine *Goldman v. United States*, 316 U.S. 129, which had held that electronic surveillance accomplished without the physical penetration of petitioner's premises by a tangible object did not violate the Fourth Amendment. This case requires us to reconsider *Goldman*, and I agree that it should now be overruled. Its limitation
on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.

[The concurrence of Justice White is omitted.]

Mr. Justice Black, dissenting.

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

While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution . . . . The first clause [of the Fourth Amendment] protects "persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those "particularly describing the place to be searched, and the persons or things to be seized." A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court's interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place . . . . Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was . . . . "an ancient practice which at common law was condemned as a nuisance. IV Blackstone, Commentaries § 168. In those days, the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse." [Berger,] 388 U.S., at 45. There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment . . . . Under these circumstances it strikes me as a charge against their scholarship, their common sense and their candor to give to the Fourth Amendment's language the eavesdropping meaning the Court imputes to it today.
THE THRESHOLD OF THE FOURTH AMENDMENT

...The Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates. The Amendment deserves, and this Court has given it, a liberal construction in order to protect against warrantless searches of buildings and seizures of tangible personal effects. But until today this Court has refused to say that eavesdropping comes within the ambit of Fourth Amendment restrictions.

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

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against unreasonable searches and seizures as one to protect an individual's privacy. By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy. As I said in Griswold v. Connecticut, 381 U.S. 479, "The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not." (Dissenting opinion, at 508.) I made clear in that dissent my fear of the dangers involved when this Court uses the "broad, abstract and ambiguous concept" of "privacy" as a "comprehensive substitute for the Fourth Amendment's guarantee against 'unreasonable searches and seizures.'" (See generally dissenting opinion, at 507-527.)

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

For these reasons I respectfully dissent.