FOURTH AMENDMENT: WIRETAPS AND CELL PHONE SURVEILLANCE

This activity explores the Supreme Court decision in ***Katz v. United States***. Katz deals with wiretapping as it is used to provide evidence of a crime and can stimulate discussion today about domestic surveillance and even the use of cell phones in public places.

The Supreme Court, for the most part, has not addressed the issue of whether or not the *Katz* standard is applicable to wiretaps undertaken for national security purposes, as opposed to criminal prosecution. Starting with these resources, students can discuss how they would argue *Katz* if a wiretapped call were made from a cell phone instead of a phone booth.

About These Resources

- Analyze the facts and case summary for *Katz v. United States*.
- Build arguments for both sides, starting with these talking points.
- Compare this case to similar cases.

How to Use These Resources

This activity is a modified Oxford style debate.

1. To get started, have participants read the *Katz v. United States* facts and case summary.
2. Assign student attorneys to the issues listed in the talking points. They are suggested points– not a script– for the debate. Student attorneys are encouraged to add their own arguments.
3. All other students are jurors who deliberate (and may refer to these talking points) during the open floor debate. They debate among themselves in the large group or smaller groups and come to a verdict after the attorneys present closing arguments.

Background: Current State of the *Katz* Decision

Although Justice Harlan proposed his two-pronged test in order to synthesize the majority holding so that it could be used in deciding future cases, it too has been the subject of much interpretation and debate. For instance, in the case of *Ciallo v. California* (1986), the Supreme Court decided that society was not prepared to recognize a privacy right—to grow a backyard crop of marijuana—that would have prohibited police from using a low-flying surveillance airplane to observe someone's garden without first getting a warrant.

Likewise, in the case of *Smith v. Maryland* (1979), the Court said that society was not prepared to extend privacy rights to bank customers regarding their bank statements. The court said the police did not have to get a search warrant before obtaining a customer's bank statements directly from the bank. The court decided that although the statements are about customers, banks—not customers—technically own the statements. However, after this decision, Congress enacted legislation requiring that police produce a search warrant to obtain a bank customer's account records.

Finally, the *Katz* decision deals only with wiretapping insofar as it is used to provide evidence of a crime. The Supreme Court has, for the most part, not addressed the issue of whether or not the *Katz* standard is applicable to wiretaps that are undertaken for national security, as opposed to criminal prosecution, purposes.

FACTS AND CASE SUMMARY: KATZ V. UNITED STATES

***Katz v. United States*, 389 U.S. 347 (1967)**
The warrantless wiretapping of a public pay phone violates the unreasonable search and seizure protections of the Fourth Amendment.

FACTS	The petitioner, Charles Katz, was charged with conducting illegal gambling operations across state lines in violation of federal law. In order to collect evidence against Katz, federal agents placed a warrantless wiretap on the public phone booth that he used to conduct these operations. The agents listened only to Katz's conversations, and only to the parts of his conversations dealing with illegal gambling transactions. In the case of *Olmstead v. United States* (1928), the Supreme Court held that the warrantless wiretapping of phone lines did not constitute an unreasonable search under the Fourth Amendment. According to the Court, physical intrusion (a trespass) into a given area, and not mere voice amplification (the normal result of a wiretap), is required for an action to constitute a Fourth Amendment search. This is known as the "trespass doctrine." Partly in response to this decision, Congress passed the Federal Communications Act of 1933. This Act required, among other things, federal authorities to obtain a warrant before wiretapping private phone lines. In the case of *Silverman v. United States* (1961), the Supreme Court refined the *Olmstead* trespass doctrine by holding that an unreasonable search occurs only if a "constitutionally protected area" has been intruded upon. At his trial, Katz sought to exclude any evidence connected with these wiretaps, arguing that the warrantless wiretapping of a public phone booth constitutes an unreasonable search of a "constitutionally protected area" in violation of the Fourth Amendment. The federal agents countered by saying that a public phone booth was not a "constitutionally protected area," therefore, they could place a wiretap on it without a warrant.
ISSUE	Does the warrantless wiretapping of a public phone booth violate the unreasonable search and seizure clause of the Fourth Amendment to the United States Constitution?
RULING	Yes
REASONING	By a 7-1 vote, the U.S. Supreme Court agreed with Katz and held that placing of a warrantless wiretap on a public phone booth constitutes an unreasonable search in violation of the Fourth Amendment. The majority opinion, written by Justice Potter Stewart, however, did not address the case from the perspective of a "constitutionally protected area." In essence, the majority argued that both sides in the case were wrong to think that the permissibility of a warrantless wiretap depended upon the area being placed under surveillance. "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 Court stated. Building upon this reasoning, the Court held that it was the duty of the Judiciary to review petitions for warrants in instances in which persons may be engaging in conduct that they wish to keep secret, even if it were done in a public place. The Court held that, in the absence of a judicially authorized search warrant, the wiretaps of the public phone booth used by Katz were illegal. Therefore, the evidence against him gathered from his conversations should be suppressed.
CONCURRENCE	**Justice John Marshall Harlan's Concurrence: Test for Constitutionally Protected**

	Searches Although he agreed with the majority opinion of the Court, Justice Harlan went further to provide a test for what is a constitutionally protected search. He said it was necessary to clarify when private actions, conducted in a public place, may be constitutionally protected. Expanding upon the general principles enunciated by the majority opinion, Justice Harlan proposed the following two-pronged test to address this issue: "My understanding of the rule that has emerged from prior judicial 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.'" Both the Supreme Court and the lower federal courts have looked to this two-pronged test, and not the majority holding *per se*, to determine when private actions in public places may be constitutionally protected. In essence, this concurrence has come to be seen as the main point of the Katz decision, and it is the test that, typically, has been used when deciding upon the constitutionality of warrantless wiretaps.

TALKING POINTS

Question: Can the Supreme Court's findings in Katz v. United States be applied to cell phone use in public places?

Katz	United States
1. Does the Fourth Amendment protect cell phone calls made in public from government surveillance?	
Affirmative. Yes. There need not be a physical intrusion into a tangible area in order to constitute a search. The Court already has recognized that certain "constitutionally protected areas" fall under the Fourth Amendment's protections. The trespass doctrine results in an overly literal reading of the Fourth Amendment. The objective of a wiretap is the same as a physical search -- to provide evidence that a crime has been committed. Therefore, the full protections of the Fourth Amendment should apply to wiretaps as well as searches.	**Negative.** No. A search, by definition, cannot occur unless there is some physical intrusion into a tangible space. A house or an office can be searched because there are physical structures involved. Merely overhearing a conversation, however, does not involve any type of search. Wiretaps simply provide the technology to overhear conversations. Although such eavesdropping may constitute an unacceptable form of social behavior if it were to be engaged in by private persons, this action may not be per se unacceptable for the government, especially when the government undertakes it as part of its Constitutional responsibility to protect the public safety. For this reason, this socially "unacceptable" behavior does not necessarily run afoul of the provisions of the Fourth Amendment.
2. Is there a "reasonable expectation of privacy" when cell phone calls are made in public?	
Affirmative. Yes. The Fourth Amendment does not draw a distinction between public and private areas. While common sense dictates that the police should not be required to ignore evidence of a crime that has been made public through an individual's own actions, even in a public area, people may wish to retain their privacy. These are areas in which people are said to have "a reasonable expectation of privacy." For instance, people carry bags in public, but this does not give the police the right to search them at will. Why? It is understood that the contents of the bags are private. Barring a warrant or consent, this expectation of privacy entitles them to constitutional protection. The same logic could be applied to a cell phone conversation. The contents of a conversation between two individuals is no less private. Simply because such a conversation happens in a public place - in	**Negative.** No. Although one has an expectation of privacy in certain private spaces (which the Court has termed "constitutionally protected areas"), it is beyond reason to assume that what one voluntarily exposes to the public remains private. A public phone booth or a cell phone call made in a public place is just that - public. If Katz or any other persons wish to avail themselves of the full protections of the Fourth Amendment, they can do so by making a call from a private phone line in a private place. The moment one enters a public space, however, the expectation of privacy is gone. For instance, what if the police simply stood outside of the phone booth or stood within hearing distance of a cell phone conversation so that they were able to overhear a conversation? Surely this would be permissible.

a phone booth or on a cell phone - does not authorize the police, without either a warrant or consent, to listen to it and take action. In other words, regardless of whether or not the conversation was in a public area, the parties to the conversation retain "a reasonable expectation of privacy."

SIMILAR CASES

The brief descriptions of the following cases are provided for students who may wish to further explore the constitutionality of domestic wiretapping.

Olmstead v. United States (1928)
Held that wiretaps are permissible because the Fourth Amendment only prohibits physical intrusion into an area ("trespass doctrine").

Goldman v. United States (1942)
Further defines the "trespass doctrine," holding that audio magnifiers are permissible so long as they are only attached to a wall. They are not permissible if drilled into the wall.

Silverman v. United States (1961)
Established the doctrine of "constitutionally protected area."

Berger v. New York (1967)
Held that a statute authorizing a magistrate to grant a warrant permitting unrestrained eavesdropping of a home was unconstitutional.

Sources:

- *Katz v. United States*
- LaFave, Wayne R. "The Forgotten Motto of Obesta Principiss in Fourth Amendment Jurisprudence," *Arizona Law Review 28* (1986): 291-310; cited in: Wayne R. LaFave. "*Katz v. United States*." *The Oxford Guide to U.S. Supreme Court Decisions*. Kermit Hall, Ed. New York: Oxford University Press, 1999. pp. 145-46.