Thirty-nine years later, *Olmstead* is overruled, but the concurring Opinions (again, in light of the Bush wire taps), are the subject of good discussion. Enjoy!

KATZ v. UNITED STATES

SUPREME COURT OF THE UNITED STATES
389 U.S. 347
December 18, 1967
[7—1][1]

OPINION: MR. JUSTICE STEWART…The petitioner was convicted…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 'there was **no physical entrance** into the area occupied by the petitioner.' We granted certiorari...

The petitioner had phrased [the] questions as follows:

> 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.
>
> Whether physical penetration of a constitutionally protected area is necessary

[1] Justice Marshall did not participate.

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 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.** ***Lewis v. United States.*** **But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.** *Ex parte Jackson.*

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, *Olmstead*[2], for that Amendment was thought to limit only searches and seizures of tangible property. But 'the premise that property interests control the right of the Government to search and seize has been discredited.' 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**

[2] Case 4A-1 on this website.

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.' 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 question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confirmed their surveillance to the brief periods during which he used the telephone booth and they took great care to overhear only the conversations of the petitioner himself.

Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, **could constitutionally have authorized**, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained the validity of such an authorization, holding that, under sufficiently 'precise and discriminate circumstances,' a federal court may empower government agents to employ a concealed electronic device for the narrow and particularized purpose of ascertaining the truth of the…allegations' of a 'detailed factual affidavit alleging the commission of a specific criminal offense.' *Osborn v. United States*...Here, too, a similar judicial order **could have** accommodated 'the legitimate needs of law enforcement' by authorizing the carefully limited use of electronic surveillance.

The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might properly have done with prior judicial sanction, we should **retroactively validate** their conduct. **That we cannot do.** It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny

by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. **Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,'** *Agnello v. United States,* for **the Constitution requires 'that the deliberate, impartial judgment of a judicial officer…be interposed between the citizen and the police...'** *Wong Sun v. United States.* 'Over and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes' and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are **per se unreasonable** under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an 'incident' of that arrest.

Nor could the use of electronic surveillance without prior authorization be justified on grounds of 'hot pursuit.' And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case. **It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree**. Omission of such authorization 'bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the…search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.'

And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.'

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. **Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures**. The government agents here ignored 'the procedure of antecedent justification…that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. **Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed…**

President George W. Bush is labeled by many, including former President Carter, as a President who has trampled on the Constitution. Please understand that I make no comment, for now, on the issue of wire tapping in the war on terror. No, for now, all I ask is whether or not our citizens realize the truth of what you are about to read.

CONCURRENCE: Mr. Justice DOUGLAS/BRENNAN…**I feel compelled to reply to the separate concurring opinion of my Brother WHITE, which I view as a <u>wholly unwarranted green light for the Executive Branch</u> to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels 'national security' matters.**

Neither the President nor the Attorney General is a magistrate. **In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be.** Under the separation of powers created by the Constitution, **the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws**. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases.

Here, we have two Justices concerned that the toolbox of the President and his Attorney General should not include the power of warrantless wire tapping in the interest of national security. And, why not? Because, if they are doing their job, they will (and should) put national security ahead of objective analysis regarding the constitutionality of wire tapping in the interests of national security.

They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate…

CONCURRENCE: Mr. Justice HARLAN…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, *Weeks*, and unlike a field, *Hester*, 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...

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 'one 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,* 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...

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...

CONCURRENCE: Mr. Justice WHITE…In joining the Court's opinion, I note the Court's acknowledgment that there are circumstances in which it is reasonable to search without a warrant. In this connection…the Court points out that **today's decision does not reach national security cases. Wiretapping to protect the security of the Nation has been authorized by successive Presidents…We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security** and **authorized electronic surveillance as reasonable.**

Let's repeat what we know to be true from this case. It would appear that "successive Presidents" used warrantless wire tapping for national security purposes. That would make it appear to have been a common occurrence that is supported by Justice White and at this point had never been questioned. Justices Douglas and Brennan respond to Justice White with fear that such a position goes too far. Both comments are dicta in this case. I realize that President Bush's wire tapping involves a federal statute with ramifications not now discussed. However, the ELL Point is this: I don't know about you, but the mainstream media and opponents of Bush make it sound like Bush is the only President who has ever wire tapped in the interest of national security without a warrant. Regardless of how one feels about the current issue, should we not at least operate from the standpoint of accuracy? Isn't it a bit unfair to label Bush as a paragon of Constitutional destruction? In other words, such activity prior to Bush has been routinely done and accepted by at least some on the High Court as virtuous. Shouldn't that history at least be a part of any rational discussion of current policy, much less constitutionality? What do you think?

DISSENT: Mr. Justice BLACK…If I could agree with the Court that eavesdropping carried on by electronic means (equivalent to wiretapping) constitutes a 'search' or 'seizure,' I would be happy to join the Court's opinion…My basic objection is twofold: (1) I do not believe that the words of the 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...

The first clause 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. **How can one 'describe' a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future? It is argued that information showing what is expected to be said is sufficient to limit the boundaries of what later can be admitted into evidence; but does such general information really meet the specific language of the Amendment which says 'particularly describing'?** 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. 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.' **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**…[I]t 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 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…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.

So far I have attempted to state why I think the words of the Fourth Amendment prevent its application to eavesdropping. It is important now to show that this has been the traditional view of the Amendment's scope since its adoption and that the Court's decision in this case, along with its amorphous holding in *Berger* last Term, marks the first real departure from that view.

The first case to reach this Court which actually involved a clear-cut test of the Fourth

Amendment's applicability to eavesdropping through a wiretap was, of course, *Olmstead.* In holding that the interception of private telephone conversations by means of wiretapping was not a violation of the Fourth Amendment, this Court, speaking through Mr. Chief Justice Taft, examined the language of the Amendment and found, just as I do now, that the words could not be stretched to encompass overheard conversations...

Goldman is an even clearer example of this Court's traditional refusal to consider eavesdropping as being covered by the Fourth Amendment. There federal agents used a detectaphone, which was placed on the wall of an adjoining room, to listen to the conversation of a defendant carried on in his private office and intended to be confined within the four walls of the room. This Court, referring to *Olmstead,* found no Fourth Amendment violation.

It should be noted that the Court in *Olmstead* based its decision squarely on the fact that wiretapping or eavesdropping does not violate the Fourth Amendment. As shown, the Court went to great pains to examine the actual language of the Amendment and found that the words used simply could not be stretched to cover eavesdropping. That there was no trespass was not the determinative factor, and indeed the Court in citing *Hester,* indicated that even where there was a trespass the Fourth Amendment does not automatically apply to evidence obtained by 'hearing or sight.' The *Olmstead* majority characterized *Hester* as holding 'that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves 100 yards away from his house, and saw him come out and hand a bottle of whiskey to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers, or effects.' Thus the clear holding of the *Olmstead* and *Goldman* cases, undiluted by any question of trespass, **is that eavesdropping**, in both its original and modern forms, **is not violative of the Fourth Amendment...**

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…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.

…[B]y 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,* '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**.' 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.

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. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. <u>The history of governments proves that it is dangerous to freedom to repose such powers in courts</u>.** For these reasons I respectfully dissent.

What a fascinating precursor to *Roe v. Wade.*