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## Emerging Technology and the Fourth Amendment

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Kathleen Mitchell Reitmayer

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### Introduction

As the world moves its way well into the twenty-first century, technology is advancing at a rate never seen before in history. Most Americans have internet access, cellular phones, global positioning systems in their cars, and other technologies available at their fingertips. Technology has been the driving force in America from the beginning of the twentieth century to today.

While technology has proven to be a great time saver as well as a source of entertainment and information for the American public, technology has also created new means of both committing and tracking crime. Both the criminals and the law enforcement agents that seek the criminals can use technology. As technology advances, new ways of tracking criminals emerge. This, however, can lead to ethical and legal questions regarding the new technologies used by law enforcement.

The key use of technology by law enforcement has been to collect evidence against a criminal suspect. The rules and regulations regarding the collection of such evidence find protection under the Fourth Amendment of the United States Constitution, which reads, “[t]he 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.”<sup>1</sup>

The United States Supreme Court has been rather consistent in its findings regarding new technology as it applies to the Fourth Amendment of the United States Constitution in the latter half of the twentieth century. The Supreme Court generally refuses evidence from any new technologies used in criminal cases when obtained without a warrant as pursuant to the Fourth Amendment. The findings of the court in several cases have stated that technology used by law enforcement has been an invasion of privacy when done without a warrant, from phone tapping to the use of forward-looking infrared (FLIR).

In recent years, there has been a law created that erodes the Fourth Amendment rights that the Supreme Court has worked so hard to protect called the USA Patriot Act of 2001. This act allows for the use of some of the technology, previously found unconstitutional by the US Supreme Court, in certain cases. This is a major deviation from almost a half-century of rulings by the Supreme Court, which will open up new pathways for law enforcement to use emerging technologies in criminal cases without the suspects afforded their Fourth Amendment rights.

While the technology available for use by law enforcement advances, it is important to look at the legal and ethical aspects of the use of these new technologies. By reviewing key Supreme Court cases of the past that regarded, what was then, new, and emerging technology, and analyzing the USA Patriot Act of 2001, the legal and ethical realities of new and emerging technology will become apparent. It will then come into question whether the use of these technologies can constitute a violation of the rights of American citizens and if criminal investigations should allow the use of the technology.

### *Weeks v. United States*

*Weeks v. United States* was the first key Supreme Court decision upholding the Fourth Amendment of the U. S. Constitution. While it did not have to do with technology, it laid the groundwork for further cases brought before the Supreme Court in regards to evidence collected by law enforcement by technology. The 1914 case surrounded a man by the name of Fremont Weeks. Police had arrested Weeks without a warrant and had searched his home. They accused him of being involved in a mail lottery, and they charged him with what was essentially mail fraud. They collected evidence used against him in the warrantless search of his home after his arrest.<sup>2</sup>

The Supreme Court found that this was a direct violation of the Fourth Amendment. Protection against an unwarranted search and the seizure of evidence from a citizen's home was the key element of the Fourth Amendment. The Supreme Court ruling clearly stated, "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as

well be stricken from the Constitution.”<sup>3</sup>

The case of *Weeks v. United States* set the precedent for all further Fourth Amendment cases. With the exception of certain circumstances, a warrant would be required for all physical searches by law enforcement. At the time of the decision, the advancement of technology did not exist that warranted any further study of technology and the Fourth Amendment. *Weeks v. US* would serve as a basis for following cases involving new technology.

### *Olmsted v. United States*

As technology advanced into the twentieth century, the criminal element began using these technologies to advance their criminal enterprises. During the era of prohibition, the case of Roy Olmsted reached the Supreme Court of the United States. Police accused Olmsted of violating the Volstead Act and running a bootlegging operation in Washington State. The majority of the evidence collected against Mr. Olmsted was by way of wiretaps on phone lines.

*Olmsted v. United States* was the first Fourth Amendment case to reach the Supreme Court that questioned the legality of the use of technology in criminal investigations. The basis of the bulk of the case against Mr. Olmsted was on what they heard through the wiretaps. Law enforcement overheard detailed plans regarding the bootlegging business, in which Olmsted was allegedly involved. Olmsted argued under the precedent of *Weeks v. US*, that this constituted an illegal search and a seizure of information. However, the police had not gone on to the property to place the wiretap, instead they had connected to the telephone lines at the street level. The lack of a seizure of tangible evidence resulted in the ruling of the Supreme Court in this case.<sup>4</sup>

The Supreme Court found that law enforcement had not violated the Fourth Amendment in the Olmsted case. They based their ruling on the fact that no trespass had taken place to place the wires. Additionally, the Supreme Court argued, the use of telephone lines that are public domain releases the right to privacy. Unlike *Weeks v. US*, where police took sealed letters and used them as evidence, telephone lines were not sealed nor were they part of the structure and therefore were exempt from the limitations<sup>5</sup> of the Fourth Amendment.

This first look at technology regarding the Fourth Amendment made sense. The telephone lines were indeed not under the ownership or control of the

person using them. There is no regard for privacy over public channels in terms of legality. This ruling would apply to all telephone and telegraph correspondences. This allowed law enforcement to intercept telephone call and telegraphs without a warrant and use the information collected against the accused at trial. The perspective that technology may not continue to evolve showed the Fourth Amendment could not protect the right to privacy.

*Irvine v. California*

The case of *Irvine v. California* was a question of the legality of placing eavesdropping devices in the home of a suspect without a warrant. Police accused Irvine of bookmaking and illegal gambling. They placed microphones and other listening devices in his residence on more than one occasion.<sup>6</sup> This differed from the *Olmsted v. US* case because law enforcement had entered the residence. Irvine argued that this was a violation of the Fourth Amendment on the same basis as *Weeks v. US*. The seizure of information was directly oppositional to the Fourth Amendment, and law enforcement violated Irvine's rights when they entered his home to place the listening device.

The Supreme Court looked at the *Irvine* case from the standpoint of technological advancement and declared, That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment.<sup>7</sup>

This, however, did not prevent them from holding up the ruling based on the fact Irvine was not arguing for any other reason than the fact that he wanted his conviction overturned.

While this did nothing to change the rule of law in regards to emerging technologies, the Supreme Court's ruling surely looked down upon the means of collecting evidence. It was, as stated, a violation of the Fourth Amendment rights of the accused. Further dealing with technology used by law enforcement would refer back to the *Irvine* case.

*Silverman v. United States*

The case of *Silverman v. United States* revolved around an illegal gambling house in Washington, DC. Law enforcement, with the permission of the neighbors in an adjoining row house, had placed a microphone under the baseboards to reach the ventilation system of the suspect residence in order to gain information about suspected gambling operations taking place.<sup>8</sup> Much like the *Irvine v. CA* case a few years earlier, it argued that law enforcement had trespassed into the residence without a warrant and due to this had directly violated the Fourth Amendment of the United States Constitution. This was in accordance with the *Olmsted v. US* decision a violation. Where *Olmsted v. US* had stated the wiretapping at street level was not a violation due to the fact law enforcement had not entered the residence, in this case since they had entered the residence, it was a violation.

The Supreme Court overturned the decision based on *Olmstead v. US*. The act of trespassing by law enforcement was enough to make the eavesdropping unconstitutional under the Fourth Amendment. Any further attempt at eavesdropping by law enforcement would require a warrant to be admissible in criminal court. This directly overruled the *Irvine v. California* case.

*Katz v. United States*

The case of Charles Katz was a major turning point in the legal aspects of technology. Police accused Katz of bookmaking and collected the evidence against him through a wiretap on a phone booth he frequented to make wagers. *Katz v. United States* was almost identical to the *Olmsted v. United States* case. The argument was the same that there was an implied privacy when one was using a telephone. More importantly, in the *Katz* case, the use of a public telephone, which he argued, was a “constitutionally protected area.”<sup>9</sup>

While the members of law enforcement had assumed they had the right to wiretap the phone under the protection of the *Olmsted* ruling, the Supreme Court questioned the rationality of not getting a warrant, which would have been attainable in the case. The Supreme Court argued that individual police officers should not make the decision as to who they are to wiretap or not. The Supreme Court questioned the ruling in *Olmsted v. US* stating that they had made the

decision without the view toward new technology.

The Supreme Court ruled that wiretapping anywhere was a direct violation of the Fourth Amendment based partially on the *Silverman v. US* ruling. They decided that seizure was to include non-tangible information such as that gained from wiretapping or eavesdropping pursuant to the *Silverman v. US* decision. The Supreme Court ruling extended the Fourth Amendment to protect the privacy of the individual citizen, regardless of location without a search warrant.

This is a major roadblock in the use of new and emerging technology by law enforcement. The *Katz v. US* ruling declared any attempts at collecting information by the means of technology without a warrant illegal. This protected the American people from technological invasions of privacy that are in line with the Fourth Amendment of the United States Constitution.

### *Kyllo v. United States*

The *Kyllo v. United States* case regarded a marijuana grower in Oregon. Law enforcement had used FLIR cameras to survey Kyllo's home for heat signatures consistent with lights used to cultivate marijuana plants indoors. They used the heat signatures found in the surveillance to get a warrant to search the residence where they found marijuana plants.<sup>10</sup> Lawyers argued *Kyllo v. US* under the precedence of *Katz v. US* stating that it was an invasion of the privacy of the resident to use this new technology to attain a search warrant. By using the FLIR technology, law enforcement had garnered information not attainable without looking into the residence.

The Supreme Court ruled in the favor of Kyllo with an eye toward future technology. With technological advances from aerial surveillance to through the wall sound recording, it was the opinion of the Supreme Court that such uses of technology were intrusive as per the *Katz v. United States* ruling. The Fourth Amendment of the United States Constitution must protect the privacy of the individual when it comes to law enforcement and technology.

### USA Patriot Act of 2001

While the United States Supreme Court has progressively tightened the

restriction on law enforcement and the use of new and emergent technology, the Patriot Act served to unravel the laws built over the past century in the United States regarding the Fourth Amendment of the United States Constitution. Title II of the Patriot Act now allowed the United States government to conduct wiretaps without a warrant in direct opposition of *Katz v. United States*. Not only does it allow law enforcement to gather information by these means without a warrant; they are required to report them. This is a violation of the Fourth Amendment. Although closely held that this is only for use in the case of international terrorism, it provides for a loophole through which authorities could possibly put non-terrorists under surveillance.<sup>11</sup> It is impossible to believe that when this Act comes before the Supreme Court of the United States, they will uphold it given the long-standing and progressive stance the Supreme Court has taken on the Fourth Amendment.

### Emerging Technology

People create new technologies to enhance the work of law enforcement against organized crime every day. As technology advances, so does the means by which criminals can conduct business. From computers and internet-based crimes to the use of cellular phones to conduct everyday business, the criminal world is now more technologically advanced. The Federal Bureau of Investigation has moved right along with the new technology to catch organized criminals. Since 1999, the FBI has had Regional Computer Forensics Laboratory sites across the United States.<sup>12</sup> This has allowed the FBI to do appropriate computer searches under the Fourth Amendment. Additionally, the FBI continues to conduct wiretaps and other visual and digital surveillance with a commitment to protecting the Fourth Amendment rights of individuals.<sup>13</sup>

While the public knows many of the technological capabilities of law enforcement, some remain unknown for the protection of the information. What the public knows are new and interesting uses of technology. One example would be cellular phone triangulation, which can pinpoint the location where someone last used a cellular phone. This could place a suspect and the scene of a crime for use against organized crime. Getting this information, according to the Fourth Amendment, would include getting a warrant for the phone records. Additionally, many cars now have built in global positioning systems which could provide useful data to law enforcement regarding where and when suspects were at a location.

## Conclusion

Over the past century, technology has grown exponentially. Both organized crime and law enforcement have been able to keep up with the pace of technology in America. As each new technology comes into place, there comes a question of what is legal and constitutional to listen to or see on the part of law enforcement. This question of technology and the Fourth Amendment has come before the Supreme Court of the United States on several occasions. The Supreme Court has broadened the spectrum of the Fourth Amendment on several occasions to protect the citizens of the United States of America.

Each general type of emerging technology has come to question before the Supreme Court. From the telephone in *Olmsted v. US* and *Katz v. US*, microphones in *Silverman v. US*, and FLIR usage in *Kyllo v. US*, the United States has questioned evidence obtained via new technology. As each new technology makes its way onto the scene, the Supreme Court has answered the question of whether law enforcement is over-stepping its bounds with the usage with a resounding “yes.” This sets the precedent for the use of new technology. One would be remiss not say that, in accordance with the Fourth Amendment, any form of new technology should not be used without an appropriate warrant to protect the rights of the suspects. The founding fathers of the United States wanted it to be this way.

Technology is a great advantage to law enforcement. Having information that definitely declares a suspect guilty beyond a reasonable doubt is much easier when the bulk of the information is coming from irrefutable evidence such as wiretaps of crime planning, being able to place a suspect at a specific location from cellular phone records, or having written evidence that has come from a computer. This, however, must balance with respect toward the suspect’s Fourth Amendment rights. If a warrant is not in place, police should not, and cannot use the evidence against the suspect in court. The Fourth Amendment will always trump new technology and that is how it should be in America.

## Notes

1. *U.S. Constitution*, amend. 4.
2. *Weeks v. United States*, 232 U.S. 383 (1914).
3. *Ibid.*

4. *Olmsted v. United States*, 277 U.S. 438 (1928).

5. *Ibid.*

6. *Irvine v. California*, 347 U.S. 128 (1954).

7. *Ibid.*

8. *Silverman v. United States*, 365 U.S. 505 (1961).

9. *Katz v. United States*, 389 U.S. 347 (1967).

10. *Kyllo v. United States*, 533 U.S. 27 (2001).

11. USA Patriot Act (2001).

12. "Introduction to RCFLs Fact Sheet," Introduction to RCFLs Fact Sheet, [www.rcfl.gov/downloads/documents/intro\\_to\\_RCFLs.pdf](http://www.rcfl.gov/downloads/documents/intro_to_RCFLs.pdf) (accessed October 10, 2011).

13. "FBI Capabilities," FBI Homepage, <http://www.fbi.gov/about-us/otd/capabilities> (accessed October 10, 2011).

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*Irvine v. California*, 347 U.S. 128 (1954).

*Katz v. United States*, 389 U.S. 347 (1967).

*Kyllo v. United States*, 533 U.S. 27 (2001).

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*U.S. Constitution*, amend. 4.

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