Fourth Amendment Jurisprudence in the Digital Age

In the words of William Douglas, Associate Justice of the Supreme Court, "It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than the citizens be subject to easy arrest."[1] The nidus for inclusion of the Fourth Amendment in the Bill of Rights lay in numerous English cases, beginning in 1761, when James Otis challenged British Writs of Assistance and search and seizure practices.[2] As a result, after declaring independence, states such as Massachusetts included search and seizure protections in state constitutions. The emphasis on search and seizure protection translated into the Bill of Rights, manifesting as the Fourth Amendment--"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures…".[2] Yet, with the recent advent of the digital age, search and seizure is no longer simply physical. This makes it more necessary than ever to examine Fourth Amendment protections as it pertains to electronic devices, social media, and surveillance technology.

A landmark case examining Fourth Amendment protections with technology was in *Katz v. United States*, where basketball handicapper Charles Katz's conversations were recorded by the FBI through a recording device placed outside of the booth.[3] The Supreme Court ruled in favor of Katz. It was found that Katz sought a "reasonable expectation of privacy" when he entered the phone booth.[3] Justice Potter Stewart stated that the Fourth Amendment protects "people, not places," and the Court found the Fourth Amendment applies to oral statements.[3] Through this decision, the precedent for protection against unreasonable search and seizures even in the nonphysical sense was established, thus sealing a loophole for unreasonable search and seizure.

While *Katz v. United States* examined telephones, United States v. Jones examined the use of a Global Positioning-System (GPS) tracking device used as evidence to indict and ultimately convict Antoine Jones for drug trafficking charges.[4] Although a warrant was obtained, the GPS was placed outside of the time frame listed in the warrant.[4] Justice Scalia argued the physical intrusion was indeed a search under the Fourth Amendment, and that the case was concerned with common-law trespassory tests.[4] Further, the "reasonable expectation of privacy" established in *Katz v. United States* only contributes to the trespassory application of the Fourth Amendment instead of replacing it.[4] While this case established that this use of a GPS violated the Fourth Amendment, more importantly, it validated both the expectation of privacy established in *Katz v. United States* and the traditional trespass standards as part of Fourth Amendment protections.[4]

Protections related to the Fourth Amendment related to information obtained from cell phones were examined in *Riley v. California*, where an officer searching David Leon Riley took Riley's cell phone. Ultimately, it was ruled that without a warrant or demonstration of pressing circumstances, searching a cell phone cannot lead to an arrest.[5] Similarly, in *Carpenter v. United States*, the FBI identified cell phone numbers of robbery suspects, and consequently used cell-site data to track Timothy Carpenter's movements. It was ruled that a warrant is generally needed to access cell-site location information automatically generated when a cell phone connects to a cell tower.[6] The implications of both of these cases is the strengthening of digital privacy. In the digital world, a tremendous amount of data is recorded both passive and actively. Thus, it is necessary to implement safeguards to avoid abuse of digital technology searches.

While the Supreme Court has not yet directly addressed drone-usage, another form of digital surveillance notably used in the military, *Florida v. Riley* addressed the use of aerial

surveillance. Acting on a tip that Michael Riley was growing marijuana, Florida police circled around Riley's property at an altitude of 400 feet.[7] The police saw what they believed to be marijuana, and ultimately arrested Riley.[7] It was ruled that, because helicopters are allowed to fly at altitudes lower than 500 feet, the helicopter was flying in legal airspace; thus, there was no reasonable expectation for privacy.[7] As cases arise concerning drone surveillance, based on *Florida v. Riley*, limits will likely be placed on drone-use. This will need to develop alongside standardized, national regulations for drone flight altitudes.

The Fourth Amendment carries special meaning to me, as when my father was in Kuwait, he was searched, simply because he looked like a foreigner, without any probable cause. While his case did not involve technology, it is now important to determine what constitutes a "search" using electronics. I believe in terms of social media, a user maintains a "reasonable expectation of privacy," until they voluntarily opt-in to location tracking, waive privacy rights through Terms of Service agreements, or publicly sharing of information. While confusion may arise in interpreting the Fourth Amendment in light of modern digital technology, the original intent of the Fourth Amendment must be maintained: to secure privacy and protect against unreasonable search and seizure.

Along a similar grain, as it pertains to drones, I believe Fourth Amendment protections should not be extended to areas accessible to the public. Law enforcement should not need a warrant to perform surveillance in airspace open to the public, though areas outside of that airspace should necessitate a warrant. As demonstrated in *Florida v. Riley*, one cannot reasonably expect privacy in public airspaces. While some may argue law enforcement should have different standards from the public, it would be hypocritical.

Altogether, the purpose of the Bill of Rights was to protect the rights of Americans. Even as times change, this purpose must be maintained. While numerous areas have been defined regarding the relationship between the Fourth Amendment and technology, numerous areas have yet to be explored. Protection from unreasonable search and seizure is an integral piece of American freedom, and it is our duty, as citizens, to get involved in government to forge future Fourth Amendment jurisprudence.

[1] Henry v. United States, Thomson Reuters, https://caselaw.findlaw.com/us-supreme-court/361/98.html.
[2] Thomas Clancy, The Framers' Intent: John Adams, His Era, and the Fourth Amendment, 86 INDIANA L.J. 979, 979-1060 (2011).
[2] Nicandro Iannacci, Katz v. United States: The Fourth Amendment Adapts to New Technology, National Constitution Center (Dec. 18, 1967), https://constitutioncenter.org/blog/katz-v-united-states-the-fourth-amendment-adapts-to-new-technology.
[4] United States v. Jones, CORNELL LAW SCHOOL, https://www.law.cornell.edu/supremecourt/text/10-1259.
[5] Riley v. California, CORNELL LAW SCHOOL, https://www.law.cornell.edu/supremecourt/text/13-132.
[6] Carpenter v. United States, OYEZ, https://www.oyez.org/cases/2017/16-402.
[7] Florida v. Riley, OYEZ, https://www.oyez.org/cases/1988/87-764.

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