Fifty Years of *Katz*: A Look Back—and Forward—at the Influence of Justice Harlan's Concurring Opinion on the Reasonable Expectation of Privacy

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ABSTRACT

Nearly fifty years ago, Supreme Court Justice John Marshall Harlan introduced to the judiciary a new framework for analyzing Fourth Amendment issues when he issued his concurring opinion in the seminal case of Katz v. United States*. Into the twenty-first century, the* Katz *framework has remained tried and true to the spirit of the Constitution's prohibition against warrantless searches, despite ever-changing methods of government surveillance. As the semi-centennial anniversary of the* Katz *decision approaches, this Essay celebrates the forward-thinking approach that Justice Harlan so giftedly annunciated in the* Katz *decision. Ultimately, this Essay suggests that application of Justice Harlan's* Katz *framework in future government surveillance cases will remain relevant as technology continues to advance at a seemingly exponential pace.*

INTRODUCTION

As one of the most frequently cited cases in American law, the United States Supreme Court's decision in *Katz v. United States*[1] continues to enormously impact Fourth Amendment jurisprudence.[2] Associate Justice John Marshall Harlan's concurring opinion is perhaps the most widely remembered excerpt from the high Court's opinion.[3] As the semi-centennial anniversary of the *Katz* decision approaches, this Essay celebrates the forward-thinking approach that Justice Harlan so giftedly annunciated in his concurrence.[4] This Essay goes on to suggest that, despite changing technology and fading societal privacy norms, Justice Harlan's

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1 389 U.S. 347 (1967).

2 *See* Shane Marmion, *Most-Cited U.S. Supreme Court Cases in HeinOnline—Part II*, HEINONLINE BLOG (Feb. 16, 2009), http://heinonline.blogspot.com/2009/01/most-cited-us-supreme-court-cases-in.html (ranking the *Katz* decision as the fifteenth most-cited case, with a total of 6741 citations).

3 *See generally Katz*, 389 U.S. at 360–62 (Harlan, J., concurring).

4 *Katz* was argued on October 17, 1967, and decided on December 18, 1967. *Id.* at 347.

approach has remained influential to Fourth Amendment caselaw and always will.

I. THE *KATZ* DECISION

Mentioned in virtually every criminal procedure casebook, the *Katz* decision is a jewel of criminal procedure that is studied year after year by law students across the country.[5] An unaccustomed reader might assume that the facts of the case sprouted from a highbrowed spinoff of a 1950s mob film plot.[6] Charles Katz was a well-known sports handicapper from Los Angeles, California.[7] As was his daily routine, Katz wandered from his apartment on the famous Sunset Boulevard to visit one of three nearby telephone booths, where he placed wagering calls to Miami and Boston.[8] While both an exciting and a scandalous way to make a living, Katz's gambling antics ran afoul of the Federal Wire Act.[9] Without a warrant, federal authorities recorded Katz's illicit conversations using an electronic eavesdropping device after catching on to his phone booth shell game.[10] Following his indictment and conviction, Katz appealed the ruling, arguing that the Fourth Amendment's protection from "unreasonable searches and seizures" extends to cover warrantless electronic wiretaps.[11] The appeal eventually came before the Supreme Court.[12]

On October 17, 1967, the parties made their arguments before a bench comprised of nine legal giants: Chief Justice Earl Warren and Associate Justices Hugo Black, William Brennan, William Douglas, Abe Fortas, John Marshall Harlan, Thurgood Marshall, Potter Stewart, and Byron White.[13] Arguing for Katz as the petitioner, Attorney Harvey Schneider, who had been admitted to practice law only little more than four years prior,

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5 *See, e.g.*, RONALD JAY ALLEN ET AL, COMPREHENSIVE CRIMINAL PROCEDURE 367 (3d ed. 2011) ("*Katz* is the leading case on the question what constitutes a 'search' for Fourth Amendment purposes.").

6 *See generally Katz*, 389 U.S. at 348 (for the Court's recitation of the facts); Harvey A. Schneider, Katz v. United States*: The Untold Story*, 40 MCGEORGE L. REV. 13, 13–14 (2009) (for an unabridged version).

7 Schneider, *supra* note 6, at 13.

8 *Id.*

9 *Id.*

10 *Id.* at 13–14. Katz was recorded saying, "Give me Duquesne minus seven for a nickel!" Nicandro Iannacci, Katz v. United States*: The Fourth Amendment Adapts to New Technology*, NAT'L. CONST. CTR.: CONST. DAILY (Dec. 18, 2015), http://blog.constitutioncenter.org/2015/12/katz-v-united-states-the-fourth-amendment-adapts-to-new-technology/.

11 Schneider, *supra* note 6, at 14.

12 *Id.* at 17.

13 *Id.* at 19.

approached the lectern to propose a fundamentally new idea in Fourth Amendment jurisprudence.[14] Up to that point, the Supreme Court generally took a property-based approach to answering Fourth Amendment questions, meaning the Fourth Amendment's prohibition against unreasonable searches and seizures only extended to certain constitutionally protected private areas.[15] Decided in 1928, the Court's ruling in *Olmstead v. United States*[16]—a case with eerily similar facts—supported this theory, suggesting that evidence secured only by a "sense of hearing" did not involve a search or seizure because "[t]here was no entry of the houses or offices of the defendants."[17] However, Schneider contended that "the question should [not] be determined as to whether or not you have an invasion of a constitutionally protected area," such as a house or an office.[18] Rather, he attempted to convince the Justices "that the right to privacy follows the individual . . . whether or not he's in a space enclosed [sic] by four walls and a ceiling and a roof, or in an automobile, or in any other physical location."[19] These words laid the groundwork for the test that Justice Harlan would come to favor and that would eventually become the law of the land.[20]

When the opinion came down, Justice Stewart scribed a gallant opinion for the majority. Tipping his hat to Schneider's argument, Justice Stewart stated that "the Fourth Amendment protects people, not places."[21] He went on to explain, "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."[22] Because Katz intended his call to be sheltered from the uninvited ear—even in a public telephone booth—the government's eavesdropping activities violated his privacy, and the Court reversed his conviction.[23] But Justice Stewart's opinion did not go far enough; to at least one member of the Court, it left

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14 Schneider, *supra* note 6, at 13, 21.

15 *See generally* Olmstead v. United States, 277 U.S. 438 (1928).

16 277 U.S. 438 (1928).

17 *Id.* at 464.

18 Schneider, *supra* note 6, at 19 (quoting Transcript of Oral Argument at 5, *Katz*, 389 U.S. 347, *reprinted in* 65 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 106 (Philip B. Kurland & Gerhard Casper eds., 1975)).

19 *Id.* at 20 (quoting Transcript of Oral Argument at 7, *Katz*, 389 U.S. 347).

20 *See Katz*, 389 U.S. at 360–62 (1967) (Harlan, J., concurring).

21 *Katz*, 389 U.S. at 351 (majority opinion).

22 *Id.* at 351–52 (citation omitted) (citing Lewis v. United States, 385 U.S. 206, 210 (1966); United States v. Lee, 274 U.S. 559, 563 (1927)).

23 *Id.* at 359.

room for further exploration.[24]

II. JUSTICE HARLAN'S CONCURRENCE

While Justice Stewart's majority opinion was intended to be the main act, indeed it was Justice Harlan's concurring opinion that stole the spotlight. Justice Harlan agreed that "the Fourth Amendment protects people, not places."[25] Yet, like a wise professor teaching his students, he challenged the majority to hone its analysis and pontificated that the real question "is what protection it affords to those people."[26] In answering that question, Justice Harlan annunciated his famous two-part test: "[F]irst 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.'"[27] He continued to explain that the first prong of the test relates to the plain view doctrine.[28] The Fourth Amendment does not protect evidence found in plain view because a person who exposes "objects, activities, or statements . . . to the 'plain view' of outsiders" cannot have a subjective intent to keep them private.[29] Likewise, under the first prong of Justice Harlan's test, when an individual engages in dialogue with another, knowingly within earshot of others, or "outsiders," that individual cannot be said to hold a subjective intent to keep their conversation private.[30] The second prong requires an objective analysis as to whether society recognizes and permits the person's subjective expectation of privacy.[31]

In a single footnote, Justice Harlan also declared that the Court's decision effectively overruled the property-based approach in *Olmstead*.[32] This was a significant proposition because, in his own words, the *Olmstead* decision "essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment."[33] The footnote served to emphasize the notion that, like his colleagues in the majority, Justice Harlan believed the Fourth Amendment extends beyond physical intrusions to protect conversations that were expected to be safe from the uninvited

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24 *See Katz*, 389 U.S. at 360–62 (1967) (Harlan, J., concurring).

25 *Id.* at 361.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.* The second prong became widely known as the "reasonable expectation of privacy" test.

32 *Id.* at 362 n.* (citing Olmstead v. United States, 277 U.S. 438 (1928)).

33 *Id.*

ear, even when made in a public place like a telephone booth.[34]

III. JUSTICE HARLAN'S INFLUENCE: THEN AND NOW

Despite lacking clear precedential value when *Katz* was decided, the Supreme Court unambiguously adopted Justice Harlan's two-part test nearly twelve years later. In *Smith v. Maryland*,[35] the Court held that the government's utilization of a dialed number recorder did not constitute a search under the Fourth Amendment.[36] Justice Harry Blackmun delivered the Court's opinion, joined by, among others, then–Associate Justice William Rehnquist, Justice Harlan's successor.[37] Justice Blackmun lauded Justice Harlan's two-part test as the Court's "lodestar" in deciding the case,[38] and he listed eight Supreme Court opinions that uniformly recognized the central principle of the *Katz* decision: "[T]he application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action."[39]

His praise for Justice Harlan's concurrence extended further as he went on to say that the question the Court sought to resolve in *Smith* embraces the two-part test that Justice Harlan so "aptly" noted in *Katz*.[40] Justice Blackmun then applied this test to the facts of the case, focusing his analysis on the objective standard, concluding, "Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret."[41]

Like in the *Smith* decision, the Court again focused its analysis on the objective criterion of the *Katz* test when it held in 1983 that police may use

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34 *Id.* at 361.

35 442 U.S. 735 (1979).

36 *Id.* at 745–46.

37 *Id.* at 736. Justice Rehnquist would eventually ascend to the position of Chief Justice.

38 *Id.* at 739. The term "lodestar" is a particularly unique descriptor. According to the Merriam-Webster Dictionary, lodestar refers to "a star that leads or guides" or "one that serves as an inspiration, model, or guide." *Lodestar*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/lodestar (last visited Sept. 3, 2017).

39 *Smith*, 442 U.S. at 740 (citing Rakas v. Illinois, 439 U.S. 128, 143 & n.12 (1978); Rakas, 439 U.S. at 150–51 (Powell, J., concurring); Rakas, 439 U.S. at 164 (White, J., dissenting); United States v. Chadwick, 433 U.S. 1, 7 (1977); United States v. Miller, 425 U.S. 435, 442 (1976); United States v. Dionisio, 410 U.S. 1, 14 (1973); Couch v. United States, 409 U.S. 322, 335–36 (1973); United States v. White, 401 U.S. 745, 752 (1971) (plurality opinion); Mancusi v. DeForte, 392 U.S. 364, 368 (1968); Terry v. Ohio, 392 U.S. 1, 9 (1968)).

40 *Id.*

41 *Id.* at 743.

a radio transmitter to surveil a suspect.[42] In the seminal case of *United States v. Knotts*,[43] Justice Rehnquist, writing for the majority, concluded that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[44] Thus, police surveillance conducted by means of a radio transmitter placed within a car did not violate the Fourth Amendment when the transmitter was used to gather the starting point, intermediate stops, and final destination of the suspect's travels.[45] Justice Rehnquist relied heavily on Justice Harlan's opinion in *Katz*, not only with reference to the two-part test, but particularly with regard to the overturning of *Olmstead*.[46] From that, Justice Rehnquist gleaned that "notions of physical trespass based on the law of real property were not dispositive in *Katz v. United States*," therefore reaching the conclusion that the physical placement of the radio transmitter was also not dispositive in *Knotts*.[47]

Notwithstanding disagreement amongst the Court regarding the objective prong of the *Katz* test, *California v. Ciraolo*[48] is another landmark case that displays the fingerprints of Justice Harlan's concurrence.[49] In that case, police flew a private airplane over the respondent's backyard to confirm the presence of marijuana plants that were protected by two fences.[50] Chief Justice Warren Burger wrote for a sharply divided 5–4 majority, holding the aerial observation did not constitute a search because it was "unreasonable for [the] respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet."[51]

With specific reference to Justice Harlan's concurrence in *Katz*, Associate Justice Lewis Powell penned the dissent, criticizing the majority

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42 *See* United States v. Knotts, 460 U.S. 276, 281–82 (1983).

43 460 U.S. 276 (1983).

44 *Id.* at 281.

45 *Id.* at 282.

46 *Id.* at 280–81. Justice Rehnquist dedicated a significant portion of his opinion to explain the caselaw history of the Fourth Amendment. *Id.* He the harkened back to the *Olmstead* decision, and noted that "[n]early 40 years later, in *Katz v. United States*, the Court overruled *Olmstead* saying that the Fourth Amendment's reach 'cannot turn upon the presence or absence of a physical intrusion into any given enclosure.'" *Id.* at 280 (citation omitted) (quoting Katz v. United States, 389 U.S. 347, 353 (1967)). Justice Rehnquist also quoted the language from the *Smith* decision that echoed Justice Harlan's two-part test. *Id.* at 280–81.

47 *Id.* at 284–85.

48 476 U.S. 207 (1986).

49 *See id.* at 211.

50 *Id.* at 209.

51 *Id.* at 215.

for ignoring Justice Harlan's wisdom:

> Concurring in *Katz v. United States*, Justice Harlan warned that any decision to construe the Fourth Amendment as proscribing only physical intrusions by police onto private property "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." Because the Court today ignores that warning in an opinion that departs significantly from the standard developed in *Katz* for deciding when a Fourth Amendment violation has occurred, I dissent.[52]

Responding pointedly to these concerns, the majority saw Justice Harlan's guidance as being narrower than the dissent:

> Justice Harlan made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not being intercepted. This does not translate readily into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft—or by a power company repair mechanic on a pole overlooking the yard.[53]

Regardless of the outcome of the case, Justice Harlan's concurrence undoubtedly gave the *Ciraolo* Court careful food for thought, even if almost two decades old. The *Ciraolo* case was arguably the first to truly challenge application of the *Katz* test in a modern world, particularly with respect to the reasonable expectation prong.[54] Although the Court was divided in its *Ciraolo* decision, the *Katz* test persevered.[55]

More recent Supreme Court jurisprudence has indicated a potential retreat from the *Katz* decision. In *United States v. Jones*,[56] the Court considered whether the government's use of a Global Positioning System ("GPS") to track a vehicle constitutes a search under the Fourth

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52 *Id.* at 215–16 (Powell, J., dissenting) (citation omitted).

53 *Id.* at 214–15 (majority opinion).

54 *See id.* at 211–12.

55 The Supreme Court has cited *Katz* in a number of other contexts as well. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34 (2001) (determining that use of thermal imaging to monitor a residence violates the expectation of privacy a person has in their home); California v. Greenwood, 486 U.S. 35, 39–40 (1988) (ruling that individuals do not have a reasonable expectation of privacy in their trash bags set curbside for pickup); Rakas v. Illinois, 439 U.S. 128, 149 (1978) (holding that vehicular passengers do not have a reasonable expectation of privacy in areas of a car they do not own).

56 565 U.S. 400 (2012).

Amendment.[57] The Court's ruling was unanimous: "[E]vidence obtained by warrantless use of [a] GPS device . . . violate[s] the Fourth Amendment."[58] However, the Justices did not agree on the basis of that ruling.[59]

Delivering the majority opinion, Justice Antonin Scalia signaled a resurgence of the property-based approach from the *Olmstead* decision that Justice Harlan bitterly shunned:

> The Government contends that the Harlan standard shows that no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. . . . [F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates.[60]

However, the *Jones* decision did not go as far as to eradicate the *Katz* test.[61] Justice Scalia, also writing for Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, and Sonia Sotomayor, explained, "we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis."[62] Other members of the Court nonetheless remained skeptical of the majority's promise that its decision would complement the *Katz* analysis, not exterminate it.[63]

Justice Samuel Alito, with whom Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan joined in dissent, criticized the majority for creating "[d]isharmony with a substantial body of existing case law."[64] While Justice Alito acknowledged that the *Katz* test "is not without its own difficulties,"[65] he suggested that the majority's approach employs a slight-of-hand that focuses on the physical intrusion that occurred in placing the

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57 *Id.* at 404.

58 *Id.* at 404, 413.

59 *See id.* at 400.

60 *Id.* at 406.

61 *See id.* at 411.

62 *Id.* (emphasis removed).

63 *See id.* at 422–23 (Alito, J., concurring).

64 *Id.* at 422.

65 *Id.* at 962. Those difficulties include "a degree of circularity, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks." *Id.* (citation omitted).

GPS on the undercarriage of the vehicle, whereas the real question concerned the GPS tracking itself.[66] Further, Justice Alito pointed out that the majority's approach will lead to incongruous results between the use of GPS surveillance and more traditional methods, such as those involving unmarked cars and aerial support.[67]

If the majority did not overturn *Katz*, why was Justice Alito so adamantly opposed to its opinion?[68] According to two legal commentators, "the trespassory test espoused in *Jones* is the first step in a proposed paradigm shift by Justice Scalia in Fourth Amendment analysis."[69]

But we will never know the extent of Justice Scalia's plan for the fate of Fourth Amendment analysis and the *Katz* test. As this Essay was being drafted, two significant events occurred that will unquestionably affect the path of Fourth Amendment jurisprudence: the unexpected passing of Justice Scalia,[70] and the election of President Donald Trump.[71] President Trump pledged during his campaign to appoint a Justice "in the mold of Scalia,"[72] listing twenty-one potential appointees.[73]

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66 *Id.* at 961.

67 *Id.*

68 *See* Kevin Emas & Tamara Pallas, United States v. Jones*: Does* Katz *Still Have Nine Lives?*, 24 ST. THOMAS L. REV. 116, 157–58 (2012) (offering an answer to this question).

69 *Id.* at 167. In their article, Judge Kevin Emas and Tamara Pallas postulate that Justice Scalia was laying the groundwork for the following analysis in lieu of the *Katz* test:

> (1) Applying the *Jones* trespassory test, did a Fourth Amendment search occur?
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> (2) If application of the trespassory test yields a Fourth Amendment search (and assuming it was made without a warrant), was the search reasonable?
>
> (3) In determining whether a warrantless Fourth Amendment search was "reasonable," the *Katz* reasonable-expectation-of-privacy test would serve simply as one of many factors to be considered as part of the totality-of-the-circumstances analysis.

Id. at 168.

70 Justice Scalia passed away at the age of 79 in February 2016. *See* Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html.

71 President Trump was sworn into office on January 20, 2017. *See* Peter Baker & Michael D. Shear, *Donald Trump Is Sworn In as President, Capping His Swift Ascent*, N.Y. TIMES (Jan. 20, 2017), https://www.nytimes.com/2017/01/20/us/politics/trump-inauguration-day.html.

72 Nico Lang, *Donald Trump Vows to Appoint Supreme Court Justice 'In the Mold of Scalia,'* ADVOCATE (Oct. 10, 2016, 11:31 AM), http://www.advocate.com/election/2016/10/10/donald-trump-vows-appoint-supreme-court-justice-mold-scalia.

73 *See* Press Release, Donald J. Trump Finalizes List of Potential Supreme Court Justice Picks (Sept. 23, 2016), https://perma.cc/2K6S-T3CT. President Trump may have future opportunities to impact the makeup of the Court. The average retirement age of Supreme Court Justices is approximately seventy-nine years old, and three members of the Court are at least seventy-eight years old. Jaime Fuller, *Everything You Didn't Even Think You Wanted to Know About Supreme Court Retirements*, WASH. POST (Apr. 21, 2014),

IV. THE FUTURE OF *KATZ*

Delivering on his promise, it appears that President Trump indeed selected a nominee that fits the mold of Justice Scalia. On February 1, 2017, President Trump nominated Neil Gorsuch to the high bench, and on April 7, 2017, the Senate confirmed.[74] *The National Review* called Judge Gorsuch, who—at the time of his nomination—served as a judge on the United State Court of Appeals for the Tenth Circuit, "a worthy heir to Scalia," noting that his legal thinking is comparable to that of the late Justice.[75] Regardless of any actual or perceived partisan leaning, Judge Gorsuch boasts a sterling pedigree: a bachelor's degree from Columbia, a law degree from Harvard, and a doctorate from Oxford.[76]

Following his nomination, Justice Gorsuch was criticized by opponents for stating in a speech to law students at Case Western University School of Law, "Judges should . . . strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be."[77] In confirmation hearings, U.S. Senator John Cornyn of Texas asked Judge

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https://www.washingtonpost.com/news/the-fix/wp/2014/04/21/everything-you-didnt-even-think-you-wanted-to-know-about-supreme-court-retirements/. Justice Stephen Breyer is seventy-nine years old (born in 1938), Justice Anthony Kennedy is eighty-one years old (born in 1936), and Justice Ruth Bader Ginsburg is eighty-four years old (born in 1933). *Current Members*, SUPREME COURT U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Sept. 3, 2017).

74 Press Release, The White House, President Trump's Nominee for the Supreme Court Neil M. Gorsuch (Jan. 31, 2017), https://www.whitehouse.gov/nominee-gorsuch; Ed O'Keefe & Robert Barnes, *Senate Confirms Neil Gorsuch to Supreme Court*, WASH. POST (Apr. 7, 2017), https://www.washingtonpost.com/powerpost/senate-set-to-confirm-neil-gorsuch-to-supreme-court/2017/04/07/da3cd738-1b89-11e7-9887-1a5314b56a08_story.html.

75 Ramesh Ponnuru, *Neil Gorsuch: A Worthy Heir to Scalia*, NAT'L REV. (Jan. 31, 2017), http://www.nationalreview.com/article/444437/neil-gorsuch-antonin-scalias-textualist-originalist-heir.

76 *Id.*

77 Richard Wolf, *Neil Gorsuch: Supreme Court Nominee in His Own Words*, USA TODAY (Jan. 31, 2017, 8:27 PM), https://www.usatoday.com/story/news/politics/2017/01/31/supreme-court-neil-gorsuch-antonin-scalia-nominee-justice/97262576/. His detractors interpreted these comments as indicating a desire to weaken civil rights laws. *See, e.g.*, Daniel Bush, *'Backward Is Not Backwards' and Other Takeaways from Neil Gorsuch's Supreme Court Confirmation Hearing*, PBS: NEWSHOUR (Mar. 22, 2017, 10:11 PM), http://www.pbs.org/newshour/updates/backward-not-backwards-takeaways-neil-gorsuchs-supreme-court-confirmation-hearing/; David G. Savage, *Is the Scalia Theory Embraced by Judge Gorsuch a Lofty Constitutional Doctrine Or Just an Excuse to be Conservative?*, L.A. TIMES (Mar. 17, 2017, 3:00 AM), http://www.latimes.com/politics/la-na-pol-constitution-originalism-20170317-story.html.

Gorsuch to explain these remarks.[78] Judge Gorsuch explained that he meant, when deciding a case, a judge must review the "law at the time the alleged crime was committed."[79] Judge Gorsuch further clarified, "We look backward, in this sense, in the sense of looking at historic facts."[80]

When it comes to the Fourth Amendment, Justice Gorsuch is a champion for privacy rights and is not reluctant to look forward when applying precedent to the facts. In *United States v. Denson*,[81] the Tenth Circuit considered whether law enforcement officers had probable cause to search the house of a suspect—for whom they had an arrest warrant but no search warrant—after using a Doppler radar device to conclude that the suspect was not home.[82] The court ruled that the law enforcement officers had probable cause to enter the home based on other evidence concerning the suspect's whereabouts that was gathered separately from the Doppler device.[83] However, then–Judge Gorsuch showed unease with the government's use of Doppler radar:

> It's obvious to us and everyone else in this case that the government's warrantless use of such a powerful tool to search inside homes poses grave Fourth Amendment questions. New technologies bring with them not only new opportunities for law enforcement to catch criminals but also new risks for abuse and new ways to invade constitutional rights.[84]

Looking to the future, he further wrote, "We have little doubt that the radar device deployed here will soon generate many questions for this court and others along both of these axes."[85]

In another Fourth Amendment case, *United States v. Carloss*,[86] then–Judge Gorsuch penned a witty dissent criticizing the majority for ruling that law enforcement officers did not violate the Fourth Amendment by knocking on a suspect's front door to speak to him, even when the suspect had posted "No Trespassing" signs on and around his house.[87] Challenging the majority, then–Judge Gorsuch quipped, "A homeowner may post as many No Trespassing signs as she wishes. She might add a wall or a medieval-style moat, too. Maybe razor wire and battlements and mantraps

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78 Bush, *supra* note 77.

79 *Id.*

80 *Id.*

81 775 F.3d 1214 (10th Cir. 2014).

82 *Id.* at 1216.

83 *Id.* at 1217–18.

84 *Id.* at 1218.

85 *Id.*

86 818 F.3d 988 (10th Cir. 2016).

87 *Id.* at 1003–04 (Gorsuch, J., dissenting).

besides. Even *that* isn't enough to revoke the state's right to enter."[88] Despite his clever remarks, the seriousness of then–Judge Gorsuch's concern was not lost:

> Our duty of fidelity to the law requires us to respect all these law enforcement tools. But it also requires us to respect the ancient rights of the people when law enforcement exceeds their limits. In this case the two arguments the government offers to justify its conduct can claim no basis in our constitutional tradition. . . . And, respectfully, I just do not see the case for struggling so mightily to save the government's cause with arguments of our own devise—especially when what arguments we are able to muster suffer so many problems of their own . . . .[89]

Although *Carloss* did not involve the government's use of technology, Justice Gorsuch's sentiment in *Carloss* highlights his consistent hypervigilance over Fourth Amendment encroachments; and, given this sensitivity, Justice Gorsuch will no doubt make his mark on future Fourth Amendment analysis at the Supreme Court level.

But bigger questions remain: how will the eight other Justices follow? In future Fourth Amendment cases, will the Court yet again embrace Justice Harlan's wisdom and turn to the *Katz* test as its "lodestar"—its guiding star?[90] Or will the Court take another step away from the *Katz* framework, as it did in *Jones*?[91] If so, how far will that step be? Only time will tell.

One thing is certain: just as the Court continues to change, so will technology. The contexts in which the Court analyzes Fourth Amendment issues will become more complex than ever. Like the Court has ruled on issues pertaining to wiretapping,[92] pin registers,[93] radio transmitters,[94] aerial surveillance,[95] and GPS tracking,[96] in the future, it may consider issues pertaining to emerging technologies having the same or greater levels of intrusiveness. For example, the government's use of drones,[97] police body

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88 *Id.* at 1004.

89 *Id.* at 1015.

90 *See supra* note 38 and accompanying text.

91 *See* United States v. Jones, 565 U.S. 400 (2012).

92 *See* Katz v. United States, 389 U.S. 347, 351–52 (1967).

93 *See* Smith v. Maryland, 442 U.S. 735, 743 (1979).

94 *See* United States v. Knotts, 460 U.S. 276, 281 (1983).

95 *See* California v. Ciraolo, 476 U.S. 207, 215 (1986).

96 *See Jones*, 565 U.S. at 403.

97 *See* Martin McKown, *The New Drone State: Suggestions for Legislatures Seeking to Limit Drone Surveillance by Government and Nongovernment Controllers*, 26 U. FLA. J.L. & PUB. POL'Y 71, 72–73 (2015) (analyzing government use of drones under the Fourth

cameras, facial recognition scanners, PRISM,[98] real-time satellite mapping, and traffic monitoring systems all pose new Fourth Amendment issues.

CONCLUSION

The application of Justice Harlan's logic as it relates to the reasonable expectation of privacy in future surveillance cases will become all the more relevant—and complicated—as technology continues to advance at a seemingly exponential pace. But complicated does not mean problematic. The rationale in applying the *Katz* test, including the reasonable expectation prong, rings true whether the Court is dissecting the implications of the government's use of phone booth surveillance in the 1960s or, in the case of *Denson*, its use of Doppler radar in the twenty-first century. As technology advances, so must the judiciary's awareness, familiarity, and understanding of that technology and correlated societal expectations.

Amendment).

98 PRISM is the code name for a covert program allowing the government to tap "directly into the central servers of nine leading U.S. Internet companies, extracting audio and video chats, photographs, e-mails, documents, and connection logs that enable analysts to track foreign targets." Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html.