AMENDMENT III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.[263]

263. This amendment was one of the bases on which the Court, in *Griswold v. Connecticut*, overturned Connecticut's law in respect of certain aspects of birth control. The idea that birth control was what the founders had in mind when they wrote the amendment has been mocked by a number of commentators. But Justice Douglas, writing for the Court, decided the matter this way: "Various guarantees create zones of privacy. The right of association contained in the

penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'" *Griswold*'s reliance on the First, Third, Fourth, Fifth, and Ninth Amendments was ridiculed by Justices Black and Stewart, the latter of whom noted: "No soldier has been quartered in any house."

The actual record from the founding period suggests the authors of the Constitution were concerned with one of the grievances that had been raised against George III in the Declaration of Independence, which complained of the keeping "among us, in times of peace, Standing Armies, without the Consent of our legislatures" and of "quartering large bodies of armed troops among us." Colonial New York had resisted the first Quartering Act, of 1765, which allowed Redcoats to stay in private homes. The second Quartering Act, issued in 1774, was greeted as one of the so-called Intolerable Acts. "The billeting of soldiers upon the citizens of a state, has been generally found burthensome to the people, and so far as this article may prevent that evil it may be deemed valuable; but it certainly adds nothing to the national security." Joseph Story wrote: "[The] plain object is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion. The billetting of soldiers in time of peace upon the people has been a common resort of arbitrary princes, and is full of inconvenience and peril."

This amendment has seldom been adjudicated in the federal courts, as the practice of quartering troops in homes was brought to a halt with the triumph of the Revolution. But the amendment figured

in one case, *Engblom v. Carey*, which was dealt with in 1982 by the judges who ride the Second U.S. Appeals Circuit. It involved a strike of corrections officers at the Mid-Orange Correctional Facility in Warwick, New York. Governor Hugh Carey called out the National Guard, and several of its members stayed in the homes of the striking guards, who brought suit under this amendment. The circuit court did not rule out a claim for protection under the Third Amendment, but Judge Irving Kaufman, in a dissent, said the Court majority's "willingness seriously to entertain a 'quartering of troops' claim" in the prison strike "holds us up to derision."

AMENDMENT IV.

The 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.[264]

264. A "conspiracy of amazing magnitude," as it was characterized by Chief Justice Taft, was at the center of one of the first cases to test how the advance of technology would be treated under this amendment. The case involved a bootlegger, Roy Olmstead, on whose operations federal agents placed a wiretap. Taft described it this way: "Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses." He reasoned: "By the invention of the telephone fifty years ago and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched."

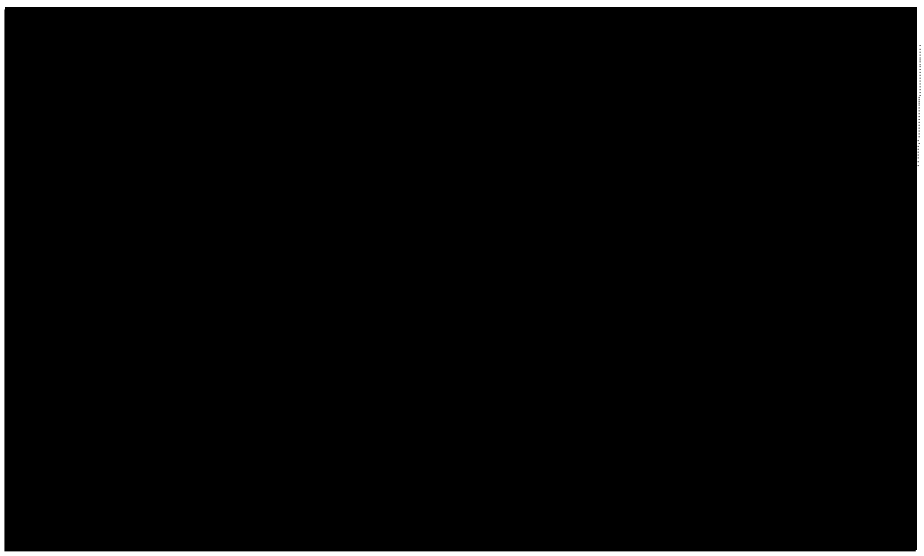
Things have come a long way since *Olmstead v. United States*. Witness the furor that erupted after September 11, 2001, when America's intelligence services, in a time of war, tracked telephone numbers in the United States that had been connected to telephones being used by terrorists overseas. The big step to the current state of the law was taken in a 1967 case involving a gambler named Charles Katz, whose telephone conversation in a telephone booth was monitored by the FBI. Justice Potter Stewart, writing in *Katz v. United States*, said the Court had concluded that the underpinnings of *Olmstead* "have been so eroded by our subsequent decisions" that the "doctrine there enunciated can no longer be regarded as controlling." The government's activities "in electronically listening to and recording" the gambler'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."

In recent decades, the Court has suggested that it would permit a cocaine-sniffing canine to case the luggage of a suspected drug trafficker. In *United States v. Place*, the Court decided that the Fourth Amendment rights of Raymond J. Place, who was traveling to New York from Miami, had been violated, but for reasons other than the dog that sniffed the cocaine. "Despite the fact that the sniff tells the authorities something about the contents of the luggage," wrote Justice O'Connor for the Court, "the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods. In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public

place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment."

The use of thermal imaging equipment was deemed by the Court to be a search under the Fourth Amendment. The case involved an Oregon man, Danny Lee Kyllo, whose garage was the source of a large amount of heat detected by federal agents. They speculated it was emanating from heat lamps such as those used to grow marijuana. The Supreme Court, in a case on which supposedly conservative members such as Justice Thomas and supposedly liberal members such as Justice Ginsberg agreed, declared, in an opinion by Justice Scalia, that not only does the Fourth Amendment draw "a firm line at the entrance to the house," as it had said in an earlier case, but the line "must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant."

Controversy over where to draw the line of the Fourth Amendment during a time when foreign terrorist organizations are targeting the United States has intensified since the attacks of September 11, 2001, and the passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, known as the USA PATRIOT Act.



AMENDMENT IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[278]

278. "The great residuum" is how Madison (in 1789) characterized all powers that are not granted by the Constitution and are retained by the people. But the Supreme Court famously preferred the word "penumbra," which merriam-webster.com defines as "a space of partial illumination (as in an eclipse) between the perfect shadow on all sides and the full light," or, among other definitions, "a body of rights held to be guaranteed by implication in a civil constitution." The word sprang into the national debate when an executive of Planned Parenthood, Estelle Griswold, challenged Connecticut over her contraception clinic. In *Griswold v. Connecticut*, Justice Douglas considered the Ninth Amendment to be one of several penumbras that make up "zones of privacy." Justice Goldberg wrote at length about the Ninth Amendment in a concurring opinion: "To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to

the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever."

Goldberg cited Joseph Story, who stated that the Ninth Amendment "was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others," as well as the reverse, "that a negation in particular cases implies an affirmation in all others." But Justice Black, dissenting in *Griswold,* noted that the Constitution nowhere expressly spells out a right to privacy: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."

Griswold was a watershed in Ninth Amendment jurisprudence. One academic, Russell Caplan, has written that the Ninth Amendment had been "mostly a source of intermittent curiosity" until *Griswold* "catapulted" it "into respectability." In *Roe v. Wade*, Justice Blackmun reprised how the district court had decided that the choice of whether to have children was a fundamental right protected by the Ninth Amendment. He argued for the privacy right by relying on other grounds but clung to the Ninth Amendment just in case: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

Douglas, in his concurrence in *Roe*, wrote that the Ninth Amendment did not conceive of "federally enforceable rights," but rather meant that the people retain "customary, traditional, and time-honored rights, amenities, privileges and immunities that come within the sweep of 'the Blessings of Liberty'" from the Preamble. Judge Bork, during his fractious confirmation hearings in 1987, said he viewed the Ninth as "an amendment that says 'Congress shall make no' and then there is an inkblot, and you can't read the rest of it, and that is the only copy you have."