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Welcoming Remarks: “Katz v. U.S.: 40 Years Later”

*Dean Rex R. Perschbacher**

Good morning. I am Rex Perschbacher, Dean of the School of Law. I am very proud to be here this morning. On behalf of our Chancellor, Chancellor Vanderhoef, and the School of Law and the UC Davis Law Review, welcome to UC Davis and the 2007 Law Review Symposium. This is an immensely talented group, and I am honored to make a formal start to this Symposium.

First, let me thank those who took the lead in putting this Symposium together. That includes members of the UC Davis Law Review, Editor in Chief Dave Richardson, Jennifer Carbuccia, Amanda Cary, Sean Carney, Guy Danilowitz, Amber Hawk, Lila Hollman, Lara-Beye Molina, Tarik Naber, and Joanne Suk. Thanks also go to our talented faculty members themselves, our distinguished scholars who are going to be moderating the panels, particularly Jennifer Chacón, Diane Marie Amann, and Floyd Feeney.

I also need to recognize and thank the co-sponsors of today's Symposium: DLA Piper, Reed Smith, and Shartsis Frieze LLP. Thank you very much!

* Dean and Professor of Law, UC Davis School of Law. Remarks delivered at the UC Davis Law Review Symposium — *Katz v. U.S.: 40 Years Later* (March 9, 2007).

Although I really cannot even begin to do justice to the breadth and sophistication of the papers these panelists have prepared, even a casual reader has to be impressed by the scholarship they reflect. The three panels are just going to be outstanding. The first panel is entitled, “*Katz* in Context: Privacy, Policing Homosexuality and Enforcing Social Norms,” and will be moderated by Professor Jennifer Chacón with speakers Professors Aya Gruber, Christian Halliburton, Erik Luna, Jonathan Simon, and David Sklansky. The opening panel will situate the *Katz* decision within a robust framework. The five panelists will provide an expansive vision of the realities that shaped the *Katz* decision and that continue to define and limit its scope.

The second panel, entitled “*Katz*: Rights and Remedies,” will be moderated by Professor Floyd Feeney, who is a former clerk for Justice Hugo Black. Speakers include Professors Raquel Aldana, Timothy Casey, Sharon Davies, and Anil Kalhan. Forty years after the Supreme Court determined that the Fourth Amendment protected “people, not places,” this panel will assess the strength of that protection. The panelists will examine the ways in which contemporary courts define the limits of an individual’s “reasonable expectation of privacy” and propose alternative frameworks for conducting the appropriate legal analysis. They will also examine the evolution of remedies available for searches found to be unreasonable under *Katz*.

The final panel, entitled “*Katz* in the Age of International Crime and Terrorism,” will be moderated by Professor Diane Marie Amann. The speakers are Professors Tracey Maclin and Glenn Sulmasy. In his concurrence in *Katz*, Justice White left open the possibility that in cases of national security, the President or Attorney General could authorize warrantless wiretaps. In recent years, events such as the warrantless wiretapping program carried out by the National Security Agency after September 11, 2001, have brought into sharp focus the question of how *Katz*’s protection should be interpreted in cases involving national security. Our final panel explores these questions, along with the related question of the degree to which citizenship status limits the protections afforded by *Katz*.

This Symposium gave me a chance to think and reflect that I am something of a child of *Katz*. I went to law school not so many years after this case was decided. I grew up in an entirely different environment than you, the law students of today, do, where we were celebrating the activism and wonderful reforms of the Warren Court’s revolution in constitutional law. In particular in criminal procedure, one of the advantages time and age brings us is the chance to look

back and say, “Was it really all so wonderful?” *Katz* in particular brings up those thoughts to me.

The Law Review Symposium says at the outset that this case is not a relic of history and I think that’s true. It’s not a relic of history, but I don’t know that it is really a success either. Our panelists are going to tell you that with a lot more background and sophistication.

What strikes me is that the Warren Court revolution — which gave us all the *Miranda* warnings and the things that you all have brought with you almost in your DNA today, I think — was very successful on several fronts. Indeed *Miranda*, the cases that followed, the Fifth and Sixth Amendment cases providing accused in criminal cases with counsel, and really elevating the quality of representation in general, and watching out for the protections against self-incrimination were very successful revolutions that have changed things forever. I believe they have had a very positive effect, certainly initially, although it has been eroded over time, on structuring the way in which police would have to interact in their activities of seeking out and apprehending criminals or those accused of crime. Those were very positive. There was a real step forward in professionalizing policing in the United States, which is for all of our own good.

But, not every part has been successful. *Katz* highlights the problems that its reinterpretation of the Fourth Amendment would create. You will hear from the panelists who are going to tell us ways in which this case and the whole jurisprudence has been overwhelmed by subsequent developments.

By the time I went to law school, *Katz* and the search and seizure cases generally were being fought vigorously and undermined. At the time, the attacks came against the exclusionary rule because apparently highly probative evidence was being excluded from criminal trials solely because the police had acted apparently in contravention of Fourth Amendment protections. That has produced almost a grotesque jurisprudence in these last forty years.

The cases made for great law school exams — when you had to determine if the police actually had to stop the car. Could the police search in this particular compartment of the car versus the trunk of the car? Could you search inside the bag that didn’t have anything else suspicious about it? These were great exam questions, but we really should have taken a step back and realized that in a jurisprudence this elaborate and this technical, in the face of policing and crime, it was going to risk collapsing under its own weight. When a series of cases has been enormously undermined, it is likely that the original jurisprudential structures were not that strong.

Of course it's a cliché that the greatest casualty of the War on Drugs was the Fourth Amendment. But, the Fourth Amendment has been murdered on several occasions now. This Symposium brings that front and center as well. Professor Halliburton is going to elaborate on this. The War on Drugs has really meant the crash of this jurisprudence. That is because it is far too easy for public interests, in particular public security interests, to run rampant over the way in which this jurisprudence was formulated out of *Katz* and out of the similar Fourth Amendment cases. Was it worth it? Maybe. There will be another cycle. There will be another revolution. You or your children are going to be here to see the revival of the jurisprudence.

But undermining the Fourth Amendment hasn't brought us more security. If the idea was that you and I would become more secure in our homes and our possessions, and freer of government intrusions, then everyone has to admit that realization has not materialized. I think part of it is due to *Katz*. I know our panelists will talk about this more.

By building in the expectation of privacy as a fundamental part of the Fourth Amendment jurisprudence in this area, you actually open the door to its unraveling. That is because for every one of us in this room, especially with the onset of the Internet age, and YouTube, and the Facebook world, the expectations of privacy are ludicrous under current technology and in the shadow of the law on terror. It turned out to be a path we would rather have not taken.

Finally there is the last of the ways in which I have seen this case injured and put to rest and destroyed — the technological environment that has grown up around it. The methods of surveillance have become so wonderfully sophisticated.

It's true there's a sign when you go through certain intersections announcing they are monitored by a red light camera. That sign lets you know a camera is going to take your picture if you drive through that red light whether at 3 a.m. or in the middle of the day. I think we are all getting accustomed to the fact that when you walk down the street of any major American city and probably any world city there are untold numbers of video cameras watching you as you go about your business. Something other than the expectation of privacy is going to have to save us. Now I leave all those questions of whether there is any salvation here at hand in the hands of our wonderful panelists.

Just having the chance to introduce this Symposium has made me think that Justice Black was right (in a dissent that we don't even get assigned to in law school) to suggest that *Katz* was wrong in its approach or it may be that the Constitution gets itself into big trouble in the privacy area for whatever reasons.

I was happy for *Katz* and I was enjoying it while I was in law school. I was hoping we'd defend it and preserve it in practice, but none of that has happened. Instead, I think it is time to start anew. So, I really look forward both to a deeper critique by our very talented panelists and I hope that they will hold out for something better and stronger that will grow out of this. Perhaps there will be more fundamental reassertions of private citizens' rights to be free of governmental intrusion.

I do welcome you all despite this gloomy introduction. You will think and learn a lot. There will be no privacy to the panelists. This will be a wonderful discussion and I am happy to get out of the way of your work and let it begin. Thank you for coming to UC Davis. On with "*Katz v. U.S.: 40 Years Later.*"