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THIRD-PARTY DOCTRINE: GENERAL WARRANTS OF THE DIGITAL AGE

A THESIS APPROVED FOR THE  
DEPARTMENT OF POLITICAL SCIENCE

BY

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I would like to dedicate this work to my family for always keeping me on track, encouraging me and supporting me throughout this entire thesis process, my collegiate academic career, and my life in general.

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# Table of Contents

Acknowledgements .....	iv
List of Figures.....	vii
Abstract.....	viii
Chapter 1: Introduction.....	1
Chapter 2: Origin and Original Meaning of the Fourth Amendment .....	4
The Controversy over Writs of Assistance and General Warrants.....	5
State Constitutions and Search and Seizure Policy .....	9
The Fourth Amendment Signals a Lasting Change.....	13
Chapter 3: Fourth Amendment Jurisprudence.....	17
The Assumption of Risk Theory .....	18
Early Conceptions of a “Search” under the Fourth Amendment .....	20
Chapter 4: The Supreme Court.....	25
The Supreme Court as a Policy Maker.....	25
Is Dahl’s ruling regime still relevant? .....	27
Models of Judicial Decision Making.....	29
Chapter 5: Conservative Backlash Sets up the Third-Party Doctrine .....	32
Nixon and the Supreme Court .....	33
The Third-Party Doctrine in Academia.....	36
Visual Representations of Supreme Court Shifts .....	37
Chapter 7: The Third-Party Doctrine is Born.....	42
Miller v. United States.....	42
Smith v. Maryland .....	46

Chapter 8: Application of the Third-Party Doctrine.....	49
Chapter 9: Cases that possibly support the Third-Party Doctrine .....	54
Balancing Technology and the Fourth Amendment.....	56
Chapter 10: Critiquing the Third-Party Doctrine .....	57
Is Privacy an All-or-Nothing Conception?.....	58
How voluntary is the Use of Third-Parties? .....	60
Assuming the Risk.....	62
The Chilling Effect .....	63
Chapter 11: Recent Developments .....	65
United States v. Jones.....	65
DOJ Rule 41 Proposed Change .....	67
Riley v. California .....	69
State v. Andrews.....	73
Chapter 12: Conclusion .....	76
References .....	80

## List of Figures

Figure 1.....	39
Figure 2.....	40



## **Abstract**

The Third-Party Doctrine came about in the late 1970's in two Supreme Court rulings in *United States v. Miller*, and *Smith v. Maryland*. The doctrine states that if an individual voluntarily provides information to a third party, the Fourth Amendment does not prohibit the government from accessing that information without a warrant from the third party. However, scholars studying the Third Party Doctrine have paid less attention to how the doctrine came into being, instead concentrating on the implications for jurisprudence. From a political science perspective, determining what allowed the Third-Party Doctrine to come into being is a vital question. In the past the Third-Party Doctrine might have been good law, but that time has since come to pass. It is time for Fourth Amendment law to join the 21<sup>st</sup> Century.

## **Chapter 1: Introduction**

When the Founding Fathers met in Philadelphia at Independence Hall and created The Constitution of the United States in the summer of 1787, it was a profound moment for democracy. A moment only, perhaps, surpassed by the meeting of the First Congress of the United States on September 25, 1789, where twelve amendments to the Constitution were proposed to the state legislatures.

Of the twelve, ten were ratified by the necessary majority of three-fourths of state legislatures and these first ten amendments became known as the Bill of Rights on December 15, 1791. Many of the immunities granted to citizens in these first ten amendments were the first of their kind to be codified and enumerated by a government in the protection of its citizenry. One amendment in particular, the Fourth Amendment, brought into being ideas that had been developing for centuries.

Among complex clauses and various key terms of the Fourth Amendment comes the idea that general warrants are unreasonable and, therefore, unlawful. This idea that some searches and seizures are reasonable and unreasonable had been in development across England and then later in the Colonies for years before the creation of the Fourth Amendment. To describe accurately the origin and original meaning of the amendment and to provide insight into the framers and public's thinking the history of the amendment will be outlined. Unfortunately, after over 220 years the very rights, the amendment originally sought to protect are at risk from a now arcane doctrine created in the 1970's.

The Third-Party Doctrine came about in the late 1970's emanating from two Supreme Court rulings in *United States v. Miller*<sup>1</sup> (1976), and *Smith v. Maryland*<sup>2</sup> (1979). This doctrine states that if an individual voluntarily provides information to a third party, the Fourth Amendment does not prohibit the government from accessing that information without a warrant from the third party. To put the Third Party Doctrine into context; I will trace the origins and original meaning of the Fourth Amendment as well as examine the temporal shift on the Supreme Court that lead to the creation of the doctrine.

After exploring the trajectory Fourth Amendment law has taken leading up to and including the cases that established the Third-Party Doctrine I will examine how the doctrine itself has evolved over time and the implication current cases have had on it and Fourth Amendment law more generally. In addition to examining how the laws and doctrine have changed, it will be critical noting the numerous societal changes that have occurred since the inception of the Third-Party Doctrine in order to determine if it is still worth being a part of Fourth Amendment Law.

Since the establishment of the Third-Party Doctrine in the 1970's an individual's daily interaction with third-party providers has grown exponentially. Some third-parties, like banks, still hold roughly the same relationship with customers today that they did 35 years ago. While other third-parties, such as telephone providers, have seen their relationship with clients change dramatically in the intervening period. Telecommunication companies have seen their relationship shift from a majority of consumers using a single landline utilized for the entire household, to individual cell

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<sup>1</sup> 425 U.S. 435 (1976)

<sup>2</sup> 442 U.S. 735 (1979)

phone lines for every member of the family. Then there are new third-party companies to consider, such as internet service providers, which are unlike anything that existed in the 1970's.

At this point, one may wonder how a doctrine that seems to be so controversial could have come into being. The answer is one that has not been examined in depth much at all because of the peculiar nature of the question. The Third-Party Doctrine is widely reviewed by legal scholars, and it is in their nature to care less about how the doctrine came into being and more about its implications for jurisprudence. From a political scientist's perspective, determining what allowed the Third-Party Doctrine to come into being is a vital question that needs answering.

To understand how this doctrine came into being it will be important to examine the shifts that occurred in the Supreme Court around the time the pivotal cases were decided. In 1969, Richard Nixon was elected president of the United States as part of a reactionary wave of conservatives swept into office in part by campaigning against what was seen by some to be a liberal court. From Nixon's election in 1969 to the confirmation of Justice Stevens to the Supreme Court in 1975, there was a considerable conservative shift on the bench. This new Supreme Court took it upon itself to bring a decidedly more conservative and strict constructionist tone to its decisions. It was a shift that led to the creation of the Third-Party Doctrine.

The digital revolution and everything that came with it forever changed how individuals interact with third-party providers. Phone companies and Internet service providers (often one in the same now) have seen their relationship with customers reach unprecedented heights, while new services such as online social networking sites have

forever changed human interactions. In the digital world, we live in today; it is no longer reasonable that the government can, without a warrant given upon probable cause or even reasonable suspicion and lacking particularity, access information from third-party providers at will.

## **Chapter 2: Origin and Original Meaning of the Fourth Amendment**

The wish and recognition of privacy preceded the Fourth Amendment by millennia. As early as the Babylonian Talmud of the Jews (3<sup>rd</sup> and 5<sup>th</sup> centuries) there was a recognition of privacy between neighbors.<sup>3</sup> The Romans too shared this recognition for privacy as stated by Cicero, “(citizen’s homes) sacred... hedged about by every kind of sanctity.”<sup>4</sup> Furthermore, under Emperor Justinian of Byzantium, 533 C.E., a man could not be compelled from his home. “Everyone’s safest place, his refuge and his shelter (is his home).”<sup>5</sup>

More closely related to the origin of the Fourth Amendment, British thinking on the right to privacy stretches far back as well. As early as 1505 Chief Justice John Fineux of the Court of King’s Bench held, “the house of a man is for him and his castle and his defense.”<sup>6</sup> This sentiment was echoed by multiple judges by 1616.<sup>7</sup> While these statements prove that, in English thought, there was some expectation of privacy, the idea was not absolute. While English courts believed that an individual’s house was

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<sup>3</sup> Baba Bathra, 2b-3a, 5a, 6b, 59a-60a, *Talmud*, Epstein ed., pt.4, vol. 3, pp. 2-4, 18-19, 24-25, 237-42.

<sup>4</sup> Cicero, “De Domo Sua Ad Pontifices Oratio,” XLI, 109 (29 September 57 B.C.E.), *idem*, *The Speeches. Pro Archia Poeta. Post Reditum in Senatu* (trans. By N.H. Watts, Cambridge and London, 1923), pp. 45, 262-63.

<sup>5</sup> D. 2, 4, 18, *The Civil Law*, trans. By S.P. Scott (17 vols. In 7. Cincinnati, 1932), vol. 2, p. 275.

<sup>6</sup> Opinion of Chief Justice Sir John Fineux, Year Book, Michaelmas, 21 Henry VII, 39 (K.B. [Oct./Nov.] 1505): *De Termino Hilarii Anno XXI Henricii VII* [London, 1530], fol. 41b, no. 50: “Nota.”

<sup>7</sup> *Bettisworth’s Case* (C.P. Easter 1591), 2 Coke 32a; 76 E.R. 1257, sec. 6.

off limits to his fellow man, the courts also made clear that when the king was a party nothing was off limits.<sup>8</sup>

### **The Controversy over Writs of Assistance and General Warrants**

While the benefits of the specific warrant over general warrants were well known by the 1750s, the time has still not progressed to a point where there was widespread acceptance. In the colonies, these writs were used to allow agents of the King to search any person they believed to be involved in a crime, as well as any place they believed a crime has or is currently taking place. On top of giving complete power to any official that possessed a writ, the writs themselves were valid for the life of the King that the writ was issued under.<sup>9</sup> This means that once a writ was issued it could stand in effect for a decade or longer without any judicial input.

These writs became so notorious in hindsight that in his opinion in *Stanford v. Texas*<sup>10</sup>, Justice Stewart referred to them as “hated writs” and explained that, “vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists.” The *Paxton Case* brought the issue of writs of assistance and general warrants to the forefront in the colonies.

The death of King George II on October 25, 1760, brought the situation in the colonies to a head with the writs issued under him set to expire six months after his death. Before these writs could expire, Charles Paxton, a customs official in Boston,

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<sup>8</sup> Semayne’s Case (K.B. Michaelmas [Oct./Nov.] 1604), 5 Coke 91a at 91b, 93a; 77 E.R. 194 at 195, 198. Quote at 91b/195: “In all cases where the king is party the sheriff...may break the house...”

<sup>9</sup> Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 54.

<sup>10</sup> 379 US 476 (1965)

petitioned the Superior Court for new writs, which led a large group of merchants to ask the court to hear arguments against the new writs. With a case granted the merchants hired the help of Oxenbridge Thatcher and James Otis Jr., while Jeremiah Gridley represented the customs officers. The three briefs issued by the lawyers would lay out the arguments for and against issuing these new writs.

Gridley took the position that parliament's word was supreme, and the statutes passed clearly allowed the issuance of new writs. His argument rested on the fact that, in 1662, the Fraud Act allowed such broad searches in England and later these searches were extended to the colonies in 1696.<sup>11</sup> Gridley also referenced the 'man's home is his castle' idiom saying, "The Subject has the (privilege) of House only against his fellow Subjects, not verses ye King either in matters of Crime or Fine."<sup>12</sup> However, times were changing, and even the idea that the King would open all the doors was evolving.

Thatcher's brief, while still on the same side as Otis and the merchants, was limited to a few technical issues surrounding the issuance of new writs and their legality.<sup>13</sup> Otis would grapple with the larger philosophical questions concerning the reasonableness of the writs in his brief.

In his brief, Otis directly challenged the assumptions of British search and seizure law and how it was operating within the colonies. According to William J. Cuddihy, four key factors were explored in the Otis brief: "(1) Statute law defined writs of assistance as specific, not general, search warrants;(2) moreover, even if legislation

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<sup>11</sup> Brief of Gridley, *Paxton's Case* (Mass. Sup. Ct. 22-24 Feb. 1761), *Mass. Reports*, Quincy ed., p.476; J. Adams, *Works*, vol. 2, p.522; *idem.*, *Legal Papers*, vol. 2.

<sup>12</sup> *Ibid*

<sup>13</sup> Brief of Thacher, *Paxton's Case* (Mass. Sup. Ct. 22-24 Feb. 1761), *Mass. Reports*, Quincy ed., p.p. 469-70; J. Adams, *Works*, vol. 2, p.522; *idem.*, *Legal Papers*, vol. 2.

encompassed general writs, practice had since rendered them specific;(3) legislation and practice notwithstanding, the English Constitution tolerated only specific warrants;(4) the unconstitutionality of the door-to-door searches in Massachusetts was independent of their constitutional standing elsewhere.”<sup>14</sup> This brief would be fundamental in changing how the reasonableness of search and seizure would be considered in the colonies.

While a majority of the points Otis made in his brief stood on an uncertain legal ground at best, he still espoused a full-throated defense of an individual’s right to privacy; a point that would resonate within the colonists. Otis also stated that, “...one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle.... This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please... Bare suspicion without oath is sufficient.”<sup>15</sup> Otis’s argument showed the gap that existed between the legal reality of the briefs and how they were put into practice in the colonies.

Otis even attempted to establish precedent for his views by recalling the decision in *Bonham’s Case*<sup>16</sup> (1610). Otis refers to the example from Charles Viner: “It appears in our books, that in several Cases the Common Law will controul Acts of Parliament and sometimes adjudge them to be utterly void; For where an Act of Parliament is against Common Right and Reason or repugnant or impossible to be performed, the

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<sup>14</sup> Cuddihy, William J. 2009. *The Fourth Amendment: Origins and Original Meaning*, 602-1791. Oxford; New York: Oxford University Press.

<sup>15</sup> “James Otis: Against Writs of Assistance.” 2015. Accessed October 13. <http://www.nhinet.org/ccs/docs/writs>

<sup>16</sup> *Bonham’s Case* (C.P. 1610), 8 Coke 113b, 118; 77 E.R. 646 at 652-53



common-law will controul it and adjudge it to be void.”<sup>17</sup> While the *Bonham Case* appeared to support strongly Otis and the merchant’s, in the end, it was not enough. The case was lost, and the courts issued new writs.

While this trial was lost, the overall impact the *Paxton Case* would have on the development of search and seizure jurisprudence in the colonies would prove invaluable. So much so that in 1886 the Supreme Court of the United States would state that the use of general warrants and writs of assistance were, “perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.”<sup>18</sup>

Two years after the Paxton Case had brought the colonists’ attention to the grave danger that existed with general warrants, the *Wilkes Case* did the same in England. In this case, a general warrant was used to break in twenty doors, numerous trucks, and hundreds of locks all while knocking over thousands of books, charts and manuscripts.<sup>19</sup> John Wilkes, an English newspaper publisher, had long been in opposition to the crown and critical of decisions that were made in the King’s name in his newspaper, *The North Briton*. As Cuddihy recounts, “Within thirty hours time, a single warrant had facilitated the search of at least five houses and the arrest of some forty-nine persons, nearly all innocent.”<sup>20</sup> A few years later, one individual involved in executing the general searches noted that it was not uncommon to take every piece of personal paper one

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<sup>17</sup> *A General Abridgement of Law and Equity* (23 Vols. Aldershot, 1742-56), vol. 19, pp. 512-13.

<sup>18</sup> *Boyd v. United States*, 116 U.S. 616, 625 (1886).

<sup>19</sup> David Snyder, *The NSA's "General Warrants": How the Founding Fathers Fought an 18th Century Version of the President's Illegal Domestic Spying*, <https://www.eff.org/files/filenode/att/generalwarrantsmemo.pdf>

<sup>20</sup> Cuddihy, William J. 2009. *The Fourth Amendment: Origins and Original Meaning*, 602-1791. Oxford; New York: Oxford University Press.

could get their hands on during these searches if the political targets were valuable.<sup>21</sup> The *Wilkes Case* had garnered a considerable amount of attention in the colonies and would only further solidify the opposition to general warrants and writs of assistance.

As times changed, English intellectuals began to believe that there were differences between reasonable and unreasonable searches and seizures. Cuddihy noted, “Between 1700 and 1760, ‘a man's house is his castle (except against the government) yielded to ‘a man's house is his castle (*in particular* against the government).”<sup>22</sup> This reversal in thinking represented a pivotal shift that would lead down a path towards the Fourth Amendment. Cuddihy continued, “the (Fourth) amendment’s most conspicuous feature, the specific warrant clause, a direct outgrowth of a multistage, century’s long rebellion against General warrants by British intellectuals that inspired all other facets of the amendment.”<sup>23</sup>

This account of the evolution and discussion that took place concerning privacy and general versus specific warrants serves to set the stage for how the individual states and Americans at large would come to view privacy and help shape the debate between specific and general warrants. In the evolution of the discussion concerning privacy the inchoate ideas existed that would eventually become the Fourth Amendment.

### **State Constitutions and Search and Seizure Policy**

While the specific warrant was winning the battle with general warrants, the general warrant did not immediately fall out of favor in some jurisdictions in the newly

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<sup>21</sup> Opinion of Pratt, *Entick v Carrington* (C.P. [27 Nov.] 1765), *S.T.* vol., 19 (1753-71), p. 1065.

<sup>22</sup> Cuddihy, William J. 2009. *The Fourth Amendment: Origins and Original Meaning*, 602-1791. Oxford; New York: Oxford University Press.

<sup>23</sup> *Ibid*

formed states. As in other areas of governance, there was a geographic difference in the application of specific versus general warrants, with specific warrants being more favored in the northern states and general warrants more favored in the south.

Cuddihy notes that “By 1784, Vermont and seven of those states (the thirteen separate states) had formulated constitutions with restrictions on search and seizure.”<sup>24</sup>

The language of these various state constitutions would be the building blocks for The United States Constitution and The Bill of Rights. For instance, section ten of The Virginia Declaration of Rights stated: “That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.”<sup>25</sup> While this section does, in fact, authorize the use of general warrants, it also states that evidence must be presented for the warrant to be obtained and that particular offenses be named. This section called for something of a mix between general and specific warrants.

Maryland’s Declaration of Rights, 1776, utilized similar language in its section twenty-three: “That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants-to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special-are illegal, and ought not to be

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<sup>24</sup> Ibid

<sup>25</sup> “Bill of Rights - The Virginia Declaration of Rights.” 2015. Accessed October 27. [http://www.archives.gov/exhibits/charters/virginia\\_declaration\\_of\\_rights.html](http://www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html).

granted.”<sup>26</sup> While some of the language is similar, there are a few key changes that make Maryland’s Constitution unique. First, requiring an “oath or affirmation” be sworn increases protections. Second, the section denounces the use of general warrants as “illegal”.

John Adams, a future president, would write the Massachusetts Constitution and in its section fourteen declare, “Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation...”<sup>27</sup> Here is the first reference to “unreasonable searches, and seizures” that would later be a part of the Fourth Amendment. The Massachusetts Constitution would also require an oath or affirmation to issue a warrant.

While the language used in some of these state constitutions helped to establish the right against unreasonable searches and seizures and aided in establishing ideas such as probable cause and particularity, when put into practice this language was not always followed.

There were five states where the use of general warrants was still the go-to search method: New York, Maryland, North and South Carolina, and Georgia<sup>28</sup>.

Despite the fact that, as stated above, Maryland and even North Carolina<sup>29</sup> had adopted

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<sup>26</sup> “Constitution of Maryland - November 11, 1776.” 1998. Text. December 18. [http://avalon.law.yale.edu/17th\\_century/ma02.asp](http://avalon.law.yale.edu/17th_century/ma02.asp).

<sup>27</sup> “Bill of Rights: Massachusetts Constitution of 1780, PT. 1.” 2015. Accessed October 27. [http://press-pubs.uchicago.edu/founders/documents/bill\\_of\\_rightss6.html](http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss6.html).

<sup>28</sup> Cuddihy, William J. 2009. *The Fourth Amendment: Origins and Original Meaning*, 602-1791. Oxford; New York: Oxford University Press.

<sup>29</sup> “...without specially naming or describing the place or person, are dangerous, and ought not to be granted.” “Bill of Rights: North Carolina Ratifying Convention, Declaration of Rights and Other

constitutions that demonized the general search warrant it was still the most widely used method for searches.

Other states were able to strike a balance between the use of general and specific warrants: New Hampshire, Connecticut, Pennsylvania, and Virginia.<sup>30</sup> In these states, the use of general warrants was mostly reserved for when the police were searching for murderers and other high-level criminals.<sup>31</sup> Still, a final group of states was able to lead the way for specific warrants.

Massachusetts, Rhode Island, New Jersey, and Delaware all used the specific warrant as their standard method of search and seizure. The broad use of specific over general warrants in these states would prove that the specific warrant was, in fact, superior and would come to sweep the United States. From the time of the Declaration of Independence in 1776 to the adoption of The Constitution of the United States in the summer of 1787 American search and seizure law underwent a revolution as well.

This revolution created a fundamental separation between American and British law when it came to the topic of search and seizure. In addition to favoring specific over general warrants in most state constitutions, other searches were prohibited as well. Unannounced searches, as well as those that took place at night, were also found to be unreasonable by various states.<sup>32</sup> In the intervening period between 1776 and 1787 the specific warrant evolved from a possible option to use alongside general warrants to being its replacement. This change would be solidified with the adoption of The

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Amendments.” 2015. Accessed October 27. [http://press-pubs.uchicago.edu/founders/documents/bill\\_of\\_rightss10.html](http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss10.html).

<sup>30</sup> Cuddihy, William J. 2009. *The Fourth Amendment: Origins and Original Meaning*, 602-1791. Oxford; New York: Oxford University Press.

<sup>31</sup> Ibid

<sup>32</sup> Ibid

Constitution of the United States and the The Bill of Rights, specifically, the Fourth Amendment.

### **The Fourth Amendment Signals a Lasting Change**

With the adoption of The Constitution, there was an implicit agreement that a bill of rights would be added at the meeting of the first Congress. On June 8<sup>th</sup>, 1789 James Madison would present a rough draft of a bill of rights that included an amendment dealing with search and seizure. His original draft stated, “The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.”<sup>33</sup> Looking back, one can see the structure of what would become the Fourth Amendment lives in this passage.

Moving forward there would be many changes made to the language of the proposed amendment. Various committees would add and subtract phrases at will to appease differing factions. Three months later, after a conference committee on September 25<sup>th</sup>, 1789 Congress agreed on the final language of what was, at the time, the sixth amendment.<sup>34</sup> When the first two proposed amendments did not get the

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<sup>33</sup> “Proposed Amendments to the Constitution < James Madison < Presidents < American History From Revolution To Reconstruction and beyond.” 2015. Accessed October 28.

<http://www.let.rug.nl/usa/presidents/james-madison/proposed-amendments-to-the-constitution.php>

<sup>34</sup> Procs., 21 and 24 Sept. 1789, U.S. House of Representatives, *Jnl.*, 1789, pp. 146, 152; reprinted: *D.H.F.F.C.*, vol. 3, pp. 217, 227 at 228. Procs., 21 and 24 Sept. 1789, U.S. Senate, *Jnl.*, 1789, pp. 142, 145, 148; reprinted *D.H.F.F.C.*, vol. 1, pp. 180 at 181, 185 at 189.

necessary support to be ratified, they were dropped, and the amendment concerning search and seizure took its current place at fourth.

The final language of the amendment lasts through to today stating: “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.”<sup>35</sup>

With the origin of the Fourth Amendment explored, it is now imperative to attempt to understand the original meaning of the amendment. At the time of the amendment’s adoption the framers and their constituents had a mutual understanding of what was a reasonable and unreasonable search or seizure. That understanding has changed and evolved; however, reaching back to understand the original meaning of the Fourth Amendment is vital to appreciate how and why the Third Party Doctrine that exists today is unacceptable under the Fourth Amendment.

At the time, three categories of searches were thought to be unreasonable: general warrants (including those related to it), night searches, and unannounced searches. Within the language of the amendment, a stricter burden was placed on searches over seizures. This specificity is shown by the fact that in the particularity clause, a warrant must describe a place, singular, to be searched; however, it may list persons or things, plural, to be seized.

This language illustrates that, at the time, citizens wanted to restrict searches by the government more so than arrests and seizures. To them, general searches of multiple properties represented the greatest threat to a person’s liberty, freedom, and

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<sup>35</sup> U.S. CONST. amend IV.

privacy. Along with the consensus that general warrants were unreasonable, searches at night were also agreed to be so. Laws in multiple states such as Massachusetts<sup>36</sup>, New Hampshire<sup>37</sup>, Connecticut<sup>38</sup>, Rhode Island<sup>39</sup>, New York<sup>40</sup>, Pennsylvania<sup>41</sup>, New Jersey<sup>42</sup>, Maryland<sup>43</sup>, Virginia<sup>44</sup>, North<sup>45</sup> and South<sup>46</sup> Carolina, and Georgia<sup>47</sup>, all outlawed nocturnal searches. These searches were largely seen as inconvenient and unnecessary to execute adequately the laws of the land. The final category of searches deemed unreasonable at the time was unannounced searches.

As with nocturnal searches the unannounced or so-called “no-knock” searches were first legislated against on a state-by-state basis and not prohibited by The Constitution. However, with the passage of The Judiciary Act of 1789<sup>48</sup>, federal officers were required to go through the legal processes in their states thus effectively ending the use of “no-knock” warrants. It is important to point out these three types of searches because it shows that at the time of the adoption of The Bill of Rights, these are the kinds of searches thought to be unreasonable by a majority of people in the United States.

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<sup>36</sup> Mass. Resolution 1776-77, c. 1179 (7 May 1777), *Mass. Acts and Resolves*, vol. 19 (Resolves: 1775-76), p. 935. Mass. St., 1782, c. 51 (10 Mar. 1783), *Mass. Acts and Laws, 1782-83*, pp. 131-32.

<sup>37</sup> N.H. St. 2<sup>nd</sup> Gen. Assemb., sess. 3, c. 1 (19 June 1777), *N.H. Laws*, vol. 4 (1776-84), p.98.

<sup>38</sup> Ct. St., 1783, Jan. sess., Ct. Laws, Stats., *Acts and Laws*, 1783, Jan. sess., p. 622

<sup>39</sup> R. I. St., 1785, Oct. sess., *R.I. Acts (1747-1800)*, [vol. 13], 1784-85, 1785, Oct. sess., p. 43.

<sup>40</sup> N. Y. St., sess. 5, c. 39, sec. 3 (13 Apr. 1782), *N.Y. State Laws*, vol. 1 (1777-84). p. 480. N. Y. St., sess. 8, c. 7 (18 Nov. 1784), *ibid.*, vol. 2 (1785-88), p. 17.

<sup>41</sup> Pa. St., c. 1161, sec. 3 (5 Apr. 1785), *Pa. Stats.*, vol. 11 (1782-85) p. 577. Pa. St., c. 1279, sec. 12 (28 Mar. 1787), *ibid.*, vol., 12 (1785-87), p. 421.

<sup>42</sup> N. J. St., 5<sup>th</sup> Gen. Assemb., 2<sup>nd</sup> Sitting, c. 44, sec. 3 (28 June 1781), *N.J. Laws, Stats., Acts*, 1780-81, May sess., pp. 115 at 116-17. N.J. St., 6<sup>th</sup> Gen. Assemb., 2<sup>nd</sup> Sitting, c. 32, sec. 18 (24 June 1782), *ibid.*, 1781-82, May sess., pp. 95, 105 at 101.

<sup>43</sup> Md. St., 1784, c. 84, sec. 7, *Laws of Maryland, 1784*, unpaginated.

<sup>44</sup> Va. St., 1786 (11 Commonwealth), Oct. sess., c. 40, sec. 9, *Va. Stats.*, vol. 12 (1785-88), p. 308.

<sup>45</sup> N. C. St., 1784, sess. 1 (Apr.), c. 4, sec. 7, *Laws, 1774-88; N.C. State Recs.*, vol. 24, p. 50.

<sup>46</sup> S. C. St., no. 1196, sec. 23 (13 Aug. 1783), *S.C. Stats.*, vol. 4 (1752-86), pp. 581-82.

<sup>47</sup> Ga. St., 13 Aug. 1786, Statutes, 1744-1805; Ga. Col. Recs., vol., 19, pt. 2, pp. 507-08.

<sup>48</sup> U.S. St., 1<sup>st</sup> Cong., 1<sup>st</sup> sess., c. 20, sec. 33 (24 Sept. 1789), *ibid.*, pp. 73 at 91; reprinted: D.H.F.F.C., vol. 5 (Legislative House), pp. 1150 at 1164.



When breaking down these concerns and the language of the Fourth Amendment, it is clear that the first clause, declaring protection against unreasonable searches and seizures, is more memorable than the later section evoking particularity or denouncing general warrants. To Cuddihy, this is because “the framers of the amendment were less concerned with the right against general warrants than with the broader rights those warrants infringed.”<sup>49</sup> Privacy was the general right that the framers were hoping to protect for generations to come.

In the 1780s general warrants were not seen as unreasonable just because they allowed broad searches, but because they were a fundamental threat to privacy. By stating that all, not just people, but houses, papers, and effects were protected from unreasonable search and seizure the framers then went on to insist that warrants only be issued when an individual would swear that there was cause for such and that any warrant issued be narrowly drawn, particularly describing persons and places, so as to limit the invasion of privacy for citizens.

Some scholars may look at the Fourth Amendment and find it lacking in clarity and specifics as to what types of searches are reasonable and unreasonable and if particular situations may change what is or is not reasonable; however, these scholars are missing that point. In the minds of the framers what was considered unreasonable was very clear to them. Seared into the public consciousness were the writs of assistance and general searches that occurred in New York, Boston, and Philadelphia, and across the colonies when under British rule.

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<sup>49</sup> Cuddihy, William J. 2009. *The Fourth Amendment: Origins and Original Meaning*, 602-1791. Oxford; New York: Oxford University Press.

These memories made it clear that it was of paramount importance to prohibit the use of general warrants at all costs. Cuddihy speaks to this in his closing paragraph: “To lament the ambiguities on probable cause, search incident to arrest, and remedies for violation that characterized the original amendment is to fault its authors for not anticipating the constitutional issues of later centuries. The amendment succeeded spectacularly in its most obvious purpose, to keep general warrants out of the hands of the federal government.”<sup>50</sup>

The foresight of the framers in aiming to protect against the evils of general warrants would however not last forever. In the 1970s the Third-Party Doctrine would effectively open the door to possible abuse by the government. With an understanding of the origins and original meaning of the Fourth Amendment, one can now better judge the reasonableness of what came to be known as the Third-Party Doctrine.

### **Chapter 3: Fourth Amendment Jurisprudence**

Two key features make up the critical components of the Third-Party Doctrine: the assumption of risk theory and the so-called secrecy model of privacy. Richard M. Thompson II, a legislative attorney, detailed in a report by the Congressional Research Service that, “under the secrecy model, once a fact is disclosed to the public in any way, the information is no longer entitled to privacy protection.”<sup>51</sup> While this sentiment was again expressed in *Katz*, the idea had long been a part of the Court’s thinking.

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<sup>50</sup> Ibid.

<sup>51</sup> U.S. Library of Congress, Congressional Research Service, *The Fourth Amendment Third-Party Doctrine*, by Richard M. Thompson II, R43586 (2014).

The Court had long deemed the packaging of a parcel of mail<sup>52</sup> as well as items in “plain view”<sup>53</sup> of the public not to have protection under the Fourth Amendment. This idea would grow through multiple cases in the 20<sup>th</sup> century that an individual has no reasonable expectation that someone they shared information with would not later give that information to authorities. As Thompson notes, this thinking would later be extended to transactional data and documents shared with third parties under the Third-Party Doctrine.<sup>54</sup>

With an understanding of what was most important to the framers of the Fourth Amendment and the citizens that voted for its ratification, it will be significant to highlight next the development of Fourth Amendment as it will come to pertain to the Third-Party Doctrine. Knowing when Fourth Amendment protections are activated by governmental actions is paramount to this endeavor. To understand this one must figure out what is and is not considered a search as well as the assumption of risk theory.

### **The Assumption of Risk Theory**

In a line of cases that would occur both before and after *Katz*, the Court would refine its thinking concerning the assumption of risk in undercover informant cases. In 1952, *On Lee v. United States*<sup>55</sup>, the owner of a laundromat was visited by an undercover agent wearing a microphone in an attempt to record incriminating conversations. When the agent testified at On Lee’s trial, the defense tried to get the evidence thrown out as an illegal search under the Fourth Amendment. In the Court’s

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<sup>52</sup> *Ex parte Jackson*, 96 U.S. 727, 736 (1877).

<sup>53</sup> *United States v. Lee*, 274 U.S. 559 (1927)

<sup>54</sup> U.S. Library of Congress, Congressional Research Service, *The Fourth Amendment Third-Party Doctrine*, by Richard M. Thompson II, R43586 (2014).

<sup>55</sup> 343 U.S. 747, 748 (1952).

decision, Justice Jackson reasoned that since On Lee talked willingly and indiscreetly with the agent and that since the agent was let into laundromat freely that there was no Fourth Amendment violation.<sup>56</sup>

Eleven years later in *Lopez v. United States*<sup>57</sup>, an individual tried to bribe an IRS agent who was recording the conversation. Again the defense attempted to claim this was an illegal search, and again the Court stated that since the conversation was had willingly and there was no trespass involved that the recording was legal.<sup>58</sup> In two more cases, *Lewis v. United States*<sup>59</sup> and *Hoffa v. United States*<sup>60</sup>, the Courts ruled that the use of undercover agents and the conversations had with them permissible.

The cases above all had two central beliefs in play. The first was that under *Olmsted*'s physical trespass test each agent was freely able, if not invited, to enter the defendant's business, home, or other possibly constitutionally protected area. Secondly, since the defendants all engaged in conversations willingly, there was no search under the Fourth Amendment. For example, in the *Hoffa* decision Justice Stewart wrote, "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."<sup>61</sup>

It is worth noting that all of the cases mentioned above were decided before the Court moved away from *Olmsted*'s line of thinking with its decision in *Katz*. With the shift away from a strict physical trespass interpretation of the Fourth Amendment, there

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<sup>56</sup> Ibid

<sup>57</sup> 373 U.S. 427, 430 (1963).

<sup>58</sup> Ibid

<sup>59</sup> 385 U.S. 206 (1966).

<sup>60</sup> 385 U.S. 293, 296 (1966). the

<sup>61</sup> Ibid

was the possibility of change. However, in *United States v. White*<sup>62</sup>, the Court did not change course. In the opinion, Justice White reaffirmed, “a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights.”<sup>63</sup> While the trespass rationale was overturned, individuals still had no expectation of privacy with what they voluntarily shared, and they assumed the risk that the information may be given to the government. With the assumption of risk theory analyzed one must understand what is considered a search requiring Fourth Amendment protections.

### **Early Conceptions of a “Search” under the Fourth Amendment**

After the adoption of the of the Fourth Amendment, it would take nearly one hundred years before the Supreme Court would take up the question of what constitutes a search under the Fourth Amendment. *United States v. Boyd*<sup>64</sup> in 1886 would provide this opportunity. In this case, Boyd was required, by a court order, to present documents detailing the value and goods that he was importing under the suspicion that they were attempting to falsify the paperwork to avoid paying duties and fees.

The Boyd family complied. However, they claimed that forcing them to turn over these documents represented an illegal search under the Fourth Amendment. The Court agreed with the Boyd and found that forcing one to turn over documents was analogous to a search under the Fourth Amendment. Furthermore, in delivering the

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<sup>62</sup> 401 U.S. 745, 746-47 (1971).

<sup>63</sup> Ibid

<sup>64</sup> 116 U.S. 616 (1886).

opinion, Justice Bradley stated: "...constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance."<sup>65</sup> He went on to stress, "it is the duty of the courts to be watchful.... Their motto should be *obsta principiis*"<sup>66, 67</sup>

Unfortunately, some forty-two years later the Court decided *Olmstead v. U.S.*<sup>68</sup> in 1928 and significantly contradicted what would be considered a search under the Fourth Amendment. In *Olmstead*, federal agents were attempting to put an end to a bootlegging operation and in the process placed several wiretaps on multiple suspects' private phone lines without a judge's approval. This case was decided 5-4 for the United States Government.

Chief Justice Taft delivered the majority opinion of the Court. In this judgment, the majority found that, because the Fourth Amendment "shows that the search is to be of material things -- the person, the house, his papers, or his effects"<sup>69</sup> intangible voices are not protected. Furthermore, as the federal agents did not cross onto any of the defendant's property, that there was no "actual physical invasion"<sup>70</sup> So Fourth Amendment protections did not apply, this created what became known as the trespass theory. While there may have been a majority of justices in agreement, there was also strong opposition.

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<sup>65</sup> Ibid

<sup>66</sup> Latin for: Resist the beginnings

<sup>67</sup> Ibid

<sup>68</sup> 277 U.S. 438 (1928).

<sup>69</sup> Ibid

<sup>70</sup> Ibid

Three justices, Brandeis, Butler, and Stone all wrote dissenting opinions with Justice Holmes writing a separate opinion to add slightly to Brandeis's dissent. Out of all of these dissents, Justice Brandeis's is the one that had the greatest lasting effect. One of the most important points in Brandeis's dissent was pointing out that in earlier decisions, such as the one in *Boyd*, the Court did not place "an unduly literal construction"<sup>71</sup> upon Fourth Amendment protections.

Additionally, Brandeis continued: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.... They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."<sup>72</sup> This stern dissent had little affect at the time as the Court continued to use the physical trespass standard for years after this case.

Decades later a shift would happen in the application of the Fourth Amendment. In 1967, *Katz v United States*<sup>73</sup> would be decided and alter the course yet again. This case arose when FBI agents were investigating illegal gambling activity. With Mr. Katz as their primary suspect, they noted that he would frequently make calls from a telephone booth. To obtain evidence, the agents attached an electronic wiretapping device to the pay phone without getting a search warrant. Under the logic used in *Olmsted*, this action would appear to be entirely legal within Fourth Amendment parameters.

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<sup>71</sup> Ibid (Brandeis, J, dissenting).

<sup>72</sup> Ibid (Brandeis, J, dissenting).

<sup>73</sup> 389 U.S. 347 (1967).

Unfortunately for the FBI, the Court decided to move past the logic in *Olmsted* and articulate new guidelines for Fourth Amendment protections. Justice Stewart delivered the opinion of the Court stating, “the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any ‘technical trespass under . . . local property law.’<sup>74</sup>”<sup>75</sup> Stewart continued, “For the Fourth Amendment protects people, not places. 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.”<sup>76</sup> With this decision the old “trespass doctrine” articulated in *Olmsted* was no longer the guiding light for the Courts in Fourth Amendment cases.

Equally important to the overall decision, in this case, was Justice Harlan’s concurring opinion. In this concurrence, Justice Harlan would introduce a two-pronged test to determine whether an individual had a right to Fourth Amendment protections or not. He stated, “My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first 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.’”<sup>77</sup> This concurring opinion would lead to the creation of the expectation of privacy test.

This test contains two hurdles. First, an individual must have an actual expectation of privacy. If it is proven that they indeed do then the second question,

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<sup>74</sup> *Silverman v. United States*, 365 U.S. 505 (1961).

<sup>75</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>76</sup> *Ibid*

<sup>77</sup> *Ibid* (Harlan, J. Concurring).



whether that expectation of privacy is one that society recognizes as legitimate, must be answered. If the response to both is yes, then Fourth Amendment protections apply. In *Katz*, the fact that the individual closed the phone booth door and paid the fee for the call gave him a reasonable expectation that the call would not be overheard and according to the justices, this expectation of privacy was one society would recognize as rational.

Both in Stewart's majority and Harlan's concurrence the idea of privacy was fluid. Stewart, as noted earlier said, "What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection."<sup>78</sup> Harlan agreed that, "conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable."<sup>79</sup> These statements show that while the Court was willing to strengthen protections under the Fourth Amendment, privacy was not all encompassing. It is these two key points, as well as the recent conservative swing in the Supreme Court that would lead to the creation of the Third-Party Doctrine.

In the years following this decision the composition of the court would change dramatically taking a more conservative tone. Chief Justice Warren Burger replaced Chief Justice Earl Warren. Justices Abe Fortas and William Douglas also left the Court and were replaced by Justices Harry Blackmun and John Paul Stevens. Also, possibly one of the most significant departures was that of Justice Harlan, who created the two-pronged expectation of privacy test in his momentous concurring decision in *Katz*. His seat went to the very conservative William Rehnquist. With this new composition of

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<sup>78</sup> Ibid

<sup>79</sup> Ibid (Harlan, J. Concurring).

justices, the Court would yet again change when the Fourth Amendment would come into play. To understand why the changing makeup of the Supreme Court has an effect on the decisions it makes, it is important to understand the various theories that exist concerning judicial decision-making and to recognize that the Supreme Court can affect real change.

## **Chapter 4: The Supreme Court**

### **The Supreme Court as a Policy Maker**

It is important to introduce the idea that the Supreme Court is a policy-making institution. This idea was first expertly analyzed by Robert Dahl in his 1957 seminal work, “Decision-making in a Democracy: The Supreme Court as a National Policy-Maker.” To give an idea of how influential Dahl’s work was and still is, in 2001 Epstein, Knight, and Martin found that, “From its publication, the Dahl Article has been cited by both social science journals and law reviews every year to date.”<sup>80</sup> Given this widespread scholarly attention, Dahl’s work is surely worth contemplation here. A key aspect of Dahl’s work was his idea of the ruling regime.

With the belief that politics in the United States are dominated by alliances that work to attain a common goal for long periods of time, (e.g. the Jeffersonian Era, Jacksonian Era, Franklin Roosevelt’s New Deal era) Dahl would argue that judicial decision making would fall in line with what he called the ruling regime.

The ruling regime is explained by Dahl: “Except for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take

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<sup>80</sup> Epstein, Lee, Jack Knight, and Andrew D. Martin. 2001. “Supreme Court as a Strategic National Policymaker, The.” *Emory LJ* 50: 583.

control of political institutions, the Supreme Court is inevitably a part of the dominant national alliance. As an element in the political leadership of the dominant alliance, the Court of course supports the major policies of the alliance”<sup>81</sup>. Dahl believed this to be so because of the unique way Supreme Court justices are appointed to the bench via nomination and confirmation.

For a Supreme Court justice to be appointed he/she must first be nominated by the President of the United States; as one can imagine this selection process involves a significant amount of scrutinizing. Furthermore, once a candidate is selected he/she is then introduced to the United States Senate where, after moving past the judiciary committee, a majority must vote to confirm the justice for him/her to be appointed to the bench. Since it is doubtful that a president would nominate a justice who did not share his views and even more improbable that a majority of senators would confirm a nominee who did not share a majority of their points of view this process helps to ensure that a majority viewpoint is upheld with every nomination and confirmation.

In their work, *The Supreme Court and the Attitudinal Model Revisited*, Segal and Spaeth argue that there are “five interrelated features of the Constitution that enable federal courts in general, and the Supreme Court in particular, to function as authoritative policy makers.”<sup>82</sup> These five points are a fundamental law, distrust of governmental power, federalism, separation of powers, and judicial review. As they explain:

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<sup>81</sup> Dahl, Robert A. 1957. “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker.” *J. Pub. L.* 6: 279.

<sup>82</sup> Segal, Jeffrey Allan. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK; New York: Cambridge University Press.

The Constitution is the fundamental law establishes it as the benchmark from which legitimacy of all governmental action is to be judged. The popular belief that the government that governs least governs best has produced and abiding distrust of government, politicians, and bureaucrats... constitutional division of governmental power between the states and Washington, as well as that among the three branches of the federal government, requires some entity to resolve the conflicts such divisions and separations produces. By its enunciation of the doctrine of judicial review in *Marbury v Madison*, the Supreme Court arrogated to itself the authority to guard against subversion of the fundamental law to concomitantly resolve the conflicts that federalism and separation of powers produce<sup>83</sup>.

Taking Dahl's ruling regime thesis and Segal and Spaeth's five points into account there is a convincing argument in place that the Supreme Court is, in fact, a policy-making entity.

### **Is Dahl's ruling regime still relevant?**

For those who are apprehensive with the fact that an unelected body of nine justices can have the final say with regards to the constitutionality of statutes created and signed into law by elected officials Dahl's ruling regimes theory would seem to put those nerves at ease. Under the ruling regimes theory, Dahl estimated that a president would have the opportunity to make great changes concerning the Supreme Court. "Over the whole history of the Court, on the average one new justice has been appointed every twenty-two months. Thus a president can expect to appoint about two new Justices during one term of office; and if this were not enough to tip the balance on a normally divided Court, he is almost certain to succeed in two terms."<sup>84</sup> With new nominations come new confirmations, and if the nominations succeed then the views of

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<sup>83</sup> Ibid

<sup>84</sup> Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *J. Pub. L.* 6: 279.

the new justices will be acceptable by a majority of elected officials and thus cause no problems.

Dahl even believe that the Supreme Court was so integrated with the ruling regime that it acted as mechanism to confer legitimacy across the board saying, “the Court operates to confer legitimacy, not simply on the particular and parochial policies of the dominant political alliance, but upon the basic patterns of behavior required for the operation of a democracy.”<sup>85</sup> He held this belief because it is not often that the Court would go against the viewpoint held by the majority. However, this article was originally published in 1957 and perhaps some things have changed since then.

Starting with John F. Kennedy in 1961 there have been ten presidents appointing twenty justices to the Supreme Court. Of those ten presidents, only two were on pace with Dahl’s calculations. Richard Nixon appointed four justices to the bench in his just over five years in office, while George H. W. Bush was on pace appointing two justices in his one term as president. President Reagan came close to meeting Dahl’s criteria with three appointments. However, Presidents Bill Clinton, George W. Bush, Lyndon Johnson, and John Kennedy only appointed two justices each. Gerald Ford appointed one, and Jimmy Carter appointed none.

Presently Barack Obama has appointed two justices to the Supreme Court; however, with the sudden passing of Justice Antonin Scalia there is a possibility that he will be appointing a third. If President Obama is successful in his nomination of Merrick Garland to the Supreme Court, it will be the first time a president has appointed a third justice to the Court since Ronald Reagan succeeded in getting Anthony Kennedy confirmed in February of 1988. All of this does not completely nullify Dahl’s idea of

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<sup>85</sup>Ibid.

the ruling regime; justices still must be tolerable to a majority of elected officials at the time of their nomination to be confirmed. The only difference now is the election of younger justices to the high court that serve on the Court longer makes it possible for the Court to be less in line with the ruling regime now than in the past.

### **Models of Judicial Decision Making**

Once a justice is on the bench scholars have attempted to come up with the perfect model to explain why a justice will vote a certain way. Over the years, many models have been proposed and tested by scholars that attempted to account for the process of judicial decision making. Among these are: The Legal model, the Strategic Model, and the Attitudinal Model. These models have raised popular and hotly contested issues in the literature concerning judicial decision-making. These models are not perfect representations of reality, merely an oversimplification that focuses on a few key factors to frame the overall picture of the Supreme Court.

The first model, the Legal Model, can be easily explained by Tracey George and Lee Epstein. “At its core, legalism centers around a rather simple assumption about judicial decision making, namely, that legal doctrine, generated by past cases, is the primary determinant of extant case outcomes.”<sup>86</sup> This model is the most simplistic as it can boil down to the use of *stare decisis*<sup>87</sup>. This aspect of modern jurisprudence is the idea that if a question has previously been brought before the Court and a definitive ruling issued, the Court will stand by the prior ruling. However, this is not always the

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<sup>86</sup> George, Tracey E., and Lee Epstein. 1992. “On the Nature of Supreme Court Decision Making.” *American Political Science Review* 86 (02): 323–37. doi:10.2307/1964223.

<sup>87</sup> Latin for “to stand by things decided.”

case; courts have from time to time reversed precedent as has been seen concerning Fourth Amendment law.

Another model is referred to as the Strategic Model. Epstein and Knight in their book, *The Choices Justices Make*, explain their strategic model saying, “Justices may be primarily seekers of legal policy, but they are not unconstrained actors who make decisions based only on their own ideological attitudes. Rather, justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act”<sup>88</sup>.

In their words, Epstein and Knight explain that the strategic decision-making model rests on three broad assumptions. First, justices’ actions are directed toward the attainment of goals. Second, justices are strategic. Third, institutions structure justices’ interactions<sup>89</sup>. The strategic model holds that justices strive to see their preferred policy positions become the law of the land. Epstein and Knight do concede that justices do have other goals beyond policy, such as sustaining the institutional legitimacy of the Court; however, most scholars see this as only a peripheral goal to obtaining preferred policy positions.

Another component of the strategic model involves how the model got its name, strategic interactions among justices and other actors. Particularly for those justices on the Supreme Court, deciding cases is a group effort. Some lower courts only have a single justice, and he/she only needs to consider how a ruling might be appealed or viewed by outside actors. However, with the Supreme Court, there are nine justices

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<sup>88</sup> Epstein, Lee. 1998. *The Choices Justices Make*. Washington, D.C: CQ Press.

<sup>89</sup> Ibid.

each with his/her policy preferences and values. Here the model dictates that a justice must take into account how other justices will act to decide how they will act.

Epstein and Knight explain, “(A justice) acts in a way that does not accurately reflect their true preferences so as to avoid the possibility of seeing his colleagues reject his most preferred policy in favor of his least preferred.”<sup>90</sup> Along with this strategic thinking inside the court, justices must likewise consider the strategic viewpoints of outside actors. If the president or Congress’s preferred policy positions are too far from where the Court rules, they risk a new law being written to counter them, or worse, outright opposition to the decision. Furthermore, public opinion is also a source of legitimacy for the Court and must be taken into account when a controversial case is at hand.

The final model of judicial decision making and perhaps the most helpful in explaining the shift that occurred between the late 1960s and mid-1970s, is the attitudinal model. Judges are often held in high esteem, especially so at the level of the Supreme Court. However, they are, after all, human and thus possess their personal biases that can affect how a case is decided. Segal and Spaeth introduce the model claiming that it ties together key concepts from legal realism, political science, psychology, and economics.

They maintain that “This model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.”<sup>91</sup> In other words, liberally leaning justices vote liberally because they maintain such ideological attitudes and vice-versa for conservatively leaning justices.

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<sup>90</sup> Ibid.

<sup>91</sup> Segal, Jeffrey Allan. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK; New York: Cambridge University Press.



With this model come certain goals, rules, and situations that are assumed for the Attitudinal Model to be completely effective. Rhode and Spaeth state that “actors in political situations are outcome oriented; when they choose among a number of alternatives, they pick that which they perceive will yield them the greatest net benefit in terms of their goals.”<sup>92</sup> This idea that justices are goal-oriented actors fits squarely within the rational choice paradigm in political science.

Next, Rhode and Spaeth speak of the rules that govern actors within the attitudinal model, including “The various formal and informal rules and norms within the framework of which decisions are made. As such, they specify which types of actions are permissible and which are impermissible, the circumstance and conditions under which choice may be exercised, and the manner of choosing”<sup>93</sup>. With constraints and utility maximization the strategic model likely falls into the rational choice variant of institutionalism.

The use of the attitudinal model helps to explain that as liberal-leaning justices were replaced with conservative-leaning justices, the decisions handed down by the Supreme Court became decidedly more conservative and the attitudes of the newly appointed justices help to account for the shift that occurred thus making the creation of the Third-Party Doctrine more likely.

## **Chapter 5: Conservative Backlash Sets up the Third-Party Doctrine**

As previously stated, there was a wave of conservative idealism that swept through the United States around the 1969 election that culminated in the election of

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<sup>92</sup> Rhode David W. and Spaeth Harold J. 1976. *Supreme Court Decision Making*. American Political Science Review 72 (01): 283–84. doi:10.2307/1953668.

<sup>93</sup> Ibid.

Richard Nixon as president. In Vincent Blasi's edited volume *The Burger Court: the counter-revolution that wasn't* chapter four by Yale Kamisar describes the situation thusly, "It was not the Warren Court's efforts to strengthen the rights of the accused in the courtroom but its 'activism' in the search and seizure, police interrogation, and pretrial notification areas that lead many to believe that it was too soft on crime and made this a major political issue in the 1968 presidential campaign."<sup>94</sup>

With the addition of Justices Powell, Blackmun, Stevens, Rehnquist and Chief Justice Burger the Supreme Court was set to make reactionary decisions. Yale Kamisar, speaking when the Burger Court was in session, already saw the negative impact of the decisions it was making. "Even more disquieting than the manner in which the present Court has narrowed the scope of the exclusionary rule is the way in which it has narrowed the substantial protection provided by the fourth amendment. By taking a crabbed view of what constitutes a 'search' or 'seizure,' the court has put no constitutional restraints at all on certain investigative techniques that may uncover an enormous quantity of personal information."<sup>95</sup>

### **Nixon and the Supreme Court**

Utilizing what is known about the different models to analyze judicial decision-making will only yield a partial picture when it comes to the Supreme Court. Before a justice can take their place on the bench and their opinions come into play, they must first be nominated and confirmed. This has lead authors like Skowronek to come up

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<sup>94</sup> The Warren Court (Was it Really so Defense-Minded?), The Burger Court (Is it Really so Prosecution-Oriented?) and Police Investigatory practices

<sup>95</sup> Ibid

with a theory concerning presidential authority regarding political time and others (Whittington and McMahon) related it to judicial behavior.

Skowronek determined that there are four distinct political facets of political time: reconstruction, articulation, disjunction, and preemption.<sup>96</sup> Utilizing this research McMahon hypothesized that “in comparison to Segal and Spaeth’s Attitudinal Model, the notions of political time and political regimes provide greater clarity about the link between presidential authority and both the timing of contentious Supreme Court appointments and their success or failure.”<sup>97</sup> While Segal and Spaeth’s attitudinal model is suited to help explain judicial decision-making, Skowronek’s model can help explain the type of justice a president is likely to nominate and the likelihood of their confirmation.

Since the conservative shift in the Court that leads to the creation of the Third-Party Doctrine occurred during Nixon’s tenure, it would be wise to apply Skowronek, McMahon and others theories to Nixon’s appointments and see what information can be gleaned. According to Skowronek’s classifications, Nixon was a preemptive president. Preemptive presidents are described by Skowronek as:

Interrupting a still vital political discourse in trying to preempt its agenda by playing upon the political divisions within the establishment that affiliated presidents instinctively seek to assuage. Their programs are designed to aggravate interest cleavages and factional discontent within the dominant coalition, for therein lies the prospect of broadening their base of support and sharpening their departure from the received formulas.<sup>98</sup>

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<sup>96</sup> Skowronek, Stephen. 1993. *The Politics Presidents Make: Leadership from John Adam to George Bush*. Cambridge, MA: Harvard University Press.

<sup>97</sup> McMahon, Kevin J. 2007. *Presidents, Political Regimes, and Contentious Supreme Court Nominations: A Historical Institutional Model*. Law & Social Inquiry. Volume 32, Issue 4, 919-954.

<sup>98</sup> Skowronek 1993

This section goes a long way in describing the actions Nixon took as president with his appointments to the Supreme Court.

One of the key issues during the 1969 presidential election was the Supreme Court, which Nixon brought to the forefront. Emphasizing what he believed to be decisions that were soft on crime, Nixon made it clear that he wanted to, at the very least, slow down the Courts. The “interest cleavages” and “fractional discontent” that Skowronek spoke of were Southern Democrats, and Nixon was determined to do what he could to bring about change.

McMahon explains that the first of the two ways in which preemptive presidents will use Supreme Court appointments is to broaden their base and go against the established regime. “Richard Nixon’s search for a Southern strict constructionist represents the best example of the first strategy.”<sup>99</sup> The importance of this pursuit for a Southern strict constructionist was two-fold. First, as McMahon suggested for a preemptive president, an attempt to appeal to Southern Democrats in an effort to broaden the base of the Republican party in the South, which at the time was feeling disconnected with the direction of the Democratic party. Secondly, a strict constructionist would, as Nixon promised, help put an end to what he saw as judicial activism on the Court.

Later in his book, *Nixon’s Court: His Challenge to Judicial Liberalism and Its Political Consequences*, McMahon would emphasize that, “Nixon’s administration focused on those constitutional concerns that appeared to have the most significant electoral payoff for the president, those that would likely advance his desire for a ‘New

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<sup>99</sup> McMahon 2007.

American Majority’.”<sup>100</sup> Through time it is clear that this was a winning strategy that helped pave the way for Reagan-Democrats and pockets of conservatives being elected in the urban north.

Along with the future electoral successes Nixon’s strategy would bring, his choices would also greatly affect the Court. Combining Segal and Spaeth’s attitudinal model and Skowronek’s political regime approach one can conclude that because Nixon was a preemptive president looking for justices that would hold strict constructionism as their guiding judicial philosophy, he placed justices on the Supreme Court that would ultimately lead to the creation of the Third-Party Doctrine when presented with the appropriate cases. Simply put, Nixon was a law and order president and nominated certain justices that fit his preferences or attitude concerning law and order.

### **The Third-Party Doctrine in Academia**

The Third-Party Doctrine is an issue that has a fair amount of academic writing behind it. This scholarship has largely focused on the question of whether or not the Third-Party Doctrine is good law and deserves to still exist in a rapidly changing digital age. This question, while valid (and even touched on in this piece), needs background before it can be properly answered.

As previously stated, The Third-Party Doctrine is a subject that is largely examined by legal scholars. Of the notable authors that have examined this issue, Kerr, Slobogin, Blasi, Kamisar, Nojeim, and Henderson all are legal scholars that have examined the issue from a legal perspective. In order to get a clearer picture of the

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<sup>100</sup> McMahon, Kevin J. 2011. *Nixon’s Court: His Challenges to Judicial Liberalism and Its Political Consequences*. Chicago: The University of Chicago Press.

doctrine taking a look at what allowed the creation of the doctrine in the first place brings a fresh prospective to the subject.

Looking at the Third-party Doctrine from a political science perspective highlighting the circumstances that led to change is important for an overall understanding of the subject. By pinpointing the circumstances that created the conditions that made the doctrine possible a new comprehension on the subject is more likely to emerge. The conservative shift of the Court represented a dynamic change in how the Court would come to decide cases.

### **Visual Representations of Supreme Court Shifts**

To present the clearest picture of the changes that occurred in the Supreme Court, it is best to use a visual medium. Along with being able to visualize the changes that took place with the Court, having each Supreme Court justice rated according to their ideological dispositions will further help to clarify the shift. For the visual mediums, two separate graphs will be used. One that uses Bailey Scores for justices and another that uses the Martin-Quinn scores for ideological leanings.

The Bailey Scores are named for Professor Michael A. Bailey of Georgetown University. His graph was originally published in June of 2012. This scale rates Supreme Court justices on a half point basis with 0.0 being centrist, 1.5 being most conservative, and 2.0 being most liberal. This graph covers justices from 1950 through 2011.

Martin-Quinn Scores refer to work done by Andrew D. Martin of the University of Michigan and Kevin M. Quinn from the University of California Berkeley School of

Law. The graph used runs through the 2014 October Term. This scale also uses 0 as a center with the most conservative number reaching 6 and the most liberal number being 7. Their data runs from 1935 through 2014 and also uses a yellow median justice line with bolded Chief Justices.

### Ideological Leanings of Supreme Court Justices

Source Data: Michael A. Bailey, Georgetown University, June 2012  
[http://www9.georgetown.edu/faculty/baileyma/Data/Data\\_Measuring1950to2011\\_June2012.htm](http://www9.georgetown.edu/faculty/baileyma/Data/Data_Measuring1950to2011_June2012.htm)

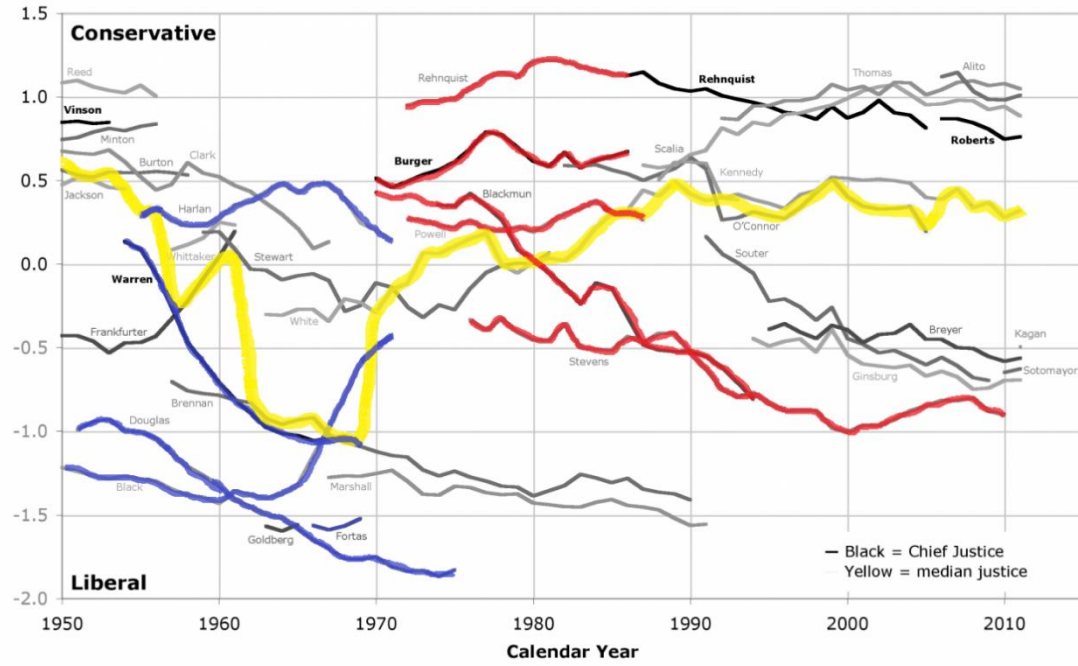
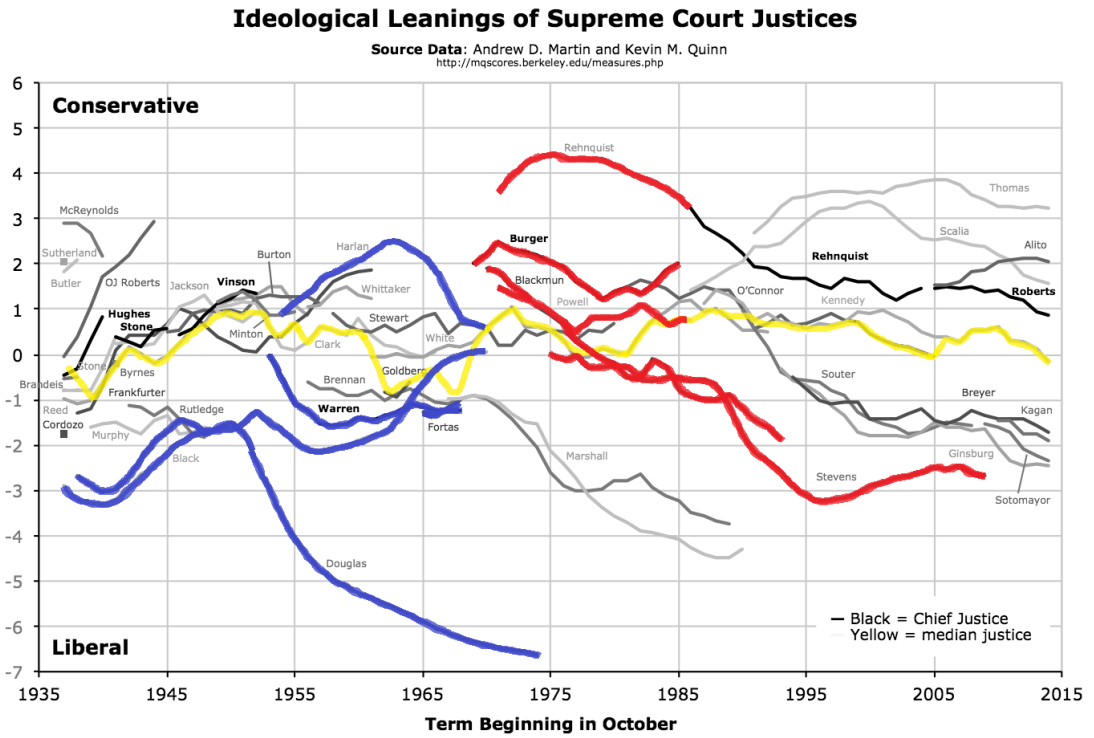


Figure 1





**Figure 2**  
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<sup>101</sup> This graph has been edited to highlight the changes that took place around the time before the Third-Party Doctrine was created

<sup>102</sup> This graph has been edited to highlight the changes that took place around the time before the Third-Party Doctrine was created

Both graphs have been edited to highlight the time when the period in question the Supreme Court saw a decided shift to the right. Also, each has been color coded, so the graphs match. Blue lines denote outgoing, more liberally leaning justices, while red lines represent incoming more conservatively leaning justices. More liberally and more conservatively leaning is used instead of a definitive liberal and conservative label because of Justice Stevens. When he first joined the Court, the Baily Score had him slightly liberal, and the Martin-Quinn score had him as a centrist.

Justice Stevens was also the last of the five highlighted justices to join the Court so his inclusion in the list might be puzzling seeing as how he was a centrist in his early years on the Court and grew more liberal over time. He is included mainly because of the justice he replaced. In 1957, Justice Stevens was confirmed to replace Justice Douglas, one of the most liberal justices to ever sit on the Court. Along with Justice Stevens as a replacement, it may be curious to some why Justice Harlan is on the list.

Justice Harlan's Bailey Score placed him as a centrist when he departed, and his Martin-Quinn score was slightly conservative. His placement on this list is important for a few reasons. First, his replacement, Justice Rehnquist, was one of the most conservative justices ever to sit on the bench, especially in his first decade on the bench. Second, in his concurring opinion in *Katz*, Justice Harlan expressed a willingness to extend Fourth Amendment protections beyond what was considered reasonable in past decisions. Another meaningful shift that occurred at the time was the transition of Chief Justices.

In 1969, then Chief Justice Earl Warren reluctantly retired leaving new President Nixon to appoint Warren Burger the new Chief Justice. This change in the in Chief

Justices represented a drastic shift for the Court. Warren was one of the most liberal Chief Justices the Court had ever seen, and Burger was one of the most conservative. With all of the changes in individual justices, it is important to note the overall effect on the Court.

Before the changes in membership on the Supreme Court, in 1969, the median Bailey Score was a -1.0, indicating a clearly liberal lean. The Martin-Quinn Score for that same period was also -1, again showing a liberal lean, however not quite as much. After all of the highlighted changes in membership had taken place the Bailey Score for the median justices had risen to just over 0.0, indicating a just right of center lean. The Martin-Quinn score can be estimated at a 0.5, again indicating a right of center lean in the Court. These indicators make it clear that the change in membership would lead to more conservative judicial thinking.

## **Chapter 7: The Third-Party Doctrine is Born**

### **Miller v. United States**

*Miller v. United States*<sup>103</sup> was the first case the Court examined involving transactional documents that would begin to solidify the rationale behind the Third-Party Doctrine. In this case, Miller was suspected and charged with possession of distilling equipment and alcohol that had not had taxes paid on it. In the course of the investigation, the Bureau of Alcohol, Tobacco, and Firearms (ATF) issued subpoenas for Miller's bank records. Two banks, Citizens & Southern National Bank of Warner

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<sup>103</sup> 425 U.S. 435 (1976).

Robins and the Bank of Byron complied and turned over paperwork that was used at Miller's trial. This information helped lead to his conviction.

Upon this conviction, Miller appealed the decision on the grounds that his Fourth Amendment rights were violated when the bank turned over the paperwork. The Fifth Circuit of the United States Court of Appeals determined that his rights were violated and overturned the conviction. Following this successful appeal, the government then appealed the decision to the Supreme Court. The question concerning the Court was seemingly simple, were the bank records illegally seized under the Fourth Amendment?

In an overwhelming 7-2 decision, the Court found that Miller had no reasonable expectation of privacy concerning his original checks and deposit slips. Justice Powell delivered the opinion of the Court. In his opinion, he made the case that, "On their face, the documents subpoenaed here are not respondent's 'private papers.' ... Instead, these are the business records of the banks."<sup>104</sup> He continued:

Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications, but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business... This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose, and the confidence placed in the third party will not be betrayed.<sup>105</sup>

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<sup>104</sup> Ibid

<sup>105</sup> Ibid

In this section of the opinion, the Court is expressing multiple ideas that are important. First is the notion that, because Miller voluntarily conducted business with the banks, the information he gave them could then be used by the banks in any way they see fit. Secondly, the final sentence would come to define what the Third-Party Doctrine meant, marrying the assumption of risk with the secrecy model.

There were two dissenting opinions filed in this case, one from Justice Brennan and one from Justice Marshall. Justice Brennan's dissent relied on a decision of a state Supreme Court, the California Supreme Court, in the case *Burrows v. Superior Court*<sup>106</sup>. This case also dealt with the government seizing records from a bank. In this decision, Justice Mosk explained that, "we hold petitioner had a reasonable expectation that the bank would maintain the confidentiality of those papers originated with him in check form and of the bank statements....the voluntary relinquishment of such records the bank at the request of the police does not constitute a valid consent by the petitioner."<sup>107</sup> In this decision, the Supreme Court of California did rely on the ruling the Fifth Circuit made in its ruling on *Miller*.

The second dissent from Justice Marshall centered on a prior holding of the Supreme Court, *California Bankers Assn. v. Shultz*<sup>108</sup> (another case in which Marshall dissented). This case centered on the constitutionality of the Bank Secrecy Act<sup>109</sup>. In this Act, there is a requirement that banks must keep records; Justice Marshall believed that "the required maintenance of bank customers' records to be a seizure within the meaning of the Fourth Amendment and unlawful in the absence of a warrant and

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<sup>106</sup> 13 Cal. 3d 238, 529 P. 2d 590 (1974).

<sup>107</sup> Ibid

<sup>108</sup> 416 U.S. 21 (1974).

<sup>109</sup> 12 U.S.C. § 1829b (d).

probable cause.”<sup>110</sup> Justice Marshall’s opinion had not changed and in *Miller*, he again believed that absent a warrant presented upon probable cause the seizure of bank records was an illegal search.

Despite the fact that the lower court held that by requiring the banks to hold the records and also using insufficient legal processes to obtain the records (using a subpoena and not a warrant) that the Fourth Amendment rights of Miler were violated the Supreme Court overturned this ruling. An important part of this 7-2 decision were the four justices Burger, Blackmun, Stevens and Rehnquist that had joined the Court in the years after *Katz* declared the Fourth Amendment protected people not places.

This fact is noteworthy and best summed by Christopher Slobogin in his book, *Privacy at Risk: The New Government Surveillance and the Fourth Amendment*: “In decisions handed down in the 1970s and 1980s, most of which all of the new justices joined [the aforementioned four], the Court indicated that in a whole host of situations, the expectation-of-privacy rubric does not necessarily provide any more protection than a property-based approach, and perhaps affords even less protection.”<sup>111</sup> Similar to the quick about-face made by the Court in “the switch in time that saved nine” the situation that occurred here seems to have been ‘the change of four, privacy no more’. If the outlook for Fourth Amendment protections was not already bleak enough, the Court was about to double down in another case years later.

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<sup>110</sup> *Miller v. United States*, 425 U.S. 435 (1976) (J. Marshall, dissenting).

<sup>111</sup> Slobogin, Christopher. 2007. *Privacy at Risk: The New Government Surveillance and the Fourth Amendment*. Chicago: University of Chicago Press.

## **Smith v. Maryland**

Three years later in 1979, the Court would decide *Smith v. Maryland*.<sup>112</sup> In this case, a young lady was robbed and in filling out the police report she gave a description of the suspect as well as the car she thought he was driving. After a few days, she started to receive threatening phone calls, one of which had her stand on the porch and watch as the same car she had described to police drove past. Police began to monitor the neighborhood and saw the car driving in the victim's neighborhood; upon seeing this they ran the license plate number and got a name, Michael Smith<sup>113</sup>.

Upon finding out Mr. Smith's name, the police contacted the phone company and asked them to install a pen register, a device that records the numbers dialed from the particular phone it is installed on, on to Smith's phone. Once a call was placed from Smith to the victim the police obtained a warrant to search Smith's home. When a phone book was found with the victim's number marked Smith was arrested and later identified in a lineup as the man that committed the robbery.<sup>114</sup>

The question before the Court was to determine if the installation of a pen register without a court order or search warrant circumvented Smith's Fourth Amendment protections. This case was decided 5-3 with Justice Powell not taking part in the case. In the majority decision, Justice Blackmun stated, "we doubt that people, in general, entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must 'convey' phone numbers to the phone company since it is through telephone company switching equipment that their calls are

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<sup>112</sup> 442 U.S. 735 (1979).

<sup>113</sup> Ibid

<sup>114</sup> Ibid

completed.”<sup>115</sup> Moreover, Blackmun reiterated the sentiment from *Miller* stating, “This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”<sup>116</sup>

There were two dissenting opinions, in this case - one from Justice Stewart and another from Justice Marshall; both dissents were joined by Justice Brennan. Justice Stewart’s dissent rested on that fact that in his mind, the numbers dialed should be constitutionally protected. He states, “It is simply not enough to say, after *Katz*, that there is no legitimate expectation of privacy in the numbers dialed because the caller assumes the risk that the telephone company will disclose them to the police... The numbers dialed from a private telephone - although certainly more prosaic than the conversation itself - are not without ‘content.’ ”<sup>117</sup>

This dissent has two main points. Firstly, that in a post-*Katz* world just because a user voluntarily gives the phone company the numbers to complete a call does not mean they “assume the risk” that the phone company will then give that information over to police instead of using the information only for their business purposes. Second, and more importantly, is the belief that the numbers dialed are in fact a form of content. While yes a pen register will only show a string of numbers, it is what those numbers can reveal that makes them valuable. Repeated calls to someone other than a family member or friend could disclose a relationship, just as numerous calls to a doctor could divulge an illness.

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<sup>115</sup> Ibid

<sup>116</sup> Ibid

<sup>117</sup> Ibid (Stewart, J dissenting).



Justice Marshall also filed a dissent in this case. His objection centered on the assumption of risk an individual could make while having no other option besides the use of a telephone company. He states:

Implicit in the concept of assumption of risk is some notion of choice. At least in the third-party consensual surveillance cases, which first incorporated risk analysis into Fourth Amendment doctrine, the defendant presumably had exercised some discretion in deciding who should enjoy his confidential communications. By contrast here, unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. It is idle to speak of "assuming" risks in contexts where, as a practical matter, individuals have no realistic alternative.<sup>118</sup>

This dissent touches on an important idea: if a person has no other viable option to take the place of a particular third party, like a phone company, bank, or Internet service provider, then they must by default accept the risk; however the acceptance is not voluntary. Justice Marshall continues by drawing the conclusion about the possibly chilling effect such easy access to third party records could have on many of the freedoms guaranteed by the constitution such as free speech, press, association, and more.

With the decisions in both *Miller* and *Smith*, the groundwork was laid for the Third-Party Doctrine by the Supreme Court. Although it would be years before the Supreme Court itself would take up a case involving the Third-Party Doctrine, lower courts would continue to make decisions based on the aforementioned decisions. It is important to note that in all of the dissenting opinions in both *Miller* and *Smith* the dissenting justices did recognize the utility of allowing the government to access information from third-party providers, however not at will. In his *Smith* dissent, Justice Marshall stated, "I would require law enforcement officials to obtain a warrant

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<sup>118</sup> Ibid (Marshall, J dissenting)

before they enlist telephone companies to secure information otherwise beyond the government's reach.”<sup>119</sup> This dissent shows that dissenting justices were not trying to hamstring law enforcement, but rather protect against the unlimited searches that occurred in the American colonies.

## **Chapter 8: Application of the Third-Party Doctrine**

With the Third-Party Doctrine in place, various courts would begin to apply it to different situations including Internet metadata, cell phone metadata, geolocation of mobile phones, and others. A distinction that has been common in the above-mentioned Fourth Amendment cases separated these cases between those involving content and those involving non-content. Reaching all the way back to 1877 with *Ex parte Jackson*<sup>120</sup>, the Court deemed that the outside of a mailed letter to not be protected as the information it contained was in plain view. However, the content, i.e. the inside of the document, was still an area protected by the Fourth Amendment.

This distinction clearly plays out in two other cases already examined. In *Katz*<sup>121</sup>, the Supreme Court made it a clear point that in the closed telephone booth an individual had a reasonable expectation of privacy and, therefore, the listening device placed that allowed FBI agents to hear what was said were not admissible as Katz's voice was treated as content. In contrast, when a pen register, a device that only collected the phone numbers dialed and did not allow police to hear the conversation,

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<sup>119</sup> Ibid (Marshall, J dissenting)

<sup>120</sup> 96 U.S. 727, 733 (1877)

<sup>121</sup> 389 U.S. 347, 352 (1967).

was used in *Smith*<sup>122</sup>, the Court deemed that the digits were non-content and thus not protected under the Fourth Amendment.

Lower courts would also use the content/non-content distinction in their rulings. In 2010, the Sixth Circuit Court of Appeals decided *U.S. v. Warshak*<sup>123</sup>. In this case, federal agents were pursuing charges against Steven and Harriet Warshak and their company TCI Media, Inc. for false advertising, negative-option schemes, and lying to credit card companies. Using the Stored Communications Act as a part of the Electronic Communications Privacy Act<sup>124</sup> the government issued a subpoena to NuVox, Warshak's Internet service provider, to have them preserve emails. In all, over 27,000 emails were given to the government.

In a 3-0 decision, the Sixth Circuit held that government agents, in fact, violated the Fourth Amendment rights of Warshak by compelling his Internet service provider (ISP) to hand over the content of emails without securing a warrant first. In a concurring opinion, Justice Keith stated that "The government cannot use email collection as a means to monitor citizens without a warrant any more than they can tap a telephone line to monitor citizens without a warrant."<sup>125</sup> Where the agents ran into trouble was asking the ISP to preserve emails and thereby conducting a backdoor wiretap of sorts without obtaining a warrant upon probable cause.

While *Warshak* concerned with the content of emails, the fate of the non-content of emails was decided a few years prior. In the 2007 case *U.S. v. Forrester*<sup>126</sup>, the Ninth Circuit Court of Appels deemed that the non-content of emails, such as the to and from

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<sup>122</sup> 442 U.S. 735 (1979).

<sup>123</sup> 631 F.3d 266 (6th Cir. 2010).

<sup>124</sup> 18 U.S.C. § 2701-2712

<sup>125</sup> 631 F.3d 266 (6th Cir. 2010) (J, Keith concurring).

<sup>126</sup> 512 F.3d 500 (9th Cir. 2007).

addresses, as well as internet protocol (IP) addresses of websites, visited, and all of the data transmitted to and from an account were not protected under the Fourth Amendment. This ruling continued the thinking towards non-content the Supreme Court had put in place with *Smith*.

The Ninth Circuit reasoned that users should know that information that “is provided to and used by Internet Service Providers (ISP) for the specific purpose of directing the routing of information.”<sup>127</sup> Furthermore, the Court explained that the government could only guess as to what content is viewed or sent because this information does not “necessarily reveal any more about the underlying contents of the communication than do phone numbers.”<sup>128</sup> This assumption brings back the point brought forth by Justice Stewart in his dissent in *Smith*.

Justice Stewart said of phone numbers, “certainly more prosaic than the conversation itself - are not without ‘content.’”<sup>129</sup> Here again, this dissent comes into play. The information the government receives with the to/from addressing of emails might be similar to phone numbers although the email would likely contain the name of the person or company being emailed saving the government from having to look it up. When that information is the IP addresses of a website a person visits, however, the information takes on a new level of content.

The difference in technology from then to now is a perfect example of how in the Third-Party Doctrine is not equipped for the digital age. The analogy between phone numbers and IP addresses, like the one in *Forrester*, is a false one. While an IP

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<sup>127</sup> Ibid

<sup>128</sup> Ibid

<sup>129</sup> *Smith v. Maryland* 442 U.S. 735 (1979) (Stewart, J dissenting).

address is not as telling as a URL<sup>130131</sup>, a significant amount of information is still displayed. The information revealed by IP addresses can be far-reaching and diverse. Daniel Solove notes, “the names of stores at which a person shops, the political organizations a person finds interesting, a person's sexual fetishes and fantasies, her health concerns...”<sup>132</sup> can all be revealed by IP addresses. The amount of information that can be gathered from third-party ISP's is simply too distinct from phone numbers to fall under the ruling in *Smith* and is much more closely related to the holding in *Katz*.

Alongside the content versus non-content debate within Third-Party Doctrine jurisprudence, there is the debate concerning whether the third-party is the recipient or if they are just an intermediary. This idea came into play in cases like *Warshak* and *Forrester* because the courts decided that the Internet service provider was merely an “intermediary that makes email communication possible”<sup>133</sup> not the recipient of the emails. This recipient versus intermediary becomes a much larger question when the subject becomes the geolocation of cell phones and the government's access to their records.

Geolocation is an issue that has proved to be divisive among lower courts, showing perhaps that the Supreme Court is waiting for more facts to develop before it makes a decisive stand on the issue, which seems to be on the horizon. A split Fourth Circuit recently ruled in *U.S. v. Graham*<sup>134</sup> that a search occurs when historical cell

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<sup>130</sup> In *United States v. Forrester*, 495 F.3d 1041, 1049 n.6 (9th Cir. 2007), The Court states, “[a] URL, unlike an IP address, identifies the particular document within a website that a person views and thus reveals much more information about the person's Internet activity.” Id.

<sup>131</sup> Special thanks to Brandon Hubbell, Enterprise Technical Support Analyst, for the clarifying discussion concerning IP addresses and URL's.

<sup>132</sup> Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1287 (2004).

<sup>133</sup> *Warshak*, 631 F.3d at 286.

<sup>134</sup> <http://www.ca4.uscourts.gov/Opinions/Published/124659.P.pdf>

phone location data is accessed and that a warrant is needed to obtain such records.

This decision created a larger split between multiple circuits. As Orin Kerr notes in his article for *The Washington Post*:

[T]he decision creates a clear circuit split with the Fifth and Eleventh Circuits on whether acquiring cell-site records is a search. It also creates an additional clear circuit split with the Eleventh Circuit on whether, if cell-site records are protected, a warrant is required. Finally, it also appears to deepen an existing split between the Fifth and Third Circuits on whether the Stored Communications Act allows the government to choose whether to obtain an intermediate court order or a warrant for cell-site records.<sup>135</sup>

The two competing views on this issue are as follows. On one hand, the information relayed by a cell phone to the tower is not used by anyone other than the provider to route calls meaning that the information could be seen as created in the ordinary course of business and the Third-Party Doctrine would apply. On the other hand, as the Third Circuit Court of Appeals noted, a cell phone user does not voluntarily give location data to the mobile phone company in any meaningful way the application of the Third-Party Doctrine would be out of bounds.<sup>136</sup>

Allowing the geolocation of cell phones to be accessed under the Third-Party Doctrine would create an injustice worse than those suffered by the colonies at the hands of the British writs of assistance. Even though it was often simply a formality, the British still required constables to petition for a writ to be granted from a judge to conduct their unlimited searches. Under the Third-Party Doctrine, there is no need for the government to obtain a warrant or show cause before receiving information. There

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<sup>135</sup> “Fourth Circuit Adopts Mosaic Theory, Holds That Obtaining ‘extended’ Cell-Site Records Requires a Warrant - The Washington Post.” 2015. Accessed November 13.

<https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/05/fourth-circuit-adopts-mosaic-theory-holds-that-obtaining-extended-cell-site-records-requires-a-warrant/>.

<sup>136</sup> See *In re* Application of the United States of America for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government, 620 F.3d 304, 317-18 (3d 2010).

are some instances in other areas of Fourth Amendment case law that seem to support the presence of the Third-Party Doctrine.

## **Chapter 9: Cases that possibly support the Third-Party Doctrine**

Some might point to *U.S. v. Jacobson*<sup>137</sup>, 1984, as a case that possibly supports the Third-Party Doctrine. In this case, the Court determined that police could open and search a package mailed through a private carrier after an employee of the private carrier searched the contents of the package. In the majority opinion, Justice Stevens delivered the opinion of the Court stating, “Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information.”<sup>138</sup>

On its face, it seems like *Jacobson* would be a strong pillar of support however, since the decision in this relies on the ruling in *Miller*, the support seems tautological in nature at best. Furthermore, there is a distinct difference between a private citizen alerting the government to potential wrongdoing and the government compelling a third-party to turn over evidence to it without first making the case to a judge and obtaining a warrant. Another case that could show support for the Third-Party Doctrine is *California v. Greenwood*.<sup>139</sup>

Sometimes referred to as the “garbage collection case”, *California v. Greenwood* arose when the police suspected that Greenwood was dealing drugs out of his home. However, the police lacked the evidence needed to obtain a search warrant; therefore, they searched the trash bags that had been left by the curb for pickup. Upon

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<sup>137</sup> 466 U.S. 109, 117-18 (1984).

<sup>138</sup> *Ibid*

<sup>139</sup> 486 U.S. 35, 37 (1988).

searching the garbage, the police found the evidence needed to obtain a search warrant for Greenwood's home and during that search found drugs and arrested Greenwood. The question before the court was if the search of the trash bags violates the Fourth Amendment. In a 6-2 decision, Justice Kennedy not taking part, the Court found that it did not.

This decision can fit squarely within the heightened protection given in *Katz* where the Court stated, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."<sup>140</sup> Given that Greenwood knowingly exposed his garbage to the public by leaving it on the curb it was open to the public and thus the police were able to search it. However, this fails to support much of what the Third-Party Doctrine has become today. In the current digital world, the doctrine is used to collect vast amounts of digital information, often stored in some form of password protection and/or privacy settings. This fact makes the digital information markedly different from a garbage bag that is left on the curb.

A final set of cases, collectively referred to as the "flyover cases" include *California v. Ciraolo*<sup>141</sup> and *Florida v. Riley*<sup>142</sup>. In these cases, the use of both an airplane and helicopter respectively were deemed valid ways of searching for illegal activities. The rationale is that if a private individual were the one flying over another's yard, that individual would be just as likely to view the illicit activity as police. These cases follow the logic that when a person moves in the public sphere, there is no reasonable expectation of privacy. In today's digital society, outside movement is not required, and the use of one or more pseudonyms is often used as individuals travel

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<sup>140</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>141</sup> 476 U.S. 207, (1986)

<sup>142</sup> 488 U.S. 445, (1989)



across the digital world with, again, various privacy settings in place to further attempt to shield their movements.

### **Balancing Technology and the Fourth Amendment**

In the debate concerning the Third-Party Doctrine, its greatest support comes from Orin S. Kerr, the Fred C. Stevenson Research Professor of Law at George Washington University's Law School. Much of Kerr's support for the Third-Party Doctrine comes from its perceived ability to balance the Fourth Amendment with the new technologies that have been created.<sup>143</sup> Central to his argument is a thought exercise in which one imagines the world where third parties did not exist. In this world, "you would need to venture out into the world on a regular basis to accomplish anything."<sup>144</sup> Kerr's argument is that, when traveling out in the world, the Fourth Amendment provides much less protection.

For Kerr, it is third parties that allow criminals to conduct business through them and thus avoid public exposure where Fourth Amendment protections are not as high. With no third-parties, "The police can see when individuals leave their homes, where they travel, and when they arrive. Using third parties allows individuals to substitute a private transaction for that public transaction. Facts that used to be known from public surveillance are no longer so visible. By allowing individuals to use remote services, the use of third parties has brought outdoor activity indoors."<sup>145</sup> It is the flexibility awarded

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<sup>143</sup> Orin Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 561, 575 (2009).

<sup>144</sup> "The Case for the Third Party Doctrine." 2015. Accessed November 9.  
[http://www.americanbar.org/groups/public\\_services/law\\_national\\_security/patriot\\_debates2/the\\_book\\_on\\_line/ch4/ch4\\_ess2.html](http://www.americanbar.org/groups/public_services/law_national_security/patriot_debates2/the_book_on_line/ch4/ch4_ess2.html).

<sup>145</sup> Ibid

to police by the doctrine that helps keep the balance in place between the Fourth Amendment and new technologies.

Although Kerr supports the Third-Party Doctrine, he does believe there should be some limitations. He notes, “my defense of the third-party doctrine implies an important limit: The doctrine should apply when the third party is a recipient of information, but it should not apply when the third party is merely a conduit for information intended for someone else.... (meaning the) doctrine should apply to the collection of non-content information to a network but not the contents of communications.”<sup>146</sup> Here again, we see the content versus non-content argument coming into play; however, in the digital world the distinction between content and non-content is an often-blurred line.

## **Chapter 10: Critiquing the Third-Party Doctrine**

On the other hand, the critics of the Third-Party Doctrine have been challenging the assumptions made in it since its creation. Some of these arguments have been mentioned previously; however, they are worth noting again. One of the strongest arguments against the doctrine is that privacy is not an all or nothing commodity. Balance can be struck between public and private; the idea that once data is shared with a person or company, its privacy is gone forever is asinine.

Another criticism of the doctrine was one made in each of the dissenting opinions in the pivotal cases that established it. The idea that the information is conveyed completely voluntarily. With the evolution of society and no real alternatives,

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<sup>146</sup> Ibid

there are third-party services that an individual has no other choice than to use. Thirdly, the assumption of risk is not a given when individuals have no viable alternative as previously stated. Fourth, the potential for a chilling effect on First Amendment rights is all too real when the communications between people and companies are not protected. Lastly, while, in the late 70s, it was possible that the negative effect this doctrine would have on individuals was minimal, times have changed significantly to the point where that is no longer the case.

### **Is Privacy an All-or-Nothing Conception?**

The first major concern mentioned above relates to the secrecy model of the Fourth Amendment that was previously mentioned. This model states that once information is made public in any way, it no longer enjoys protection under the Fourth Amendment. This sentiment was built off of a misinterpretation of a line in the decision in *Katz*. In the decision the Court determined that “the Fourth Amendment protects people not places” while stating that, “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”<sup>147</sup> This line has been taken out of context and misconstrued to support the creation of the Third-Party Doctrine.

In *Miller*, the Court seized upon this line to deem that the bank records that were to be used between an individual and the bank in the course of doing business were not protected under the Fourth Amendment. Seemingly missing from the Court's reasoning was the line that immediately followed in Justice Stewart's decision stating, “But what he seeks to preserve as private, even in an area accessible to the public, may be

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<sup>147</sup> *Katz v. United States*, 389 U.S. 347 (1967).

constitutionally protected.”<sup>148</sup> This line drastically changes the sentiment behind the first. Seeing that the documents were revealed to the bank only to conduct business and not exposed to the public as a whole, the Fourth Amendment protections should still have been in place.

Roughly Justice Marshall made this same point in his dissent in *Smith*. He argued that “privacy is not a discrete commodity, possessed absolutely or not at all... Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes.”<sup>149</sup> Justice Marshall is not alone in this viewpoint. Among many, Susan Brenner and Leo Clarke also believe in a two-tiered system of shared information.

The first tier is information posted for public consumption whether it be on a message board online, printed in a newspaper, or a loud conversation that can be easily overheard in the public domain.<sup>150</sup> Since this information has been “knowingly exposed to the public” there is no expectation of privacy and, therefore, no Fourth Amendment protections. On the other hand, the second tier includes sharing information on a limited basis between an individual and whoever is receiving the information as “an integral part of a legitimate transaction.”<sup>151</sup> In this second tier, the information is not released to the public as a whole. Instead, it is given on a limited basis for a particular purpose and, therefore, should retain Fourth Amendment protections.

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<sup>148</sup> Ibid

<sup>149</sup> *Smith v. Maryland*, 442 U.S. 735 (1979) (Marshall, J dissenting).

<sup>150</sup> Susan W. Brenner & Leo L. Clarke, *Fourth Amendment for Shared Privacy Rights in Stored Transactional Data*, 14 J.L. & POL’Y 211, 258 (2006).

<sup>151</sup> Ibid

Furthermore, dissenting in *Smith*, Justice Stewart noted that, like the numbers dialed the voice of an individual (given protection in *Katz*) also go through the phone company's systems and allow the company to listen in. Justice Stewart argued, "What the telephone company does or might do with those numbers is no more relevant to this inquiry than it would be in a case involving the conversation itself."<sup>152</sup> Justice Stewart would have placed the same protections on phone numbers that the conversation received in *Katz* because the phone numbers called by an individual reveals information about that person's life specifically.

### **How voluntary is the Use of Third-Parties?**

A second major concern facing the Third-Party Doctrine concerns the use of the word "voluntary" in describing the information that is given to third-parties. While this concern was in fact raised at the time the doctrine was created, it is even more relevant in modern society. In *Miller*, the Court decided that bank statements and deposit slips were handed over voluntarily "in the ordinary course of business,"<sup>153</sup> Similarly, in *Smith*, it was determined that phone numbers were voluntarily conveyed to phone companies in the process of making a call. This argument has been echoed recently by justices concerning cell phone location data.<sup>154</sup>

The extent to which the transfer of information to third-parties is *voluntary* has been long disagreed upon. In his dissent in *Miller*, Justice Brennan, argued that "for all practical purposes, the disclosure by individuals or business firms of their financial

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<sup>152</sup> *Smith v. Maryland*, 442 U.S. 735 (1979) (Stewart, J., dissenting).

<sup>153</sup> *United States v. Miller*, 425 U.S. 435, 442 (1976).

<sup>154</sup> *In re Application of the United States of America for Historical Cell Site Data*, 724 F.3d 600, 613 (5th Cir. 2013). Stating, "Their use of their phones, moreover, is entirely voluntary. The Government does not require a member of the public to own or carry a phone."

affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account.”<sup>155</sup> This sentiment was repeated by Justice Marshall in *Smith*. In his dissent, he states, “...unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. It is idle to speak of “assuming” risks in contexts where, as a practical matter, individuals have no realistic alternative.”<sup>156</sup>

As Justices Brennan and Marshall explain, it is all but impossible for an individual to go through life and not be forced into using a third-party at some point in time. This fact is even more undeniable in today’s modern society. The advent of the internet and, especially, online social networking sites, such as Facebook, LinkedIn, Twitter, Tumblr, etc., have forever changed how we interact with our family, friends, co-workers, and even complete strangers.

Concerning these modern developments, the terms and conditions agreements that now permeate society in all facets of life make it next to impossible for one to have any choice but to “opt-in” in every given situation. A few years ago, in 2012, Lorrie Faith Cranor and Aleecia McDonald decided to calculate the time needed to read all of the privacy policies an individual would encounter on the websites they visit. Their research led to the conclusion that it would take the average American twenty-five days out of the year just to read all of the privacy policies they encountered.<sup>157</sup> This amount

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<sup>155</sup> *United States v. Miller*, 425 U.S. 435, 451 (1973) (Brennan, J., dissenting) (quoting *Burrows v. Superior Court*, 13 Cal. 3d 238, 247 (1974)).

<sup>156</sup> *Smith*, 442 U.S. at 750 (Marshall, J., dissenting) (internal citation deleted).

<sup>157</sup> “Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days.” 2015. Accessed November 19. <http://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851/>.

of time is staggering. Furthermore, these terms of service agreements are now used by every third-party company and completely strip away the rights of individuals to truly “volunteer”.

As Christopher Slobogin noted in his aforementioned book, “It is impossible to get treatment, engage in financial transactions, obtain an education, or communicate with others without providing personal information to the relevant facilitating entities or allowing those entities to collect it. To forgo these activities would mean an isolated, unproductive, and possibly much-foreshortened existence.”<sup>158</sup> Slobogin goes on to note that, unlike in the so-called “undercover agent” cases where talking to an individual can reasonably be avoided, that is not an option when it comes to third-parties.

### **Assuming the Risk**

Hand-in-hand with the notion that the exchange of this information is voluntary is the idea that individuals assume the risk when exchanging information with third-parties. As Slobogin points out, “we (individuals) assume only those risks of unregulated government intrusion that the courts tell us we have to assume.”<sup>159</sup> Following this logic with that of Justice Marshall’s in the opinion mentioned above that it is futile to speak of assuming the risk when an individual has no choice, it is evident that simply stating that all citizens must bear the risk of sharing even the banalest of information with third-parties places a significant burden on society.

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<sup>158</sup> Slobogin, Christopher. 2007. *Privacy at Risk: The New Government Surveillance and the Fourth Amendment*. Chicago: University of Chicago Press.

<sup>159</sup> Ibid

As Justice Harlan noted in his dissent in *United States v. White*, “By casting it as ‘risk analysis’ solely in terms of expectations and risks that ‘wrongdoers’ or ‘one contemplating illegal activities’ ought to bear, the plurality opinion, I think, misses the mark entirely... Interposition of a warrant requirement is designed not to shield ‘wrongdoers,’ but to secure a measure of privacy and a sense of personal security throughout our society.”<sup>160</sup> The creation of the Third-Party Doctrine only served to erode the measure of privacy and sense of security that Justice Harlan spoke of in his dissent. In this, Justice Harlan was arguing that the Court should more carefully examine how its decisions will affect the privacy rights of individuals. With the way the Court decided in *White*, an enormous burden of assuming the risk when giving any information to third-parties was placed on all persons.

### **The Chilling Effect**

A third concern about the Third-Party Doctrine is its potential to create a chilling effect on individual citizens, citizen-to-business, as well as business-to-business relationships and communications. If a person is forced to second guess tasks that have become commonplace and monotonous in today’s digital society, such as owning a cell phone or opening an e-mail account, this places undue stress on constitutionally guaranteed freedoms such as speech, press, assembly, petition, and even the free exercise of religion.

This concern has been shared over the years in the expounding of the Third-Party Doctrine. Justice Harlan, in his dissent in *White*, stated that the surveillance of third-party records, “undermine[s] the confidence and sense of security in dealing with

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<sup>160</sup> *United States v. White*, 401 U.S. 745 (1971), (J. Harlan, dissenting).



one another that is characteristic of individual relationships between citizens in a free society... words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed.”<sup>161</sup>

In his dissent in *Smith*, Justice Marshall, again echoed these concern eight years later. He noted that “The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide. Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts.”<sup>162</sup>

Furthermore, Justice Marshall went on to state his reason for this belief. “Permitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society.”<sup>163</sup> Even in *Smith*, when the idea of the Third-Party Doctrine was in its inchoate form, Justice Marshall had the foresight to discern its potential as a threat to democracy. As many other justices and scholars would come to point out the Third-Party Doctrine represents a clear threat when any information browsed on the phone or computer can be turned over to the government at a moment’s notice.

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<sup>161</sup> *White*, 401 U.S. at 787 (Harlan, J., dissenting).

<sup>162</sup> *Smith v. Maryland*, 442 U.S. 735 (1979) (Marshall, J., dissenting).

<sup>163</sup> *Ibid*

## Chapter 11: Recent Developments

### United States v. Jones

In recent years, some cases have shed new light on the Third-Party Doctrine. The first of these cases is *United States v. Jones*.<sup>164</sup> In this case, Jones was suspected of drug trafficking; therefore, police obtained a search warrant to place a GPS tracking device on Jones's car. After the device was attached Jones was tracked for twenty-eight days, twenty-four hours a day. On its face, this all seemed to be completely legitimate as an individual had no reasonable expectation of privacy on public streets because their movement is viewable in plain sight.<sup>165</sup> However, as particular facts came to light, the legality of this search would be questioned.

While the fact that a search warrant was obtained is encouraging, the warrant stipulated that the device must be installed in the District of Columbia and within ten days of the warrant being issued. This is troublesome because the device was installed eleven days after the warrant was issued and in the state of Maryland. Meaning that the warrant had technically expired and even if it had still been active, the device was installed in the wrong jurisdiction. It is for this reason that in *United States v. Jones*, the Supreme Court decided, unanimously that the use of a GPS tracking device was a search under the Fourth Amendment, and thus the monitoring that was done after the warrant expired was unlawful.

Justice Scalia wrote the opinion of the Court. In this decision, however, Justice Scalia fell back onto the physical trespass meaning of the Fourth Amendment. He stated, "...for most of our history the Fourth Amendment was understood to embody a

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<sup>164</sup> *United States v. Jones*, 132 S. Ct. 945, 565 U.S. (2012).

<sup>165</sup> *United States v. Knotts*, 460 U.S. 276, 281 (1983).

particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates."<sup>166</sup> This position while criticized in concurring opinions, was enough to cover the scope of the question at stake in this case. The reason that the use of trespass theory by Justice Scalia was controversial was that it was a regression in Fourth Amendment jurisprudence and did not represent the most current standard.

The trespass theory came out of a 1928 decision mentioned earlier, *Olmstead v. U.S.* However, the trespass theory was overturned in the 1967 ruling *Katz v. U.S.* where the Court famously stated that the "the Fourth Amendment protects people, not places." While Justice Scalia was correct that the thirty-nine years between *Olmstead* and *Katz* is a long time not relying on the standard set forth forty-five years earlier in *Katz* was unsettling and led to Justice Sotomayor concurring with the decision but not the reasoning. Most of the attention concerning this case focuses on the concurring opinion of Justice Sotomayor.

In her concurring opinion, Justice Sotomayor articulated the most stringent critique of the Third-Party Doctrine by a Supreme Court justice since the inception of the doctrine. In keeping the full force of her criticism intact, it will be presented unabridged.

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. *E.g., Smith*, 442 U. S., at 742; *United States v. Miller*, 425 U. S. 435, 443 (1976). This approach is ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice Alito notes, some people may find the

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<sup>166</sup> *Jones*, 132 S. Ct. (Scalia, J., opinion).

“tradeoff” of privacy for convenience “worthwhile,” or come to accept this “diminution of privacy” as “inevitable,” *post*, at 10, and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection. See *Smith*, 442 U. S., at 749 (Marshall, J., dissenting) (“Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes”); see also *Katz*, 389 U. S., at 351–352 (“[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected”).<sup>167</sup>

A critique that is biting from a Supreme Court justice was an encouraging sign

for those that would err on the side of privacy. Unfortunately, since this concurrence in 2012, there have been no other remarks made at the Supreme Court level. However, that does not mean that the issue is in a holding pattern across the board.

### **DOJ Rule 41 Proposed Change**

In 2014, the Department of Justice started to consider changing what is known as Rule 41. The proposed changes would allow judges to issue warrants outside of their districts along with letting the FBI search without giving users prior notice, or notice at all. These rule changes would also allow multiple devices to be searched without obtaining multiple search warrants. Needless to say, these changes run into the same problems that the Third-Party Doctrine has.

In a memo from the Advisory Committee on Criminal Rules, the changes were debated and concerns of committee members and academics were taken into account.

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<sup>167</sup> Jones, 132 S. Ct. (Sotomayor, J., concurring opinion).

Most notably, Orin S. Kerr gave his opinion on the proposed rule changes. Kerr and the Committee found several potential problems. The first being the particularity clause of the Fourth Amendment, especially if the government could not articulate the location of the device it wanted to search. Secondly, there is reduced judicial oversight and the possibility of cherry-picking favorable judges to get warrants from. Third, delaying notification can set a dangerous precedent of obtaining warrants for remote searches over physical searches to delay notification.<sup>168</sup>

Despite the concerns put forth by the subcommittee members and Kerr, the DOJ has been progressing with the rule changes anyway. The Judicial Conference Advisory committee on Criminal Rules voted in favor of the modification.<sup>169</sup> This led Google to file a formal opposition to the proposed rule changes in 2015.<sup>170</sup> This organized opposition has had little effect as the rule changes are still moving forward. Senator Ron Wyden of Oregon has said, “The rule change will go into effect later this year unless committed people mobilize to stop it.”<sup>171</sup>

Thus far there has not been a public outrage or even news coverage as the issues have flown under the radar. With the rule change due to come up for review by the Supreme Court and barring any objections, the rule changes could take effect in December of 2016.<sup>172</sup> While the changes to Rule 41 and the Third-Party Doctrine may not seem related at first glance, there is a connection.

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<sup>168</sup> New Orleans, LA April 7-8, 2014 Agenda

<sup>169</sup> <http://www.ibtimes.com/rule-41-change-could-allow-fbi-get-warrants-remotely-search-suspects-computers-1854894>

<sup>170</sup> <http://arstechnica.com/tech-policy/2015/02/google-proposed-government-sanctioned-hacking-is-a-threat-to-us-all/>

<sup>171</sup> <http://www.politico.com/tipsheets/morning-cybersecurity/2016/03/wyden-takes-on-rule-41-obama-administration-still-might-sanction-hackers-agencies-go-backward-213485>

<sup>172</sup> <http://www.ibtimes.com/rule-41-change-could-allow-fbi-get-warrants-remotely-search-suspects-computers-1854894>

This rule change goes hand in hand with problems that exist in the Third-Party Doctrine, namely the resurrection of general warrants allowing government offices to meet minimum requirements and get full warrant powers. Aside from this, it is likely that the government will use the reasoning in the Third-Party Doctrine to support the rule change. Since the information being sought is held by Third-Parties,<sup>173</sup> the DOJ will likely take the position that individuals have no expectation of privacy since the information has been given to third-parties.

With the recent passing of Justice Scalia, and his seat empty for the foreseeable future, the proposal from the Court will likely hinge on Justice Kennedy's vote which will likely lead to a tie or denial. Taking what Justice Sotomayor said in her concurrence in *Jones*, it is probable that she will be advocating against the rule changes. The proposal the Court gives will provide some insight into its current thinking on issues concerning privacy, security, and Fourth Amendment law. This will be telling; however, depending on when the empty seat is filled this thinking could be changed.

### **Riley v. California**

Also in 2014, a Supreme Court case further cemented its position on Fourth Amendment issues in the digital age. *Riley v. California*<sup>174</sup> was decided in tandem with *United States v. Wurie*<sup>175</sup>. Both cases centered on the issue of police searches of digital information on cell phones from individuals arrested, done without a warrant.

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<sup>173</sup> ISP's, Telecommunication providers, Cloud based storage providers, and other technological companies

<sup>174</sup> *Riley v. California*, No. 13-132, 573 U.S.

<sup>175</sup> *United States v. Wurie*, No. 13-212, 573 U.S.

The facts of the cases are as follows. Police stopped Riley for having expired tags, and it was found that he had a suspended license as well. Upon a search of the car, firearms were recovered, and police arrested Riley. Having a cell phone on his person at the time of the arrest police searched the pictures and videos on the phone and determined that Riley was affiliated with a gang. Due to the information gleaned from searching the phone the state sought an enhanced sentence due to Riley's gang affiliation. In the subsequent case, Wurie was arrested after he was observed buying drugs. When Wurie was brought to the station, the police took his cell phone and saw he had received multiple calls from a contact identified as "my house." The police then opened the phone to obtain the number to trace the location of Wurie's residence. After securing the address police obtained a warrant for the apartment and found drugs, firearms, and cash in the ensuing search. The phones in question differed in each case. Wurie possessed an older style "flip" phone with limited features, while Riley's phone was a "smart" phone with the latest features. However, at stake was the larger issue of personal cell phone privacy in general.

These cases forced the court to confront how the search of digital information would stand up to the trilogy of search incident to arrest cases<sup>176</sup>. In *Chimel v. California* the Court held that when making an arrest in a home the police could lawfully search and seize anything found on the arrestee and in their immediate reach; however, a warrant must be secured before searching the rest of the house. The justification for allowing a controlled warrantless search was two-fold: firstly, to secure the officers' safety and secondly, to recover and preserve any evidence that may be on

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<sup>176</sup> *Chimel v. California*, 395 U.S. 752; *United States v. Robinson*, 414 U.S. 218; *Arizona v. Gant*, 556 U.S. 332

or in the immediate area of the arrestee. Four years later in *United States v. Robinson*, the Court held that a full search of an arrestee, including inspection of items found on them<sup>177</sup> was lawful under the Fourth Amendment. Lastly, in *Arizona v. Gant*, the Court stated that police might only search if the arrestee was within reaching distance of the passenger compartment or there is a reason to believe that there is evidence related to the offense in the car.

Here the Court attempted to strike a balance between privacy and governmental interest. In the opinion, Chief Justice Roberts admits that the standard in *Robinson* could have applied in that it allowed for searching an arrestee and inspecting items found on their person. However, C.J. Roberts rightfully reasoned, “while *Robinson*’s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones.”<sup>178</sup> The exceptions noted in *Chimel* - officer harm and destruction of evidence - are not at stake when dealing with digital content on cell phones. Due to this, the Court did not extend the *Robinson* and *Chimel* exemptions to cell phones. Roberts did yield that with today’s technology remote wiping capability was possible but the police could take simple steps to prevent this including taking out the battery, turning the phone off, or using a Faraday bag<sup>179</sup>.

Another key point in this decision was the way cell phones themselves were treated:

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person. The term “cell phone” is itself misleading shorthand; many of these devices are in fact

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<sup>177</sup> *United States v. Chadwick*, 433 U.S. 1, 15

<sup>178</sup> *Riley v. California*, No. 13-132, 573 U.S.

<sup>179</sup> Aluminum foil bags named after English scientist Michael Faraday that block radio waves.



minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.<sup>180</sup>

This section shows that in the Court's thinking digital information and the devices that carry it are unique. Indeed, a cell phone, "contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form."<sup>181</sup> Taking the position that electronic data stored on cell phones should be treated differently from other objects typically found on the average person is an encouraging step by the Supreme Court.

Another encouraging sign from the Court is tucked toward the end of the opinion. In arguing its case, the state attempted to make the point that police should be able to search a phone's call log, as in what happened in the *Wurie* case. The justification for this would seem to come from one of the cases that helped to establish the Third-Party Doctrine, *Smith v. Maryland*. Looking back, *Smith* stated that no warrant was needed to use a pen register with the phone company to identify numbers dialed by certain callers. The Court, in this instance, came to the conclusion that there is no question that a search took place in *Wurie*. Furthermore, the Court reasoned, "call logs typically contain more than just phone numbers; they include any identifying information that an individual might add, such as the label 'my house' in *Wurie*'s case."<sup>182</sup> The refusal to extend the reach of the ruling in *Smith* to cell phone logs is an encouraging step by the Supreme Court.

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<sup>180</sup> *Riley v. California*, No. 13-132, 573 U.S.

<sup>181</sup> *Ibid*

<sup>182</sup> *Ibid*

## State v. Andrews

This issue is not just one being played out on the national level; state courts are grappling with the same problems. A decision handed down on March 30<sup>th</sup>, 2016 shows signs that at least one state court is starting to push back against the abuses against the Fourth Amendment. An appellate court in Maryland handed down a promising decision in *State v. Andrews* that is encouraging for those advocating increased privacy. This case also brought to light some rather unsettling information about how new technologies that have been developed in the private sector could be detrimental to the Fourth Amendment rights of individuals are kept secret.

The case began when Kerron Andrews was positively identified via photographic array as the person who shot three people on April 27, 2014, as they were attempting to purchase drugs on the 4900 block of Stafford Street in Baltimore City. He was charged with attempted first-degree murder and attendant offenses in connection with the shooting, and a warrant for his arrest was issued on May 2, 2014.<sup>183</sup> In order to try to locate Andrews, the Baltimore police used a new device called Hailstorm.

The trouble started when the police asked the Court for the utilization of a pen register/ trap and trace (PR/TT) to try and locate Andrews from a number provided by a confidential informant. However, the Hailstorm device works differently from a PR/TT, and the order for a PR/TT only requires only showing relevance, not probable cause. This distinction is important because of how Hailstorm works. The police use the information given by the cell service providers (serial numbers) and input that information into the Hailstorm device; the device is then used like a cell tower that searches for the device in question by sending out electronic signals.

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<sup>183</sup> *State v. Andrews*

This is a problem because the device is sending electronic signals through walls and into private dwellings and the order obtained by police was for a PR/TT and thus does not meet the requirements for invading a home with electronic signals. This naturally leads to another question: why did the police not just inform the court of the device in question and its methods in order to obtain a warrant to justify its use? This was not done because of a nondisclosure agreement between Baltimore City State's Attorney and the Federal Bureau of Investigation in order for Baltimore's police department to be able to purchase the equipment.

The following is an excerpt of the nondisclosure agreement used in the court's opinion:

[T]o ensure that [] wireless collection equipment/technology continues to be available for use by the law enforcement community, the equipment/technology and any information related to its functions, operation, and **use shall be protected from potential compromise by precluding disclosure of this information to the public in any manner including b[ut] not limited to: in press release, in court documents, during judicial hearings, or during other public forums or proceedings.** Accordingly, the Baltimore City Police Department agrees to the following 23 conditions in connection with its purchase and use of the Harris Corporation equipment/technology:

5. The Baltimore City Police Department and Office of the State's Attorney for Baltimore City **shall not, in any civil or criminal proceeding, use or provide any information concerning the Harris Corporation wireless collection equipment/technology, its associated software, operating manuals, and any related documentation (including its technical/engineering description(s) and capabilities) beyond the evidentiary results obtained through the use the equipment/technology including, but not limited to, during pre-trial matters, in search warrants and related affidavits, in discovery, in response to court ordered disclosure, in other affidavits, in grand jury hearings, in the State's case-in-chief, rebuttal, or on appeal, or in testimony in any phase of civil or criminal trial, without the prior written approval of the FBI.** (Emphasis added)<sup>184</sup>

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<sup>184</sup> State v. Andrews

Along with these requirements, the agreement stated, “in the event of a Freedom of Information Act request, or a court order directing disclosure of information regarding Harris Corporation equipment or technology, the FBI must be notified immediately to allow them time to intervene “and potential[ly] compromise.” If necessary “the Office of the State’s Attorney for Baltimore will, at the request of the FBI, seek dismissal of the case in lieu of using or providing, or allowing others to provide, any information concerning the Harris Corporation wireless collection equipment/technology[.]”<sup>185</sup>

This language is extremely troubling; it shows the FBI attempting to keep intentionally secret a device that, by the appeals court of Maryland and certainly others, violates the Fourth Amendment rights of individuals. The Hailstorm device can only obtain information when the device is not in use. Meaning that, if a user is on the phone, the technology does not work. The appellate court found this to be particularly troubling.

The court of appeals relied on the Supreme Court’s decisions in *Katz* and *Kyllo* to decide key parts of this case. Looking back on *Katz*, the use of the two-pronged privacy test was implemented. The Court decided that individuals do have a reasonable expectation of privacy that their cell phones will not be used to locate them, especially when they are not in use. Furthermore, they found that this expectation of privacy is one that society would recognize as reasonable. *Kyllo v. United States* was a case in which the government believed *Kyllo* was growing marijuana in his home and used thermal imaging to detect the increased heat signatures from inside the house.

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<sup>185</sup> State v. Andrews

In *Kyllo*, the Supreme Court stated, “[w]here...the Government uses a device that is not in general public use, to explore the details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”<sup>186</sup> This same reasoning was used in *State v. Andrews* with Hailstorm as it sends electronic signals through walls thus violating the Fourth Amendment protections against unreasonable search and seizures without a warrant.

The state attempted to fall back on the Third-Party Doctrine to salvage its case saying that the information was transmitted from the Andrews phone to a third party and thus he was not entitled to Fourth Amendment protections. However, the court did not accept this argument as the Hailstorm device forces the phone to reveal its location and the user does nothing to supply its location; in fact, as stated above, if the user is making a phone call the Hailstorm device will not work. This ruling from the appellate court in Maryland shows that perhaps justices are starting to reconsider giving the executive a blank check when it comes to testing the Fourth Amendment protections of citizens.

## **Chapter 12: Conclusion**

In all of this criticism of the Third-Party Doctrine, it is important to keep in mind that I am not advocating for the government to discontinue all use of electronic surveillance and to shut out the option of using third-parties as resources when investigating crimes that have been or will be committed. My opposition to the Third-

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<sup>186</sup> *Kyllo v. United States*

Party Doctrine, as it is currently understood, emanates from the ability of the government to, without a warrant presented upon probable cause, acquire vast amounts of information on any individual, especially if that individual is an American citizen.

When the founding fathers fought for independence from the British Empire they fought for many reasons, chief among them the right for citizens to be able to live their lives free from the tyranny of an oppressive and intrusive government. The writs of assistance executed in the colonies gave government officials carte blanche in searching any person or place they desired. As previously mentioned, the *Paxton Case* was the colonists' attempt to get rid of these writs within the colonial system. When that attempt failed, more drastic measures were brought to bear on the situation.

The original meaning of the Fourth Amendment seemed to suggest that the amendment was created to stop the use of general warrants and protect the privacy of citizens. In today's digital world the existence of the Third-Party Doctrine brings back the threat of the general warrants without the need to even secure a warrant from a judge. It is for these reasons and more that the continued existence of the Third-Party Doctrine puts in jeopardy the protections against unreasonable search and seizure envisioned by the framers of the fourth amendment. This doctrine allows the government to circumvent all constitutional protections to search massive amounts of data at will without cause.

At the time of creation of the constitution specific warrants had won the battle against general warrants and in the Fourth Amendment this was codified by the particularity clause and probable cause requirements. It is no stretch of the imagination

to believe the framers of the Constitution would be appalled at the amount of data for Third-Party Doctrine gives the government access to without requiring a warrant.

While the amount of data accessible to the government via third parties in the 1970's might have been acceptable to facilitate the creation of the third-party doctrine; times have since changed substantially, and the risk posed to the privacy of individuals and the harm to constitutionally protected rights is at a point where the continuation of the Third-Party Doctrine is no longer legally sustainable.

With Justice Sotomayor's concurrence in *Jones* and the decision by the appellate court in *State v. Andrews*, there is a reason to believe that new legislation and/or a shift in judicial thinking might be occurring and will lead to a strengthening of Fourth Amendment protections. Along with these optimistic signs from the judicial branch, there are legislators like Senator Ron Wyden and others that show some fight in the legislative branch. This is a start; however, in order to make sure this issue is taken seriously media attention and a groundswell of public outrage would go far in helping to achieve lasting change.

At a time when leaked government documents bring headlines of domestic spying and outrage from the citizenry, it is important to understand that these are not the only Fourth Amendment questions at stake. The Third-Party Doctrine, created by the Supreme Court in the late 1970's after a slew of conservative appointments, also raises Fourth Amendment concerns. It is all but impossible to take part fully in today's digital world without giving information to third party providers.

Up to this point, scholarly attention on the Third-Party Doctrine revolved around debating the legitimacy of the doctrines existence, not on a discussion of the doctrines

origin. This doctrine was produced by a conservative reactionary Supreme Court filled with Richard Nixon's appointees who intended to promote a strict constructionist viewpoint by justices and handing down decisions to endorse a law and order atmosphere. By understanding the origin of the Third-Party Doctrine, the question of its continued existence in Fourth Amendment jurisprudence can be discussed. The remedy to the threat posed by the Third-Party Doctrine to the Fourth Amendment is not some complex judicial test or abstruse Supreme Court decision; it is deceptively simple: get a warrant.



## References

“1496s15.pdf.” 2016. Accessed April 24.

<http://www.mdcourts.gov/opinions/cosa/2016/1496s15.pdf>.

“*A General Abridgement of Law and Equity*” (23 Vols. Aldershot, 1742-56), vol. 19, pp. 512-13.

“Article: Quantifying Katz: Empirically Measuring ‘Reasonable Expectations of Privacy’ in the Fourth Amendment Context.” ///

“ARTICLE: The Future of Digital Evidence Searches and Seizures: FOURTH AMENDMENT FUTURE: REMOTE COMPUTER SEARCHES AND THE USE OF VIRTUAL FORCE.” ///

“ARTICLE: THE PURPOSE OF THE FOURTH AMENDMENT AND CRAFTING RULES TO IMPLEMENT THAT PURPOSE.”

“ARTICLE: Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search.” ///

Bailey, Michael A., *Ideological Leanings of Supreme Court Justices*. Digital image. *Georgetown.edu*. N.p., June 2012. Web. Apr. 2016.  
<[http://www9.georgetown.edu/faculty/baileyma/Data/Data\\_Measuring1950to2011\\_June2012.htm](http://www9.georgetown.edu/faculty/baileyma/Data/Data_Measuring1950to2011_June2012.htm)>

“Bill of Rights - The Virginia Declaration of Rights.”

“Bill of Rights: Massachusetts Constitution of 1780, PT. 1.”

“Bill of Rights: North Carolina Ratifying Convention, Declaration of Rights and Other Amendments.”

“Bonham’s Case” (C.P. 1610), 8 Coke 113b, 118; 77 E.R. 646 at 652-53

*Boyd v. United States*, 116 U.S. 616 (1886).

“Brief of Gridley, *Paxton’s Case*” (Mass. Sup. Ct. 22-24 Feb. 1761), *Mass. Reports*, Quincy ed., p.476; J. Adams, *Works*, vol. 2, p.522; *idem.*, *Legal Papers*, vol. 2.

“Brief of Thatcher, *Paxton’s Case*” (Mass. Sup. Ct. 22-24 Feb. 1761), *Mass. Reports*, Quincy ed., p.p. 469-70; J. Adams, *Works*, vol. 2, p.522; *idem.*, *Legal Papers*, vol. 2.

*California Bankers Assn. v. Shultz*, 416 U.S. 21, 94 S. Ct. 1494, 39 L. Ed. 2d 812, 1974 U.S.

“California v. Ciraolo.” 2016. *LII / Legal Information Institute*. Accessed April 24. <https://www.law.cornell.edu/supremecourt/text/476/207>.

*California v. Greenwood*, U.S. 35 (1988).

“COMMENT: The Kyllo Conundrum: A New Standard to Address Technology That Represents a Step Backward for Fourth Amendment Protections.” 2002, January.

“Constitution of Maryland - November 11, 1776.” 1998. Text. December 18. [http://avalon.law.yale.edu/17th\\_century/ma02.asp](http://avalon.law.yale.edu/17th_century/ma02.asp).

Cuddihy, William J. 2009. *The Fourth Amendment: Origins and Original Meaning, 602-1791*. Oxford; New York: Oxford University Press.

Dahl, Robert A. 1957. “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker.” *J. Pub. L.* 6: 279.

David Snyder, *The NSA's "General Warrants": How the Founding Fathers Fought an 18th Century Version of the President's Illegal Domestic Spying*, <https://www.eff.org/files/filenode/att/generalwarrantsmemo.pdf>

“EBL Reader - Digital Person: Technology and Privacy in the Information Age.” 2015.

Epstein, Lee. 1998. *The Choices Justices Make*. Washington, D.C: CQ Press.

Epstein, Lee, Jack Knight, and Andrew D. Martin. 2001. “Supreme Court as a Strategic National Policymaker, The.” *Emory LJ* 50: 583.

*Ex Parte Jackson*, 96 U.S. 727

Farivar, Cyrus. 2015. “Google: Proposed Government-Sanctioned Hacking Is a Threat to Us All.” *Ars Technica*. February 18. <http://arstechnica.com/tech-policy/2015/02/google-proposed-government-sanctioned-hacking-is-a-threat-to-us-all/>.

*Florida v. Riley*, 488 U.S. 445 (1989).

“Fourth Circuit Adopts Mosaic Theory, Holds That Obtaining ‘extended’ Cell-Site Records Requires a Warrant - The Washington Post.”

Friday, Rachel Levinson-Waldman, April 1, and 2016 at 12:05 PM. 2016. “Four Takeaways From State v. Andrews.” *Just Security*.

Gormley, Ken. 1992. “One Hundred Years of Privacy.” *Wis. L. Rev.*, 1335.

Harper, Jim. 2011. "Escaping Fourth Amendment Doctrine after Jones: Physics, Law, and Privacy Protection." *Cato Sup. Ct. Rev.*, 219.

Henderson, Stephen E. 2012. "After United States v. Jones, after the Fourth Amendment Third Party Doctrine." *North Carolina Journal of Law & Technology* 14: 431.

*Hoffa v. United States*, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374, 1966 U.S.

"James Otis: Against Writs of Assistance." 2015. Accessed October 13.  
<http://www.nhinet.org/ccs/docs/writs.htm>.

*Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576, 1967

Kerr, Orin S. 2010. "Fourth Amendment Remedies and Development of the Law: A Comment on *Camreta v. Greene* and *Davis v. United States*." *Cato Sup. Ct. Rev.*, 237.

Kozinski, Alex, and Eric S. Nguyen. 2011. "Has Technology Killed the Fourth Amendment." *Cato Sup. Ct. Rev.*, 15.

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

*Lewis v. United States*, 385 U.S. 206, 87 S. Ct. 424, 17 L. Ed. 2d 312, 1966 U.S.

*Lopez v. United States*, 373 U.S. 427 (1963).

Maclin, Tracey. 2013. *The Supreme Court and the Fourth Amendment's Exclusionary Rule*. Oxford; New York: Oxford University Press.

Martin, Andrew D., and Kevin M. Quinn. *Ideological Leanings of Supreme Court Justices*. Digital image. N.p., 2015. Web. Apr. 2016.  
<<http://mqscores.berkeley.edu/measures.php>>.

McMahon, Kevin J. 2007. *Presidents, Political Regimes, and Contentious Supreme Court Nominations: A Historical Institutional Model*. Law & Social Inquiry. Volume 32, Issue 4, 919-954.

McMahon, Kevin J. 2011. *Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences*. Chicago: The University of Chicago Press.

"Microsoft Word - 1-TOC 86-3.docm - 86\_3\_Clancy.pdf." 2015. Accessed October 28.  
[http://ilj.law.indiana.edu/articles/86/86\\_3\\_Clancy.pdf](http://ilj.law.indiana.edu/articles/86/86_3_Clancy.pdf).

"Microsoft Word - Generalwarrantsmemo.doc - Generalwarrantsmemo.pdf." 2015. Accessed October 9. <https://www.eff.org/files/filenode/att/generalwarrantsmemo.pdf>.

O'Brien, David M. 2011. *Constitutional Law and Politics*. 8th ed. New York: W.W. Norton.

*Olmstead v. United States* 277 U.S. 438

“Opinion of Pratt, *Entick v Carrington*” (C.P. [27 Nov.] 1765), *S.T.* vol., 19 (1753-71), p. 1065.

“Problem Loading Page.” 2015. Accessed November 19.

<http://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851/>.

“Proposed Amendments to the Constitution < James Madison < Presidents < American History From Revolution To Reconstruction and beyond.” 2015. Accessed October 28. <http://www.let.rug.nl/usa/presidents/james-madison/proposed-amendments-to-the-constitution.php>.

“Rethinking Privacy: Fourth Amendment ‘Papers’ and the Third Party Doctrine | Brennan Center for Justice.” 2015. Accessed October 9.

<https://www.brennancenter.org/analysis/rethinking-privacy-fourth-amendment-papers-and-third-party-doctrine>.

*Riley v. California*, No. 13-132, 573 U.S.

Segal, Jeffrey Allan. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK; New York: Cambridge University Press.

Serafino, Laurie Buchan. 2014. “I Know My Rights, So You Go’n Need a Warrant for That: The Fourth Amendment, Riley’s Impact, and Warrantless Searches of Third-Party Clouds.” *Berkeley Journal of Criminal Law* 19: 154.

Skowronek, Stephen. 1993. *The Politics Presidents Make: Leadership from John Adam to George Bush*. Cambridge, MA: Harvard University Press.

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

Slobogin, Christopher. 2007. *Privacy at Risk: The New Government Surveillance and the Fourth Amendment*. Chicago: University of Chicago Press.

*Smith v. Maryland* 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220, 1979

Starks, Tim. 2016. “Wyden Takes on Rule 41.” *Politico*. March 30.

<http://www.politico.com/tipsheets/morning-cybersecurity/2016/03/wyden-takes-on-rule-41-obama-administration-still-might-sanction-hackers-agencies-go-backward-213485>.

“State v. Andrews.” 2016.

Strandburg, Katherine J. 2010. “Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change.” *Md. L. Rev.* 70: 614.  
“SYMPOSIUM: THE SEARCH AND SEIZURE OF COMPUTERS AND ELECTRONIC EVIDENCE: THE FOURTH AMENDMENT ASPECTS OF COMPUTER SEARCHES AND SEIZURES: A PERSPECTIVE AND A PRIMER.”

“The Case for the Third Party Doctrine.” 2015. Accessed October 9.  
[http://www.americanbar.org/groups/public\\_services/law\\_national\\_security/patriot\\_debates2/the\\_book\\_online/ch4/ch4\\_ess2.html](http://www.americanbar.org/groups/public_services/law_national_security/patriot_debates2/the_book_online/ch4/ch4_ess2.html).

“The Fourth Amendment Third-Party Doctrine - R43586.pdf.” 2015. Accessed October 8. <https://www.fas.org/sgp/crs/misc/R43586.pdf>.

*United States v. Forrester*, 512 F.3d 500 (9th Cir. 2007). n.d.

*United States v. Graham*, 846 F. Supp. 2d 384 (D. Md. 2012),. n.d.

*United States v. Jacobsen*, 466 U.S. 109 (1984).

*United States v. Jones*, 565 U.S. \_\_\_\_ (2012)

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

*United States v. Lee*, 274 U.S. 559

*United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71, 1976 U.S.

*United States v. Warshak*, 631 F.3d 266

*United States v. White*, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453, 1971 U.S.

*United States v. Wurie*, No. 13-212, 573 U.S.