

DIVERGENCE OF INTERPRETATION OF THE FOURTH AMENDMENT IN CRIMINAL  
AND FOREIGN INTELLIGENCE SURVEILLANCE COURT CASES


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Abstract: This thesis analyses Supreme Court cases on the Fourth Amendment and Foreign Intelligence Supreme Court cases. By summarizing the development of Fourth Amendment case law and providing an overview of electronic surveillance and the creation of the Foreign Intelligence Surveillance Court, I will show how the warrant clause is applied differently in the FISA court than in normal jurisprudence. I argue that the fall of the trespass doctrine and establishment of the reasonable expectation of privacy test in *Katz v. United States*, as well as the establishment of the “special needs” exception to the warrant clause in *New Jersey v. T.L.O.*, has resulted in FISC warrants that do not meet the probable cause standards for criminal warrants.

Ordinary citizens often encounter issues of search and seizure, from luggage searches at airports to drug testing of student athletes, and Fourth Amendment questions come up at the US Supreme Court with similar frequency. More recently, the Fourth Amendment, which protects against unreasonable searches and seizures and general warrants, has become part of the national discussion with Edward Snowden's leaked documents on electronic surveillance by NSA and other government agencies. One such document was a court order from the Foreign Intelligence Surveillance Court (FISC or FISA court) demanding Verizon to give the NSA telephone metadata that included call and location information of United States citizens.<sup>1</sup> This has raised numerous question, including whether the FISA court has violated the Fourth Amendment by issuing such court orders.

The FISA court is a special court, separate from other criminal courts; the issue is whether or not FISC warrants apply the same probable cause as in criminal courts and if this is a problem. In this paper I will review Supreme Court cases and FISA Court cases and their relationship. Will begin with a summary of the Fourth Amendment, the legal mechanism that allows it to be enforced, and the search and seizure clause. Also, will analyze the changes in the Supreme Court's interpretation of the search and seizure clause, resulting in the decline in the trespass doctrine and the rise of the reasonable expectation of privacy test. Likewise, will examine the warrant clause, how warrants are executed in criminal situations, and instances when a warrant is not needed. Then I will provide an overview of electronic surveillance and the creation of the Foreign Intelligence Surveillance Court and how the warrant clause applies to that special court. Therefore, by showing the changes in interpretation of the Fourth Amendment in criminal court and a review of the FISA court, I will illustrate that FISC warrants are very

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<sup>1</sup> Greenwald, Glenn. "NSA collecting phone records of millions of Verizon customers daily." *The Guardian*. 06 June 2013: Web. <http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order>

different and violate the reasonable expectation of privacy test used in criminal cases, but if this is a problem it is one for legislatures as it fits within the Court's interpretation of the "special needs" exception for the warrant clause.

The interpretation and application of the Fourth Amendment has changed over the years. Its history cannot be captured as a simple pendulum swing between protecting individual rights and public security. The Fourth Amendment was dormant for more than a century; as it was not until *Weeks v. United States* in 1914 that the "exclusionary rule" was established, making the Amendment enforceable at the federal level. The Fourth Amendment became a key point in the US criminal justice system in 1961 when in *Mapp v. Ohio* the "exclusionary rule" was applied to the states. Since the sixties, Fourth Amendment case law has grown exponentially and the Court has deliberated on cases ranging from the definition of a search to replacing the trespass doctrine with the reasonable expectation of privacy test. Over the years the reasonableness standard has expanded protections of the Fourth Amendment into public spaces. At the same time, exceptions to the "exclusionary rule" and warrant clause seem to have resulted in less protection for individual privacy. In 1978 the FISA court was established, which has also expanded the "special needs" searches exception to the warrant clause greatly.

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#### *Amendment IV*

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

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The literature surrounding the Fourth Amendment can be divided into three categories, the first focussing on the historical origin of the amendment. The Fourth Amendment has strong roots in the American Revolution, when British writs of assistance were strongly resisted. Unlike a specific warrant, where the boundaries of its application are clearly outlined, a writ of assistance is a general warrant that is not confined to any person, place, or thing. As Samuel Dash, who was chief counsel for the Senate Watergate Committee writes, “The ancient and sacred right of personal privacy was thought by the leaders of the American Revolution to have been recognized in the Magna Carta . . . [and] they demonstrated this belief by recognizing a preexisting right in the Fourth Amendment . . . [which] begins with the words “The right of the people.””<sup>2</sup> Very influential British and American lawyers, such as Lord Camden and James Otis, held the belief that general searches and seizures were intolerable. However, it is a legend that the Magna Carta protected against unreasonable searches and seizures, the Petition of Rights was never signed and even after the Glorious Revolution of 1688 when the British monarchy did swear to rule under a Bill of Rights, “there was no provision in this Bill of Rights protecting against unreasonable searches and seizures.”<sup>3</sup>

Much of the colonial American and British rhetoric is based in the ancient maxim “every man’s home is his castle,” an assertion that the home is a special place of privacy, and even though this was true between citizens but not of the government.<sup>4</sup> As William Cuddihy points out, “the intellectual development of the specific warrant started in England, but by 1760, it had not yet reached the logical terminus of one house or person per warrant . . . [though the]

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<sup>2</sup> Dash, Samuel. *The Intruders: Unreasonable Searches and Seizures from King John to John Ashcroft*. New Brunswick: Rutgers University Press. 2004. 5.

<sup>3</sup> Ibid, 24.

<sup>4</sup> Cuddihy, William J. *The Fourth Amendment: Origins and Original Meaning 602-1791*. New York: Oxford University, 2009. lxiii-lxiv.

exception was Massachusetts.”<sup>5</sup> Therefore, even though the concepts of the home as a protected space and general warrants as unreasonable were not present in the Magna Carta or truly in British law, the sentiment was enough to prompt them as an issue of the Revolutionary War and the inclusion of those rights in the US Bill of Rights.

Another part of the literature often discussed by scholars is on the exact meaning of the Fourth Amendment. The amendment is usually thought as two clauses. The first clause is the Search and Seizure Clause: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”<sup>6</sup> The second clause is the Warrant Clause: “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>7</sup> Akhil Amar, a Yale professor of law, has argued “that the Fourth Amendment simply requires reasonable searches . . . [and] the warrant clause, does not require – or even prefer – warrants in all but exigent circumstances, but simply spells out the procedures that must be obeyed is a warrant is issued.”<sup>8</sup> This interpretation lead to the conclusion that if a search is reasonable than a warrant is not required. However, “Other scholars, like Jacob Landynski, argue that the warrant clause is the dominant clause of the Amendment.”<sup>9</sup> Therefore, what makes a search reasonable is that was conducted under a warrant and “the reasonableness clause, simply reemphasizes the requirement that only valid warrants be issued.”<sup>10</sup> The Supreme Court reads the clauses as joined, with the “and,” and thus reads the second clause as prohibiting

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<sup>5</sup> Cuddihy, William J. *The Fourth Amendment: Origins and Original Meaning 602-1791*. New York: Oxford University, 2009. 327.

<sup>6</sup> US Constitution. Amend. IV.

<sup>7</sup> Ibid.

<sup>8</sup> Newman, Bruce A. *Against That “Powerful Engine of Despotism”: The Fourth Amendment and General Warrants at the Founding and Today*. New York: University Press of America, 2007. Print. xv.

<sup>9</sup> Ibid, xv.

<sup>10</sup> Ibid, xv.

general warrants.<sup>11</sup> By reading the clauses as joined, the Supreme Court concludes “that warrantless searches are generally unreasonable barring a number of exceptions.”<sup>12</sup> Of course the Supreme Court sometimes fluctuates in its interpretation of the words, usually reflecting the judicial interpretation of the justice writing the majority opinion.

Most of the literature surrounding the Fourth Amendment is about the courts’ changes in interpretation. This is because as Thomas K. Clancy, Joshua Dressler and Alan C. Michaels point out in their criminal procedure books, the case law cannot be understood separate from its development. It is important to place the Fourth Amendment in a historical context. For instance the slow rise of the Fourth Amendment is closely related to police history, as policing was informal and often heavily politicized in the beginning of American history.<sup>13</sup> With the era of Progressive Reform, the police became more structured and there was heavy pressure to allow an expansion of their power to enforce Prohibition.<sup>14</sup> Then with the civil rights movement there became much more focus on individual liberties instead of economic court cases. During this time Chief Justice Warren led the Supreme Court into a much more judicially liberal era. The Fourteenth Amendment, specifically the Due Process Clause, was applied to promote individual rights and strict procedural requirements upon law enforcement.<sup>15</sup> In this era, Miranda Rights were established and federal constitutional protections were incorporated in state courts. Since the Warren Court, the Supreme Court has grown more conservative, tending to rule more in favor of public security by weakening the exclusionary rule and expanding the “special needs” warrant exceptions. At the same time however, the Court has expanded personal privacy in

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<sup>11</sup> Cuddihy, William J. *The Fourth Amendment: Origins and Original Meaning 602-1791*. New York: Oxford University, 2009. xiii.

<sup>12</sup> *Ibid*, xiii.

<sup>13</sup> Clancy, Thomas K. *The Fourth Amendment: Its History and Interpretation*. Durham, North Carolina: Carolina Academic Press, 2008. Print. 43.

<sup>14</sup> *Ibid*, 42-43.

<sup>15</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1. 5<sup>th</sup> ed. San Francisco: Lexi Nexis, 2010. Print. 16-18.

public areas by replacing the “trespass doctrine” with the “reasonable expectation of privacy test.” Yet, understanding the changes in the FISA court’s application of the Fourth Amendment is more difficult as there is less literature. This is partly because it is a newer court, founded in the seventies, but it is mainly because many of the cases are classified. Even so, it is worth exploring the differences and similarities of the FISA court’s case law and that of the Supreme Court surrounding the Fourth Amendment.

## Exclusionary Rule and Good Faith Doctrine

Without the Exclusionary Rule, the Fourth Amendment would be useless. As Justice Day writes in *Weeks v. US* (1914), the case that established the Exclusionary Rule, “If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment ... is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”<sup>16</sup> Fremont Weeks was arrested for violating a federal statute by mailing lottery tickets. While he was arrested at work and his office was searched without a warrant, police officers went to his home and searched and seized all of his papers also without a warrant. The officers turned this evidence over to an US Marshall. The US Marshall and some officers later returned to Weeks’ home without a warrant and they seized more papers, including some that were not in visible sight and some that did not have anything to do with selling lottery tickets. In a unanimous decision, the Supreme Court determined that the search was illegal and ordered the return of property and the exclusion of the

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<sup>16</sup> *Weeks v. United States*. 232 U.S. Supreme Court 383, 393. 1914.

materials, which were “not in its judgment competent to be offered at the trial.”<sup>17</sup> For even though the Marshall was acting under the “color of his office” the property was seized illegally.

However, the Court held that the Fourth Amendment was inapplicable to the papers taken by the local police officers, since “Its limitations reach the Federal government and its agencies.”<sup>18</sup> Here, a warrant was necessary, and the invasion of the sanctity of Weeks’s home under these circumstances violated Weeks’ most basic constitutional rights. Also, the evidence used against Weeks would not have come into the possession of the district attorney unless the unlawful search and seizure had occurred. As Justice Day continues, “The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.”<sup>19</sup> However, because this ruling only established that evidence gained in an illegal search by federal officers is inadmissible in federal court, it resulted in the “silver platter doctrine” and it would be decades later until the Exclusionary Rule also applied to the states.

The development of the Exclusionary Rule mirrors the different eras of the Supreme Court and the changing interpretation of the Fourth Amendment. As Rebecca Shoemaker writes, the White Court (1910-1921), led by Chief Justice Edward Douglas White, “has frequently been described as conservative, stodgy, and unremarkable, but it should be noted that in its work in this era the Court tread carefully to craft the transition to the modern postwar era.”<sup>20</sup> The White “Court was, in most of its work, not a groundbreaking institution . . . [as] Many of the cases it

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<sup>17</sup> *Weekes v. United States*. 232 U.S. 383, 394. 1914.

<sup>18</sup> *Ibid*, 398.

<sup>19</sup> *Ibid*, 393.

<sup>20</sup> Shoemaker, Rebecca S. *The White Court: Justices, Rulings, and Legacy*. Santa Barbara, California: ABC-CLIO, 2004. Print. 3.

heard and decided dealt with issues and trends that extended back into the late 1800s.”<sup>21</sup> This is true in the case of *Weeks v. US*, which was largely influenced by *Boyd v. United States* (1886). In *Boyd* the Supreme Court held that the forced production of papers violated the Search and Seizure Clause of the Fourth Amendment and the Fifth Amendment’s protection against forced self-incrimination.<sup>22</sup> The Court’s decision was less of judicial activism and more of an echo of “The maxim that ‘every man's house is his castle’ is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.”<sup>23</sup> Also, excluding evidence from trial was not a new concept, for instance in *Adams v. New York* (1904) evidence was excluded on the basis of the hearsay rule.<sup>24</sup> The White Court was a more conservative era for the Supreme Court, hearing such cases as *Plessy v. Ferguson*, and its decision in *Weeks* was one based heavily on precedent, especially in the historical motivation of the Fourth amendment. Really, *Weeks* was one of the few White Court’s cases focusing “on the protections granted individuals under the Bill of Rights as later courts would,”<sup>25</sup> though it created a major case that has been relied on to give force to the Fourth Amendment since.

A doctrine closely related to the Exclusionary Rule, is Fruit of the Poisonous Tree, which is that evidence derived from an unlawful search or seizure should also be excluded. Shoemaker continues that “Near the end of White’s term of leadership, Justice Oliver Wendell Holmes Jr. took the opportunity to expand the Court’s position on the exclusionary rule [in] *Silverthorne Lumber Company v. United States*.”<sup>26</sup> In this case, Frederick W. Silverthorne was fined and

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<sup>21</sup> Shoemaker, Rebecca S. *The White Court: Justices, Rulings, and Legacy*. Santa Barbara, California: ABC-CLIO, 2004. Print. 3.

<sup>22</sup> *Weeks v. United States*. 232 U.S. Supreme Court 383, 393. 1914

<sup>23</sup> *Ibid*, 390.

<sup>24</sup> *Ibid*, 393.

<sup>25</sup> Shoemaker, 158.

<sup>26</sup> *Ibid*, 158.

imprisoned for not complying with a subpoena. While he was in custody federal officials searched his office without a warrant and took papers to be used in the trial. Justice Holmes wrote the majority opinion in this 7-2 decision that held that any knowledge or other derivation from unlawfully seized evidence also must be excluded from trial or else “It reduces the Fourth Amendment to a form of words.”<sup>27</sup> Also, this case held that “the rights of a corporation against unlawful search and seizure are to be protected”<sup>28</sup> which was an extension of *Hale v. Henkel* (1906) in relation to subpoenas. *Silverthorne* could have easily undone *Weeks* but the ruling instead strengthened the Exclusionary Rule.

Under the Taft Court (1924-1930) the Exclusionary Rule weakened. Since federal agents were limited in their searches and seizure by the Fourth Amendment, evidence could be illegally seized by state officials and past to the federal officials in a practice termed the “silver platter doctrine.” The Court during this era upheld the practice in *Bryars v. United States* (1927) and *Gambino v. United States* (1927). As Peter G. Renstrom writes in his study of the Taft Court, “In the wave of cases stemming from efforts to enforce Prohibition, the Taft Court backed away from view contained in *Silverthorne*.”<sup>29</sup> The Court reflected the conservatism of Taft’s Republican party but was also subtly sensitive to individual rights, for even though “many of the Taft Court rulings did not further either civil liberties or civil rights, it was the Taft Court that commenced serious debate on these issues.”<sup>30</sup> In *Byars v. United States*, the Court ruled that “When a federal officer participates officially with state officers in a search, so that, in substance and effect, it is their joint operation, the legality of the search and of the use in evidence of the

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<sup>27</sup> *Silverthorne Lumber Co. v. United States*. 251 U.S. Supreme Court 385, 391. 1920.

<sup>28</sup> *Ibid*, 392.

<sup>29</sup> Renstrom, Peter G. *The Taft Court: Justices, Rulings, and Legacy*. Santa Barbara, California: ABC-CLIO, 2003. Print. 209.

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

things seized, is to be tested, in federal prosecutions, as it would be if the undertaking were exclusively his own.”<sup>31</sup> This practice was a roundabout way for federal agents to use illegally obtained evidence and encouraged abuse of the Fourth Amendment.<sup>32</sup> The silver platter doctrine would be in place years later until the Warren Court.

The Warren Court (1953-1969) was a period of revolution for the Court, shifting its focus to individual liberties. The New Deal, civil rights movement, the Red Scare, and decline of substantive due process all influenced the rulings of the Warren Court.<sup>33</sup> Melvin I. Urofsky continues in his book on the Warren Court, that prior to the 1930s the Court was dominated by economic rights and the main “debate [was] over incorporation, that is, the application to the states of the liberties guaranteed in the Bill of Rights through the Fourteenth Amendment’s due process clause.”<sup>34</sup> First, the Warren Court eliminated the silver platter doctrine in *Elkins v. United States* (1960). In *Wolf v. Colorado* (1949) the Court ruled that states were not required to adopt the exclusionary rule, as “the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule with respect to evidence illegally seized by state agents.”<sup>35</sup> Many states did adopt the exclusionary rule, such as California which was challenged and upheld in *People v. Cahan* (1955). In a 5-4 decision, the court concluded that “To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer”<sup>36</sup> and the silver platter doctrine is illegal. However, the Court did not

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<sup>31</sup> *Byars v. United States*. 273 U.S. Supreme Court 28, 29. 1927.

<sup>32</sup> Renstrom, Peter G. *The Taft Court: Justices, Rulings, and Legacy*. Santa Barbara, California: ABC-CLIO, 2003. Print. 209.

<sup>33</sup> Urofsky, Melvin I. *The Warren Court: Justices, Rulings, and Legacy*, Santa Barbara, California: ABC-CLIO, 2001. Print. 3.

<sup>34</sup> *Ibid*, 3.

<sup>35</sup> *Elkins v. United States*. 364 U.S. Supreme Court. 206, 212. 1960.

<sup>36</sup> *Ibid*, 214.

incorporate the Amendment as “With the ultimate determination in *Wolf* . . . we are not here directly concerned.”<sup>37</sup> Instead incorporation would be addressed just a year later.

*Mapp v. Ohio* (1961) applied the exclusionary rule to the states. Miss Mapp was convicted on possessing obscene material that was unlawfully seized after her home was illegally searched. The police received an anonymous tip that a fugitive was residing in the house as well as illegal paraphernalia. The police asked to search the house, to which Miss Mapp denied until a warrant could be presented. Later the police broke into the house, restrained Miss Mapp, and searched the residence where they found the material in a drawer and suitcase. No warrant was ever procured during the trial and it is believed the paper that was presented to Miss Mapp when she demanded to see a warrant was in fact an affidavit. In a 6-3 decision the Court held that the Fourth amendment does apply to state criminal proceedings.<sup>38</sup> The Court focused on the Fourth Amendment and overturned *Wolf v Colorado* and incorporated *Weeks*.

The Court observed that the decision in *Weeks*, the majority of states now have enacted exclusionary rules on the state level. Yet, even though many states had established the exclusionary rule, the *Mapp* decision was still landmark and “required a complete change in the outlook and practices of state and local police” as in many states “search warrants were virtually unknown in city police departments.”<sup>39</sup> For instance, “Joseph A. Hadley, head of the city attorney’s criminal division [in Minneapolis] from 1929 to 1954, said he could remember only two search warrants issued in that period . . . [while the] city attorney’s office has no record of any issued since 1954.”<sup>40</sup> Ending the “silver platter” custom of state officials completing illegal searches and offering that evidence to federal officers helped reaffirm the ideal of justice and

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<sup>37</sup> *Elkins v. United States*. 364 U.S. Supreme Court. 206, 240. 1960.

<sup>38</sup> *Mapp v. Ohio*. 367 U.S. Supreme Court 643. 1961.

<sup>39</sup> Griswold, Erwin N. *Search and Seizure: A Dilemma of the Supreme Court*. Lincoln: University of Nebraska Press, 1975. Print. 8.

<sup>40</sup> *Ibid*, 8.

streamlined the warrant system. Between the many cases trying to restrain police abuse of the “silver platter” custom such as *Rea v. US*, *Elkins v. US*, and *Jones v. US* and the test from *Wolf* there was much confusion on what could not be allowed into trial and *Mapp* made the rules more uniform.<sup>41</sup>

The Court had already incorporated other rights, such as the right of free speech and right to a fair, public trial, so reasonably the right against illegal searches and seizures, which is made enforceable by the Exclusionary Rule, was extended to the states as well. The Court relies on the Fourteenth Amendment for the incorporation of the Fourth as well as the Fourteenth’s support of the right of privacy and due process, which had been established to be enforceable to the States.<sup>42</sup> The Court does reply to *People v. Defore*, which the dissent heavily argues, but the fear that “the criminal is to go free because the constable has blundered” is less than the need for “judicial integrity.”<sup>43</sup> As Justice Clark writes, “Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”<sup>44</sup> *Mapp v. Ohio* is a landmark case, however the Exclusionary Rule does not apply in all situations and over time more limitations have been imposed on it.

The Burger Court (1969-1986) is the start of the shift towards conservatism in application of the Exclusionary Rule after the Warren Court. In *United States v. Calandra* (1974), the Court held that a witness before a grand jury could not invoke the exclusionary rule to bar questioning based on evidence obtained in an unlawful search and seizure.<sup>45</sup> This case effectively ruled grand jury hearings as one of the places the Exclusionary Rule does not apply, for it witness were

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<sup>41</sup> *Mapp v. Ohio*. 367 U.S. Supreme Court 643, 653. 1961.

<sup>42</sup> *Ibid*, 653.

<sup>43</sup> *Ibid*, 658.

<sup>44</sup> *Ibid*, 658.

<sup>45</sup> *United States v. Calandra*. 414 U.S. Supreme Court 383, 346. 1974.

allowed to invoke the rule this would interfere with the jury's duties.<sup>46</sup> In *United States v. Havens* (1980) "held that illegally seized evidence may be used for impeachment only if the evidence contradicts a particular statement made by a defendant in the course of his direct examination."<sup>47</sup> This is a weaker interpretation of the Exclusionary Rule, especially compared to *Silverthorne Lumber Co. v. United States*, where the Court claimed "that the exclusionary rule not only commands that illegally seized evidence "shall not be used before the Court, but that it shall not be used at all."<sup>48</sup> The main purpose of the ruling in *Havens* is to discourage people from lying and follows *Harris v. New York* (1971) and *Oregon v. Hass* (1975), cases where statements taken in violation of the individual's Miranda rights were admissible in court to inculcate the testimony of the defendant.<sup>49</sup> These two limitations of the exclusionary rule focus on maintaining honesty in court proceedings and shifting some of the burden away from police.

However, under the Burger Court civil recourse for Fourth Amendment violations was established. The Exclusionary Rule established a criminal avenue of recourse in the instance of a violation of the Fourth Amendment, but a judicial restraint argument was that could be solved in a civil manner. However, if one was jailed on illegally seized evidence, being able to sue for damages still makes the Fourth Amendment little more than words on the Constitution. However, there were still individuals who suffered Fourth Amendment violations who did not have standing in criminal court and *Bivens v. Six Unknown Named Agents* (1971) changed all of that drastically. Federal Narcotics Agents searched the home of Webster Bivens and arrested him without a warrant and without probable cause. They handcuffed him in front of his family, threatened to arrest the entire family, and searched his apartment. He was taken to a federal

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<sup>46</sup> *United States v. Calandra*. 414 U.S. Supreme Court 383, 339. 1974.

<sup>47</sup> *United States v. Havens*. 446 U.S. Supreme Court 620, 621. 1980.

<sup>48</sup> *Ibid*, 624.

<sup>49</sup> *Ibid*, 624.

courthouse in Brooklyn where was interrogated, booked, and stripped searched. Drug charges were filed but later dropped. Bivens sued in federal district court arguing that the search and arrest were illegal as there was no warrant, unreasonable force was used, and that he suffered great humiliation, embarrassment, and mental suffering and thus sought \$15,000 from each agent (\$90,000 total). In a 6-3 decision the Court held that actions for damages may be brought against federal agents acting unlawfully as they carry out their duties of the United States.<sup>50</sup> Court determined that an individual holds the right to action for monetary damages when no other federal remedy is provided because of a violation of a constitutional right, based on the principle that for every wrong, there is a remedy.<sup>51</sup> Unless of course Congress has limited such a right of recovery or there are “special factors” an individual can recover damages like any other civil action. This is protected under the Fourth Amendment, for even though it does not protect the right for monetary damages it does require relief when a violation occurs.

Overall, the Burger Court was a period of transition from the liberal Warren Court to the conservative Rehnquist Court, with the most notable case that weakened a decision from the previous decades was *United States v. Leon* (1984). *US v. Leon* established the Good Faith Doctrine, which is that the “exclusionary rule should not be applied so as to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid.”<sup>52</sup> It was established that “the affidavit was insufficient to establish probable cause,”<sup>53</sup> however the Court argued in the 6-3 decision that it is a balancing act between an individual’s interest in privacy and public security. This case established that the Exclusionary “rule should be modified

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<sup>50</sup> *Bivens v. Six Unknown Federal Named Agents*. 430 U.S 388. 1971.

<sup>51</sup> *Ibid*, 395.

<sup>52</sup> *United States. v. Leon*. 468 U.S. Supreme Court 897, 898. 1984.

<sup>53</sup> *Ibid*, 902.

to permit the introduction of evidence obtained by officers reasonably relying on a warrant issued by a detached and neutral magistrate.”<sup>54</sup> In the same year, the Court also decided *Massachusetts v. Sheppard* (1984), where a judge issued an erroneous warrant, however because officers acted in good faith it was valid.

The Rehnquist Court (1986-2005), was still predominately conservative judges like the Burger Court, however it was never as strong as conservative as the Warren Court was liberal. In *Correctional Services Corporation v. Malesko* (2001) the Rehnquist Court limited *Bivens*, the case that allowed individuals to sue government officials, to claims from the Fourth, 5<sup>th</sup>, and 8<sup>th</sup> Amendments. Also, the Rehnquist Court continued the Burger Court’s application of the Good Faith Doctrine. *Illinois v. Krull* (1987) was a case where there was an Illinois law that police did not need a warrant to search car part shops and car shops when they arrested Krull, so even though this law was found unconstitutional, the police still acted pursuant to the law and in good faith that the search was valid so the evidence could be admitted in trial. In the 5-4 ruling, the Court held the “Application of the exclusionary rule in these circumstances would have little deterrent effect on future police misconduct, which is the basic purpose of the rule”<sup>55</sup> since the officers were simply following the statute as written. Also, in *Arizona v. Evans* (1995) the Court ruled that evidence seized because of erroneous or out of date computer records can still be admitted. In this case, the officer searched the individual because he checked the records and there was a warrant out for the individual, however, the County Clerk had just forgot to update the materials.<sup>56</sup>

The Roberts Court (2005-present) became more conservative with the retirement of Justice O’Connor, but with the additions such as Justice Sotomayor the Court has become more

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<sup>54</sup> *United States v. Leon*. 468 U.S. Supreme Court 897, 913. 1984.

<sup>55</sup> *Illinois v. Krull*. 480 U.S. Supreme Court 340, 341. 1987.

<sup>56</sup> *Arizona v. Evans*. 514 U.S. Supreme Court 1. 1995.

activist, though still more leaning towards public security than individual rights. For instance, in *Ashcroft v. Iqbal* (2009) the Court did not allow a Pakistani imprisoned post 9/11 because he was “a person of high interest” to bring action against the FBI or former Attorney General Ashcroft. That case was an extension of a case from Burger Court, *Los Angeles v. Lyons* (1983), which established the plaintiff must meet a standing requirement for each form of relief sought and since *Ashcroft* did not have standing he could not sue as the ruling in *Bivens* did not apply to him. Also, in *Herring v. US* (2009) the Court held that a criminal defendant's Fourth Amendment rights are not violated when police mistakes that lead to unlawful searches are merely the result of isolated negligence and “not systematic error or reckless disregard of constitutional requirements.”<sup>57</sup> Evidence obtained under these circumstances is admissible and not subject to the exclusionary rule, which will be interesting for “as policing becomes ever more reliant on computerized systems, the number of illegal arrests and searches based on negligent recordkeeping is poised to multiply.”<sup>58</sup> More recently, the Court ruled in *Davis v. US* (2011) upheld *Illinois v. Krull* in that if officers are following precedent (it was a law in *Krull*) that was constitutional at the time of the search but later to be ruled unconstitutional that evidence can still be presented in court.

Orin Kerr for the *Washington Post* writes in an article that “Back in the middle of the 20<sup>th</sup> Century, the federal courts often found ways to impose an exclusionary rule for statutory violations in federal court”<sup>59</sup> for anything ranging from violation of the Comminutions Act to the Federal Rules of Criminal Procedure. This “free-form approach” was motivated but the Court’s opinion that it “had an inherent power to control evidence in their own cases, so the Court could

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<sup>57</sup> *Herring v. United States*. 555 U.S. Supreme Court 135, 1. 2009.

<sup>58</sup> *Ibid*, 12.

<sup>59</sup> Kerr, Orin. “The Volokh Conspiracy: The posse comitatus case and changing views of the exclusionary rule”. *The Washington Post*. 15 September 2014. Web.

be creative in fashioning what evidence could come in to deter bad conduct.”<sup>60</sup> However, “By the 1980s, after Warren Court revolution, the Supreme Court had a different view of the exclusionary rule”<sup>61</sup> and in response to the large expansion of the rule the Court started to limit the rule. This is not necessarily problematic for protecting individual’s rights, as “the Burger and Rehnquist Courts saw suppression as a doctrine that had to be rooted in deterrence of constitutional violations and not just something that courts didn’t like or found offensive.”<sup>62</sup> In this manner, the slow development of the Exclusionary Rule, *Weeks* was not until 1914, many decades after the ratification of the Bill Rights in 1791, and the rise of it with *Mapp v. Ohio* in 1961 to its limitation in the 1980’s to present mirrors that of the Supreme Court’s general interpretation of the Fourth Amendment over the years.

## Search and Seizure Clause

### What is a search?

The text of the Fourth Amendment states that people have the right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”<sup>63</sup> however it does explicitly define what a search is, what a seizure is, and what makes either of those unreasonable. The Exclusionary Rule makes the interpretation of this clause enforceable, and as the interpretation of that rule has changed over the years, so has the interpretation of the Search and Seizure Clause. First, the Amendment applies to searches and seizures made by the

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<sup>60</sup> Kerr, Orin. “The Volokh Conspiracy: The posse comitatus case and changing views of the exclusionary rule”. *The Washington Post*. 15 September 2014. Web.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> US Constitution. Amend. IV.

government and individuals acting as agents of the government and not to private parties.<sup>64</sup> Thus, “evidence secured by a private individual – no matter how unreasonable or illegal the methods used to obtain it – is constitutionally admissible or illegal the methods to obtain it – is constitutionally admissible in a criminal proceeding against the victim of the improper conduct.”<sup>65</sup> Therefore, if a private investigator uncovers evidence of an individual doing something illegal by breaking into their house that material can be entered into court, but not if a police officer uncovered that material.

The people in question who have the right against unreasonable searches and seizures is also at issue when defining a search. In *United States v. Verdugo-Urquidez* (1990) the Court ruled that the Fourth Amendment does not apply to property owned by a nonresident alien and located in a foreign country. In this case, Drug Enforcement Agents searched the Mexican property of a Mexican citizen with an authorization for the Mexican police but not from an US magistrate. The Court ruled that even though Verdugo-Urquidez was on trial in the US the Fourth Amendment would only apply to him through treaty or legislation.<sup>66</sup> Also, it was ruled that since Verdugo-Urquidez was brought to the US against his will to stand trial, “his legal but involuntary presence here does not indicate any substantial connection with this country.”<sup>67</sup> The court reasoned that “people” in the Fourth Amendment “refers to a class of persons who are part of a national community who have otherwise developed sufficient connection with this country to be considered part of that community.”<sup>68</sup> However, this definition still leaves many questions

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<sup>64</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1. 5<sup>th</sup> ed. San Francisco: Lexi Nexis, 2010. Print. 57.

<sup>65</sup> *Ibid*, 57.

<sup>66</sup> *United States v. Verdugo-Urquidez*. 494 U.S. Supreme Court 259. 1990.

<sup>67</sup> *Ibid*, 260.

<sup>68</sup> *Ibid*, 260.

of who is part of the definition of “people” and this tension can be especially seen in the Federal Court of Intelligence Surveillance’s definition of “people.”

The next issue in determining the applicability of the Search and Seizure clause to evidence is if it is a “person, house, paper, or thing.” It is very rarely that a piece of evidence is not one of those four items, especially because the Court recognizes the ambiguity of the statement and that technology influences the definition of those items. A “person” is a body, including exterior and interior materials. Therefore, a search incident to arrest must be limited to a simple pat down, with the intention of finding weapons to maintain the safety of the officers and the surrounding individuals, as established in *Terry v. Ohio* (1968) and subsequent Stop and Frisk case law. Interior of a person’s body includes blood, as established in *Schmerber v. California* (1966) and *Missouri v. McNeely* (2013). However, as found in *Maryland v. King*, taking a DNA swab, just like fingerprinting and photographing, is not a search of “persons” if it occurs incident to an arrest. Therefore, if a victim does not want to give the police a bullet lodged in them as evidence, the police must get a warrant for it, as held in *Winston v. Lee* (1985), but if they arrest an individual they can take a cheek swab without a warrant. Also, “Early in the twentieth century, the Supreme Court held that the Fourth Amendment applied only to searches and seizures of material things.”<sup>69</sup> *Olmstead v. United States* (1928) is a very important as it firmly established the Trespass Doctrine, and since eavesdropping or reading lips did not result in any physical violation it did not apply to the clause of “person, house, paper or thing.” However, with the transition of the Court to the Reasonable Expectation of Privacy Doctrine, heralded by *Katz v. United States* (1967), it has come to incorporate warrantless electronic surveillance of conversations as a violation of “person.”

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<sup>69</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1. 5<sup>th</sup> ed. San Francisco: Lexi Nexis, 2010. Print. 64.

The term “houses” encompasses “virtually all structures that people commonly use as residence, whether on a temporary basis, such as a hotel room, or on a long-term basis, such as an apartment.”<sup>70</sup> It also includes auxiliary and attached buildings such as a garage, shed, or guest house as established in *Taylor v. United States* (1932). However, it does include RVs, which is considered a vehicle as established in *California v. Carney* (1985). The Reasonable Expectation of Privacy Doctrine has also influenced the definition of “house.” The Fourth Amendment has extended to business, most notably *Silverthorne Lumber Company v. United States* (1920) which helped establish the Exclusionary Rule. However, “commercial structures are treated differently than residential property, primarily because expectations of privacy in the former are less than in homes.”<sup>71</sup> The application of the Fourth Amendment is still very much influenced by the concept that the house is a special area, that “a man’s home is his castle.”

The term “paper” includes personal papers such as diaries, some business records, mail, and electronic mail. Email has been more of a contested definition, cases like *United States v. Warshak* (2010) at the US Court of Appeals for the 6<sup>th</sup> District have found that there is a reasonable expectation of privacy in emails. However, the application of the definition in the Federal Court of Intelligence Surveillance is more ambiguous. The term “effects” includes “automobiles, luggage and other containers, clothing, weapons, and even the fruits of a crime.”<sup>72</sup> As established in *Illinois v. Caballes* (2005) and *United States v. Place* (1983) dogs can be used to sniff for drugs without a warrant, or even reasonable suspicion. However, this interpretation of “effects” is changing, for in *Florida v. Jardines* (2013) the Court ruled that police need a warrant to use dogs to sniff for drugs outside someone’s home and in *Rodriguez v. U.S.* (2015) the Court

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<sup>70</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1. 5th ed. San Francisco: Lexi Nexis, 2010. Print. 64.

<sup>71</sup> *Ibid*, 64.

<sup>72</sup> *Ibid*, 65.

ruled that dogs could not be used to sniff automobiles unless there is reasonable suspicion. Also, the Court ruled in a 7-2 decision in *Bond v. United States* (2000) “that a passenger has a reasonable expectation that his luggage will not be felt in “an exploratory manner”.”<sup>73</sup> In this manner, as the Court shifts in its emphasis of the Exclusionary Rule on public security and away from the Trespass Doctrine, the definition of a search of a search of papers or effects is becoming more protecting of individual rights.

There are somethings that are not considered items protected by the Fourth Amendment. No warrant is needed if them item to be searched or seized does not pass the reasonableness standard. Abandoned property is not protected by the Fourth Amendment, this includes a vacated hotel room<sup>74</sup> and trash<sup>75</sup> as when one abandons it one gives up the right against searches and seizures. This raises some interesting question concerning abandoned electronic material, such as deleted material still hosted on a cloud. Also, an open field is not considered a protected area since it is “accessible to the public and the police in ways that a home, office, or commercial structure would not be . . . the asserted expectation of privacy in open fields is not one that society recognizes as reasonable.”<sup>76</sup> Ariel views, or fly-overs, are not a search<sup>77</sup> however, the courts have started to define cases in the accessibility of technology, for instance in *Florida v. Riley* (1989) it was argued that since a private citizen could rent a helicopter and view the space from air was not a search. Then, in *Kyllo v. United States* (2002) the Court ruled that an aerial-view coupled with thermal imaging was a search, for those devices are not readily accessibly to the public and the individual had a reasonable expectation of privacy.<sup>78</sup>

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<sup>73</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1. 5<sup>th</sup> ed. San Francisco: Lexi Nexis, 2010. Print. 78.

<sup>74</sup> *Abel v. United States*. 362 U.S. Supreme Court. 1960.

<sup>75</sup> *California v. Greenwood*. 486 U.S. Supreme Court. 1988.

<sup>76</sup> *Oliver v. United States*. 466 U.S. 170, 171. 1984.

<sup>77</sup> *California v. Ciraolo*. 476 U.S. Supreme Court 207. 1986

<sup>78</sup> *Kyllo v. United States*. 533 U.S. Supreme Court 27. 2001.

## What is a seizure?

The main difference between a search and a seizure is that a search “affects a person’s privacy interest, [while] a seizure of property invades a person’s possessory interest in that property.”<sup>79</sup> Thus, a seizure occurs “when an officer secures the premises, i.e. prevents persons from entering or taking away or destroying personal property.”<sup>80</sup> Thus, if an officer simply picks an object up, inquires after, or some other cursory action, this is not a seizure. In *Brendlin v. California* (2007) the court summarized the seizure of persons as when “the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement through means intentionally applied . . . but there is no seizure without actual submission.”<sup>81</sup> In *Californis v. Hodari D* (1991), the Court held that a fleeing suspect is not in custody and thus no seizure has been made. Also, Terry Stops are a seizure as the freedom of the individual is halted or restrained and are so named because *Terry v. Ohio* (1968) was the first case that defined the seizure of persons. An example of being seized includes being stopped “so that she can be frisked or question on the street, she is intentionally shot by the officer, she is taken into custody and brought to a police station for questioning or fingerprinting, she is in a car ordered to pull off the highway or is forced to stop by means of roadblock.”<sup>82</sup> However, stopping to chat with a police officer at a public park or being run over accidentally do not count as seizures or person.

The test that the court uses to evaluate a seizure of persons is the Mendenhall “Reasonable Person” Test. In *United States v. Mendenhall* (1980) two federal agents identified themselves and asked for identification from a woman in an airport. In a unanimous segment of

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<sup>79</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1. 5<sup>th</sup> ed. San Francisco: Lexi Nexis, 2010. Print. 103.

<sup>80</sup> *Ibid*, 104.

<sup>81</sup> *Brendlin v. California* qtd. in Dresslin and Michaels 105.

<sup>82</sup> Dressler and Michaels 106.

the opinion, the Court wrote that “a person has been “seized” within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have been believed that he was not free to leave.”<sup>83</sup> However there is an issue of perceived authority, which is made clear in *Yarborough v. Alvarado* (2004) when a 17-year old who confessed to murder while in police station, though he was not in custody and police had made it clear he was free to leave, he maintained that his freedom to leave was not apparent. This test is different for places of employment, for workers’ “freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the worker’s voluntary obligations to their employers.”<sup>84</sup>

The reasonable person standard and that the restriction of freedom is not because of the police officers but because of the place, is applied to bus sweeps, most notably in *Florida v. Bostick* (1991) and *United States v. Drayton* (2002). In *Florida v. Bostick*, sheriff deputies regularly boarded busses and asked passengers if they could search their luggage, to which Bostick agreed to and the officers found drugs in his luggage.<sup>85</sup> The Court ruled that there still is a level of freedom on a bus with officers in *Bostick* and then in *Drayton* as well as *Florida v. Jimeno* upheld that and that the officers do not have to inform the individuals they have the right to refuse. This becomes a thin line of what is a seizure and rests on the problem of consent. An individual might feel that by refusing they are self-incriminating themselves and not feel free to say no. In *Clairbornia v. Hodari D* (1991) the Court ruled that a seizure is generated from use of physical force or submission to authority.<sup>86</sup> Therefore, a fleeing suspect is not seized, but a handcuffed suspect in the back of a cop car is seized. The interpretation of a seizure has become

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<sup>83</sup> *United States v. Mendenhall*. 446 U.S. Supreme Court 544, 545. 1980.

<sup>84</sup> *Immigration and Naturalization Service v. Delgado*. 466 U.S. Supreme Court 210, 218. 1984.

<sup>85</sup> *Florida v. Bostick*. 501 U.S. Supreme Court 429. 1991.

<sup>86</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1. 5<sup>th</sup> ed. San Francisco: Lexi Nexis, 2010. Print. 114.

more limited with the Reasonable Person Test, reflecting the overall trend in the latter half of the 20<sup>th</sup> century towards emphasis on public security.

## Against Unreasonableness: Fall of the Trespass Doctrine & Rise of the Expectation of Privacy Test

If something is not a search nor a seizure, then the Fourth Amendment does not apply as there is no protected right. However, if something is a search and/or a seizure, then the question is of reasonableness. As Chief Justice William Rehnquist once wrote “The touchstone of the Fourth Amendment is reasonableness.”<sup>87</sup> Though to properly understand reasonableness, one first must understand the development of the Court from the Trespass Doctrine to the Reasonable Expectation Privacy Test. Before *Katz v. United States* (1967) the Supreme Court “generally treated Fourth Amendment issues as a property-focused inquiry.”<sup>88</sup> Going back to *Boyd v. United States* (1886) and *Weeks v. United States* (1914), the Court was very much influenced by British common law, most notably the British “condemnation of general warrants set out in *Entick v. Carrington*, in which Lord Camden stated that “every invasion of private property be it ever so minute, is a trespass”.”<sup>89</sup> Therefore, until the Warren Court’s decision in *Katz*, if a physical intrusion did not take place, a search or seizure did not take place.

In *Olmstead v. United States* (1928), the Court held that wiretapping conversations was not a search or seizure as there is no physical intrusion. Police wiretapped the offices of Roy Olmstead and other individuals suspected breaking the Prohibition Act without a warrant. Since the place where the wires were tapped were not private property, in this case public streets and a

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<sup>87</sup> *Ohio v. Robinette*. 519 U.S. Supreme Court 33. 1996.

<sup>88</sup> Dressler and Michaels 68.

<sup>89</sup> *Ibid*, 69.

large office building, “no trespass was committed upon any property of the defendants.”<sup>90</sup> Also, the Court held that the evidence is not self-incriminating as the conversation is voluntarily and therefore does not violate the suspect’s Fifth Amendment right against forced self-incrimination.<sup>91</sup> This ruling was overturned in *Katz v. United States* (1967) which established the “reasonable expectation of privacy test.”

Katz was arrested by the FBI for placing illegal gambling over the phone. The FBI had placed electronic listening and recording devices on the outside of the phone booth and only heard and recorded Katz’s conversations. The Court ruled that Katz’s conversations were protected by the Fourth Amendment and that a physical intrusion is not necessary as the “the Fourth Amendment protects people, not places.”<sup>92</sup> In this manner, the Court did not frame the case that a phone booth is a constitutionally protected area, such as part of the definition of “house” and thus the agents were trespassing, but that it was a place Katz had a reasonable expectation of privacy.

The “reasonable expectation of privacy test” was established in Justice Harlan’s concurring opinion in *Katz*. The Court refutes the government’s argument that a phone booth is a public place, and holds that even in a public place something can be considered private.<sup>93</sup> The argument that the telephone booth was a public place, for instance where someone could lip read Katz’s conversation, is rejected as Katz “sought to exclude when he entered the booth was not the intruding eye – it was the uninvited ear.”<sup>94</sup> As Harlan writes, “there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that

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<sup>90</sup> *Olmstead v. United States*. 277 U.S. Supreme Court 438. 1928.

<sup>91</sup> *Ibid*, 439.

<sup>92</sup> *Katz v. United States*.389 U.S. Supreme Court 347, 351. 1967.

<sup>93</sup> *Ibid*, 349.

<sup>94</sup> *Katz v. United States*.389 U.S. Supreme Court 347, 352. 1967.

the expectation be one that society is prepared to recognize as “reasonable.”<sup>95</sup> Therefore, a home is “for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the “plain view” of outsiders are not “protected,” because no intention to keep them to himself has been exhibited.”<sup>96</sup> Also, *Katz* maintained that the Fourth amendment does apply to electronic surveillance even though it is not a tangible thing, as previous precedent such as *Silverman v. US* (1961) has found that conversations are part of “persons” and to not conclude that “is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.”<sup>97</sup> Therefore, if *Katz* had been having a conversation of a park bench, where anyone could have overheard this is not protected as he does not have an expectation of privacy there, however he does when he enters into the phone booth.

*Katz* established the Reasonable Expectation of Privacy and the majority opinion called for the end of using property as the main form of interpretation for the Fourth Amendment, however subsequent cases still used the Trespass Doctrine. For instance, the in *Smith v. Maryland* (1979) it was argued that “Since the pen register was installed on telephone company property at the telephone company's central offices, [thus *Smith*] . . . cannot claim that his “property” was invaded or that police intruded into a “constitutionally protected area”.”<sup>98</sup> In this manner, the Trespass Doctrine was used with the “reasonable expectation of privacy test” to conclude that a pen register is not a search. *Smith* had robbed Patricia McDonough and “After the robbery, McDonough began receiving threatening an obscene phone call from the robber.”<sup>99</sup> The police were able to deduce the robber and installed a pen register, which captures outgoing

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<sup>95</sup> *Ibid*, 360.

<sup>96</sup> *Ibid*, 360.

<sup>97</sup> *Ibid*, 362.

<sup>98</sup> *Smith v. Maryland*. 442 U.S. Supreme Court 735, 741. 1979.

<sup>99</sup> *Smith v. Maryland*. 442 U.S. Supreme Court 735. 1979.

phone numbers, at the central offices of the telephone company without a warrant. Also, the Court found that Smith did not have a reasonable expectation of privacy as telephone companies have “facilities for recording this information and does in fact record it for various legitimate business purposes” and since this is common knowledge, even if Smith thought he had an expectation to privacy, society would not conclude that.<sup>100</sup> Therefore, when Smith “voluntarily conveyed numerical information to the phone company . . . he assumed the risk that the company would reveal the information to the police.”<sup>101</sup> This case solidified the two prong test of Justice Harlan and has a major impact on electronic surveillance cases.

The “reasonable expectation of privacy test” relies on the nature of the place still, even though Harlan wrote that the Fourth Amendment “protects people, not places” in *Katz*. This is because the question is of whether there is a reasonable expectation privacy in that place, and if “a person has taken measures to keep information, his property, or an activity private.”<sup>102</sup> In *Katz*, he made an attempt to make his betting a secret while in *Smith*, he called from his home phone and made no move to keep his phone number private (such as using a phone booth). Also, intrusion is an important part of the test. In *Kyllo v. United States* (2000) the Court held that the use of an electronic device “not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, [and] the surveillance is a “search” and is presumptively unreasonable without a warrant.”<sup>103</sup> The question in the case became of what is a reasonable expectation of privacy, whether one has an expectation of privacy against the government using thermal imaging on one’s home, and in a 5-4 decision the Court found that there is an expectation of privacy in that case.

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<sup>100</sup> Ibid, 735.

<sup>101</sup> Ibid, 736.

<sup>102</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1. 5<sup>th</sup> ed. San Francisco: Lexi Nexis, 2010. Print. 79.

<sup>103</sup> *Kyllo v. United States*. 533 U.S. Supreme Court 27, 28. 2001.

*United States v. Jones* (2012) is another modern case where the majority opinion rested on the Trespass Doctrine. The government obtained a warrant to install a GPS device on the car of Mr. Jones (which was owned by Mrs. Jones but not driven by her) that stated the GPS would be installed within 10 days in D.C but the device was installed in Maryland on the 11th day. The GPS was used for 28 days. The data was used in indicting Mr. Jones (and his nightclub business partner) on drug trafficking conspiracy charges. In a unanimous decision the Court held that the attachment of a GPS device, which monitors a vehicle's movement, is a search as a vehicle is an effect, which is protected by the Fourth Amendment.<sup>104</sup> With the original meaning of the Fourth Amendment, which for most of its history has been focused against the Government trespassing on private property, a car is an "effect" and thus they trespassed without a warrant on private property. Scalia concludes that the *Katz* "reasonable expectation of privacy test" added to the trespass doctrine and did not replace it. The reason why the trespass test is used here, while in *United States v. Knotts* and *United States v. Karo*, which are the two cases about beepers in the mid-1980s, is that the property the tracking device was placed on was not already owned by the defendants. Here the police had to attach the GPS device to Jones' car. Thus, installing the GPS device and using it to monitor the defendant together constitutes a search as it is a trespass on the defendant's property right (his car) for surveillance.

Justice Alito with Ginsburg, Breyer, and Kagan joining, wrote in a concurring opinion Justice Scalia's use of the trespass rule is unnecessary as the "reasonable expectation of privacy test" is sufficient.<sup>105</sup> GPS is cheap, compared to having a police officer tail a car or even a beeper which is short range, and thus normal constraints of surveillance have been overcome but that does not mean that the expectation of privacy has lessened. In this manner, "relatively short-term

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<sup>104</sup> *United States v. Jones*. 565 U.S. \_\_\_. 2012.

<sup>105</sup> *United States v. Jones*. 565 U.S. \_\_\_. 2012.

monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. . . . But the use of longer term GPS monitoring . . . impinges on expectations of privacy"<sup>106</sup> and this sort of infringement was not conceivable or possible until this technology emerged. If only the Trespass Doctrine is used, then it becomes a search to install a GPS but not a search for a police man to follow the car, which is an incongruent conclusion. The concurring opinions in *US v. Jones*, especially Justice Sotomayor's, highlights the problems of relying on the Trespass Doctrine in the modern age where technology can achieve the same ends but with less or no physical intrusion.<sup>107</sup> This shift of the Court, from simply relying on physical trespass to the "reasonable expectation of privacy test" to expanding what is considered "a person, place, paper, or effects" shows the Court's shift in protecting individual rights and not just property. However, this shift is not parallel to the limitations of the Exclusionary Rule and in the realm of foreign intelligence surveillance, where the Court has come to focus more on public security.

## Warrant Clause

However, before analyzing the effects of the "reasonable expectation of privacy test" on electronic surveillance, the warrant clause of the Fourth Amendment must first be understood. If something does not qualify as a search or seizure then the warrant clause does not apply. The warrant clause is that "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>108</sup> The Constitutional text is usually interpreted to mean that "arrest and search warrants

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<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> *U.S. Constitution*. Amend. IV.

may only be issued if supported by probable cause. . . [and] all arrests (even those that do not require a warrant) require probable cause.”<sup>109</sup> *Brinegar v. United States* (1949) was a case about a Prohibition car chase and search that is one of the most cited (observed?) casing concerning probable cause as it established there is a difference between conviction standards and probable cause. As Justice Rutledge writes for the majority, “Probable cause exists where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed.”<sup>110</sup> Searches are held to this standard, thus there must probable cause that evidence of a crime will be uncovered.<sup>111</sup> However, simply because officers have probable cause to arrest an individual does not necessarily mean they have probable cause to search the individual and vice versa.

This is an objective standard, it cannot be that the officer simply believes that there is a good cause for a search or seizure. In *Beck v. Ohio* (1964) the Court held that a subjective belief by the officer is not probable cause. However, an objective standard also means that the officer does not necessarily need to believe that probable cause exist for probable cause to exist. For instance, in *Florida v. Royer* (1964) the Court determined that probable cause did exist when the officers believed that it did not. Also, “the officer’s subjective motivations for making the arrest or search – even if they are perpetual or malicious – are irrelevant to the “probable cause finding.””<sup>112</sup> This may seem problematic, however the court does defer to the expertise of

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<sup>109</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1. 5<sup>th</sup> ed. San Francisco: Lexi Nexis, 2010. Print. 115.

<sup>110</sup> *Brinegar v. United States*. 338 U.S. Supreme Court 160, 161. 1949.

<sup>111</sup> Dressler and Michaels 116.

<sup>112</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1. 5<sup>th</sup> ed. San Francisco: Lexi Nexis, 2010. Print. 116.

officers and other law enforcement agents in many cases, such as *Terry v. Ohio*, as the average citizen has not been trained in detective work.

Until the Warren Court ruled in *Warden v. Hayden* (1967), the main the rule for probable cause in searches was the “mere evidence rule.” This meant that the government could only seize evidence if it was “(1) a “fruit” of a crime (e.g., money obtained in a robbery); (2) an instrumentality of a crime (e.g., the gun used to commit a robbery); or (3) contraband (e.g., illegal narcotics).”<sup>113</sup> Other evidence could not be seized, offering a strong protection to individual property rights. The Court found in *Hayden* that such a distinction, between “mere evidence” and instrumentally valuable evidence, is not made in the Fourth Amendment nor is it rational in terms of privacy.<sup>114</sup> By trying to distinguish between evidence before a trial many exceptions and convoluted precedent is created, which can be avoided now that the Exclusionary Rule offers remedy to violations.<sup>115</sup> In *Warden v. Hayden* the Court reaffirmed that the Fourth Amendment protects privacy interests, not simply property interests.<sup>116</sup> This is not a new concept for the Court, as cases such as *Gouled v. United States* (1920) defended the “mere evidence rule” in that “The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search . . . be regarded as equally in violation of his constitutional rights.”<sup>117</sup> The idea that the Fourth Amendment protects privacy is part of its founding, that persons, houses, papers, and effects have strong privacy interest that should not be invaded by the government unless for reasonable cause. However, even though the abolishment of the “mere evidence” rule reaffirmed that Fourth Amendment protects the privacy interests, it also expanded what could be searched. If non pecuniary papers can be searched, then innocent people who may have

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<sup>113</sup> Ibid, 118.

<sup>114</sup> *Warden v. Hayden*. 387 U.S. Supreme Court 294, 295. 1967.

<sup>115</sup> Ibid, 295.

<sup>116</sup> Ibid, 322.

<sup>117</sup> *Gouled v. United States*. 255 U.S. Supreme Court. 298, 303. 1920.

“unwittingly come into possession of evidence that relates to a criminal investigation”<sup>118</sup> are now subject to searches. Therefore, *Hayden* enlarged the class of persons who may be subjected to searches.<sup>119</sup> Though *Hayden* has many implications for expanding what can be searched and seized under probable cause, it made the law clearer and thus more meaningful.

The test to determine the trustworthiness of direct or hearsay information presented to a judge or impartial magistrate to obtain a warrant was originally the Aguilar-Spinelli warrant test. *Aguilar v. Texas* (1964) and *Spinelli v. United States* (1969) “suggested two inquiries regarding hearsay evidence: (1) “How did the informant get the information?” and (2) “Why should I [the magistrate] believe this persons?.”<sup>120</sup> This means that the information should be first-hand and for every step away from it being first-hand knowledge the individual should be evaluated on reliability. This two prong test of assessing credibility and then reliability was replaced in *Illinois v. Gates* (1983) with a “totality of the circumstances” test. Under this test more than just the credibility and reliability can be evaluated and if one of the prongs is weaker this does not automatically mean there is not probable cause because the case is looked at a whole. The Court defended this position “on the ground that “probable cause” is a “fluid,” nontechnical, commonsense conception, based on “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act”.”<sup>121</sup> That same year the Court also ruled in *United States v. Place* (1983) that suspicion is not enough for probable cause. Even with that limitation, the Gates test is still a large expansion of what sort of information police can base probable cause on.

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<sup>118</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1. 5<sup>th</sup> ed. San Francisco: Lexi Nexis, 2010. Print. 119.

<sup>119</sup> *Ibid*, 119.

<sup>120</sup> *Ibid*, 125.

<sup>121</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1, Investigation. 5<sup>th</sup> ed. San Francisco: LexisNexis Group, 2010. Print. 129.

## Execution of Criminal Warrants

Just because an officer of the law has a warrant this does not mean they can act however they please; there are limits on the execution of warrants. Police can search only the place described in the warrant and the warrants should not be vague.<sup>122</sup> If the warrant specifies a certain person to be searched, the police can search only that person, unless they have independent probable cause to search other persons who happen to be present at the scene.<sup>123</sup> Officers can seize any contraband or evidence of crime that they find while executing a warrant, even if the object isn't mentioned in the warrant since the abolishment of the mere evidence rule with *Warden v. Hayden*. Media and other non-agents should not accompany the execution of a warrant unless it is in the direct aid of the warrant's execution.<sup>124</sup> This expectation of privacy as found in *Katz* extends to the execution of the warrant, not just its application. However, this standard of privacy also must be balance against safety, and law enforcement agents are allowed to minimize the risk of harm to themselves, others, and evidence, including using "reasonable force" to detain individuals when executing a warrant.<sup>125</sup> Also, police officers are not required to knock-and-announce their presence, though this is a common custom.<sup>126</sup> In *Wilson v. Arkansas* (1995) the Court held that "in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment."<sup>127</sup> One modern limitation on the

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<sup>122</sup> *Stanford v. Texas*. 379 U.S. Supreme Court 476. (1965). Upheld *Mapp v. Ohio* and ruled that general warrants are unconstitutional, especially when they infringe on First Amendment freedoms (such as owning books).

<sup>123</sup> *Maryland v. Buie*. 494 U.S. 325. (1990). Must have probable cause there is a clear and present danger, cannot simply search for evidence. Related to *Terry v. Ohio* (1968).

<sup>124</sup> *Wilson v. Layne*. 526 U.S. 603. (1999).

<sup>125</sup> *Ybarra v. Illinois*. 444 U.S. 85. 1979, *Michigan v. Summers*. 452 U.S. 692 1981, *Illinois v. McArthur*. 531 U.S. 326. 2001, *Muehler v. Mena*. 544 U.S. 93. 2005, and *Los Angeles County v. Rettele*. 550 U.S. 609 2007.

<sup>126</sup> *Richards v. Wisconsin*. 520 U.S. Supreme Court 385. 1997.

<sup>127</sup> *Wilson v. Arkansas*. 514 U.S. Supreme Court 927, 934. 1995.

exclusionary rule is abandoning suppressing evidence gained when police had no reason to not knock-and-announce yet still entered without knocking or announcing.<sup>128</sup>

## Warrantless Searches

Many searches constitutionally occur without warrants, either because they do not meet the definition of a search or seizure the reasonable expectation of privacy test. The most common manner that warrantless searches are completed is if a person in control of the premise, freely and voluntarily consents to a search.<sup>129</sup> If consent is given, police do not need a warrant or probable cause but they must limit their search to whatever the person agreed, though police are allowed to interpret what was consented to and do not have to perform the search in front of the individual.<sup>130</sup> In *Illinois v. Rodriguez* (1990) the Court held that if the police reasonably believed that the person consenting had authority to consent, even if it turns out differently, the search can still be admitted to the trial as per the Good Faith Doctrine. Also, in *Frazier v. Cupp* (1969) and *United States v. Matlock* (1973) the Court held that if there are multiple tenants the consent is enough to search at least part of the premise. Though, as held in *Georgia v. Randolph* (2006) consent of one co-tenant does not make the warrantless search alright if the other present co-tenant objects, however if that person then leaves, as in *Fernandez v. California* (2014), the consent of the still present co-tenant is sufficient.

A warrant is not needed to seize contraband or evidence that is “in plain view” of an officer legitimately in the area where it is first spotted. The Plain View Doctrine was established in *Harris v. US* (1968), where the court found that simply spotting an item out in the open is not

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<sup>128</sup> *Hudson v. Michigan*. 547 U.S. Supreme Court 586. 2009.

<sup>129</sup> *United States v. Matlock*. 415 U.S. Supreme Court 164. 1974.

<sup>130</sup> *United States v. Rich*. 992 5<sup>th</sup> Cir. 502. 1993.

a search and thus admissible.<sup>131</sup> One has a lower expectation of privacy when the item is out in the open compared to hidden.<sup>132</sup> In *Coolidge v. New Hampshire* (1971) the Court ruled that “police may without a warrant seize evidence in “plain view,” though not for that reason alone and only when the discovery of the evidence is inadvertent.”<sup>133</sup> The inadvertence condition was later overturned, for although “inadvertence is a characteristic of most legitimate plain view seizures, it is not a necessary condition.”<sup>134</sup> The officer must be in the location justifiably, or the evidence can be excluded following the Fruits from the Poisonous Tree Doctrine.<sup>135</sup> Also, the item’s “incriminatory character must be immediately apparent”<sup>136</sup> meaning no manipulation (such as through clothes) or use of non-public technology.<sup>137</sup> The “plain view doctrine” reinforces that the Fourth Amendment is rooted in privacy, and since we have a lower expectation of privacy if something is out in the open, it is not a search for officers to see it.

## Vehicle Exception

For an officer to stop a vehicle, which is a seizure, she must have probable cause but she does not need a warrant. This is because vehicles, unlike items like homes, are highly mobile and can leave a jurisdiction before a warrant can be obtained.<sup>138</sup> Also, vehicles are highly regulated, such as required equipment and registration, therefore the expectation of privacy in a vehicle is less than other items protected by the Fourth Amendment.<sup>139</sup> In *Carroll v. US* (1925) the Court ruled that “The Fourth Amendment does not denounce all searches or seizures, but only such as

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<sup>131</sup> *Harris v. United States*. 390 U.S. Supreme Court 234, 235. 1986.

<sup>132</sup> *Minnesota v. Dickerson*. 508 U.S. Supreme Court 366, 370. 1993.

<sup>133</sup> *Coolidge v. New Hampshire*. 403 U.S. Supreme Court 443, 444. 1971.

<sup>134</sup> *Horton v. California*. 496 U.S. Supreme Court 128, 130. 1990.

<sup>135</sup> *Brown v. Texas*. 443 U.S. Supreme Court 47. 1979. The seizure was unlawful thus so any material seized in the search was unlawful.

<sup>136</sup> *Arizona v. Hicks*. 480 U.S. Supreme Court 321. 1987.

<sup>137</sup> *Kyllo v. US*. 533 U.S. Supreme Court 27. 2001. A warrant is necessary to use thermal imaging technology when completing a search, as heat signatures are not readily apparent and that is not a readily accessible technology.

<sup>138</sup> *Carroll v. United States*. 267 U.S. Supreme Court 132, 153. 1925.

<sup>139</sup> *United States v. Ross*. 456 U.S. Supreme Court 798, 832. 1982.

are unreasonable.”<sup>140</sup> Traffic stops include stops for traffic violations as well as criminal activity. The worry however is “that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants . . . [or as] pretexts for pursuing other investigatory agendas.”<sup>141</sup> Pre-textual stops are not evaluated on “whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given” and they pass this test than such stops are compatible with the Fourth Amendment.<sup>142</sup> Also, roadblocks are permitted under the Fourth Amendment so long as they are conducted in a neutral or non-arbitrary manner, their intrusion on motorists is limited, and they further an important governmental or public purpose. There is no requirement that an officer have a reasonable suspicion of criminal activity to justify a stop at a roadblock, the issue of public safety<sup>143</sup> and efficiency<sup>144</sup> is sufficient. Overall the development of the vehicle exception has been consistent since *Carroll v. US* in 1925 with an emphasis on the fact that cars are highly mobile and thus are the exception is that of exigent circumstances.

## Emergency Exception

As a general rule, the police are authorized to conduct a warrantless search when the time it would take to get a warrant would jeopardize public safety or lead to the loss of important evidence or escape.<sup>145</sup> The warrant requirement can be outweighed by the officers’ duty to protect people<sup>146</sup> and themselves as well as preserve evidence.<sup>147</sup> This requires that there was

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<sup>140</sup> *Carroll v. United States*. 267 U.S. Supreme Court 132, 147. 1925.

<sup>141</sup> *Whren v. United States*. 517 U.S. Supreme Court 806, 810. 1996.

<sup>142</sup> *Ibid*, 810.

<sup>143</sup> *Michigan Department of State Police v. Sitz* 496 U.S. Supreme Court 44. 1990. and in *Illinois v. Lidster* 540 U.S. 419. 2004. The Court held that public safety and interest in solving a crime were sufficient reasons for checkpoints.

<sup>144</sup> *United States v. Martinez-Fuerte*. 428 U.S. Supreme Court 543. 1976.

<sup>145</sup> *Warden v. Hayden*. 387 U.S. Supreme Court 294. 1967.

<sup>146</sup> *Brigham City v. Stuart*. 547 U.S. Supreme Court 398. 2006.

<sup>147</sup> *United States v. Santana*. 427 U.S. Supreme Court 38. 1976 and *Cupp v. Murphy*. 412 U.S. 291. 1973.

there was probable cause, not just reasonable suspicion, at the time of the search to believe that evidence was concealed and that evidence existed and was in danger of being destroyed.

### Search Incident to an Arrest

A police officer doesn't need a warrant to conduct a limited search made in connection with an arrest. *U.S. v. Rabinowitz* (1950) established that a search incident to arrest is reasonable for officer safety. After a lawful arrest, an officer has the right to search the arrestee and the area within the arrestee's immediate control for safety reasons and to prevent destruction of evidence. Therefore, a search incident to an arrest only includes "lunge area" as held in *Chimel v. California* (1969) and *U.S. Robinson* (1973). Also, a protective sweep is a limited search of the area that is aimed at protecting the officers, not gathering evidence, however officers may seize evidence of crime that is in plain view.<sup>148</sup> However, even if the electronic device is in plain sight, this does not mean officers can look through it. A warrantless search after an arrest is to protect the safety of the officer and surrounding citizens,<sup>149</sup> and a cellphone is not a weapon. Also the search is supposed to protect from the destruction of evidence, and to prevent remote wiping the phone can be disconnected from the network by turning it off, removing the battery, or putting it in a Faraway bag which "isolates the phone from radio waves."<sup>150</sup> Therefore, a warrant must be obtained before searching a cellphone unless exigent circumstances or the individual gives consent.<sup>151</sup> Also, a cellphone is very different from other personal effects as "a cell phone search would typically expose to the government far more than the most exhaustive search of a

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<sup>148</sup> *Maryland v. Buie*. 494 U.S. 325. (1990).

<sup>149</sup> *Harrison v. State*. 392 U.S. Supreme Court 219. 1968.

<sup>150</sup> *Riley v. California*. 573 U.S. Supreme Court \_\_\_. 2014.

<sup>151</sup> *Maryland v. King*. qtd in. *Riley v. California*.

house.”<sup>152</sup> The Court is unwillingly to give police officers full discretion in searching people’s effects, even after an arrest.

## Reasonable Suspicion

Not all searches or seizures require probable cause, and some searches can occur before an arrest. Reasonable suspicion is a minimal level of objective justification for a stop (which is a seizure) and was established in *Terry v. Ohio* (1968). Officer McFadden was patrolling downtown Cleveland when he saw three men he suspected of casing the store to rob it and approached them and asked their names. He then frisked the three men and found weapons on two of them. The officer did not put his hands under the outer garments of the plaintiffs until he felt the guns. Terry was convicted of carrying a concealed weapon and sentenced to three years in jail. In an 8-1 decision the Court held in favor of Ohio, that the search was reasonable and the weapons seized could be introduced into evidence against Terry.<sup>153</sup> Also, the Court held, similar to the Gates test for warrants, stops should be assessed based on totality of the circumstances.<sup>154</sup>

The Court affirmed that whenever a police officer restrains someone’s freedom to walk away he has seized that person and a frisk is a search. Also, “the reasonableness of any particular search and seizure must be asses in light of the particular circumstances against the standard of whether a man of reasonable caution is warranted in believing that the action was appropriate.”<sup>155</sup> Therefore, in this case the Officer acted reasonably in the conclusion that the men were going to commit a crime and were possibly armed and did what was minimally necessary to protect himself and others, thus the evidence seized can be admitted.

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<sup>152</sup> *Riley v. California* 573 U.S. Supreme Court \_\_\_. 2014.

<sup>153</sup> *Terry v. Ohio*. 392 U.S. Supreme Court 1. 1968

<sup>154</sup> *US v. Sokolow*. 490 U.S. Supreme Court 1. 1989.

<sup>155</sup> *Terry v. Ohio*. 392 U.S. Supreme Court 1. 1968

The Court held in *Katz v. United States* that “the Fourth Amendment protects people, not places” and even though there is a difference between a stop and an arrest, the difference between a frisk and a full-blown search does not mean the Fourth Amendment is not applicable nor is it invalid because Terry was not arrested. The majority opinion affirms that this ruling does not undermine the exclusionary rule.<sup>156</sup> A warrant is not necessary in this instance, nor does probable cause need to be met, however this is not quite exigent circumstances (not hot pursuit) but it does require swift action. The interest of effective crime prevention and detection underlies this conclusion. Also, it would be unreasonable to require police officers to not take precaution to protect themselves. However, the threat of physical harm must be balanced with intrusion on individual rights. The Court found that the searches undertaken were limited in scope and designed to protect the officer's safety incident to the investigation. This thus radically expands police authority to investigate crimes where there is a reasonable basis for suspicion.

This precedent, that an officer with reasonable and articulable suspicion that a crime has been committed or is about to be committed may conduct an investigative stop and frisk for weapons has influenced many subsequent cases. In *Michigan v. Long* it was determined that “frisking the lunge area” is valid, which extends searching areas where an individual could grab a weapon. Also, *Hibel v. Sixth Judicial District Court of Nevada* (2004) held that one must present identification when asked during a stop. Also, as established with the “plain view doctrine” an officer may only search near the seizure as to prevent harm to them and others and evidence being destroyed.<sup>157</sup> Therefore, if a police officer during a frisk feels a zip-log baggie this item cannot be seized without a warrant.

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<sup>156</sup> Ibid.

<sup>157</sup> *Minnesota v. Dickerson*. 508 U.S. Supreme Court 366. 1993.

## “Special Needs” Searches and Seizures

There are some areas that the Supreme Court has determined are “beyond the normal need for law enforcement, [which] make the warrant and probable-cause requirement impracticable.”<sup>158</sup> There is no clear standard for determining what a “special needs” area is but can be described as cases that involve a specific governmental interest beyond ordinary criminal investigations that usually is conducted by officials other than police officers.<sup>159</sup> This includes border searches and checkpoints, which are sometimes also discussed in the framework of Terry stops. In *Camara v. Municipal Court* (1967) and *See v. City of Seattle* (1967) it was established that to complete administrative searches, such as health, fire, and safety inspections, “except in the case of emergency or consent, the right of entry to conduct an administrative inspection requires a warrant, albeit one based on administrative, not ordinary probable cause.”<sup>160</sup> Administrative probable cause does not require suspicion of criminal activity but a reasonable need to search.<sup>161</sup> However, over time this definition of administrative probable cause has been abandoned in favor of whether or not there is a substantial interest in the search (for instance in protecting the safety of workers), if it is necessary within the regulatory system, and if it is sufficiently narrow (must not be a general warrant).<sup>162</sup> In *New York v. Burger* this standard was not just applied to inspectors, but also to police officers.<sup>163</sup> In *Ferguson v. City of Charleston*, evidence of criminal wrongdoing was “merely incidental to the purposes of the administrative search.”<sup>164</sup> The difference between government officials carrying out their duties, such as

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<sup>158</sup> *New Jersey v. T.L.O.* 469 U.S. Supreme Court 325. 1985.

<sup>159</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1, Investigation. 5<sup>th</sup> ed. San Francisco: Lexi Nexis, 2010. Print. 312-313.

<sup>160</sup> Dressler, Joshua and Alan C. Michaels. *Understanding Criminal Procedure*. Vol 1, Investigation. 5<sup>th</sup> ed. San Francisco: Lexi Nexis, 2010. Print. 299.

<sup>161</sup> *See v. City of Seattle*. 387 U.S. Supreme Court 541. 1967.

<sup>162</sup> Dressler and Michaels 299-300.

<sup>163</sup> *New York v. Burger*. 482 U.S. Supreme Court 691. 1987.

<sup>164</sup> *Ferguson v. City of Charleston* qtd in Dressler and Michaels 301.

checking valid passports and inspecting cleanliness of food establishment, to that of searches and seizure by police officers has not been made very clear by the courts.

Another “special area” is the public school. In *New Jersey v. T.L.O.* (1985) the vice-principal of a school searched a student’s bag and found evidence that she was dealing marijuana. In a 6-3 decision the Court held that the search was unreasonable and the Fourth Amendment applies, however school officials are held to a lower standard and that standard is of reasonable suspicion and not probable cause. The Fourth Amendment applies as school officials are representatives of the State and not surrogates for the parents and thus can’t claim parents’ immunity to the Fourth Amendment. Schoolchildren also are protected by the Fourth Amendment, for even though they are minors they still have legitimate expectations of privacy; but a school also has an “equally legitimate need to maintain an environment in which learning can take place requires some easing of the restrictions to which searches by public authorities are ordinarily subject.”<sup>165</sup> Therefore school officials need not obtain a warrant nor are they held to probable cause.

The reasonableness of the search test is that the official must have reasonable suspicion and not be excessively intrusive of the student’s age and sex and the nature of the infraction.<sup>166</sup> Following this test, the search in *New Jersey v. T.L.O.* of the purse was reasonable as there was clear evidence she had broken the no smoking rule and this logically leads to search of the bag. However, in *Safford Unified School District v. Redding* a thirteen year-old girl was strip-searched on the basis of a tip from another student that she possessed prescription and nonprescription drugs (ibuprofen) in violation of school policy.<sup>167</sup> In a 7-2 ruling the Court held that the search was unconstitutional for even though the search of the girl’s belongings was

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<sup>165</sup> *New Jersey v. T.L.O.* 469 U.S. Supreme Court 325. 1985.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Safford Unified School District v. Redding.* 557 U.S. Supreme Court 364. 2009.

reasonable, “the point of making her pull out her underwear was constitutionally unreasonable” especially since she was 13 and this “whose adolescent vulnerability intensifies the patent intrusiveness of the exposure.”<sup>168</sup> There was a limited threat from the drug and the manner of the search was too intrusive.

In *Vernonia School District* (1995) schools implemented a random urinalysis drug testing of students who played sports because of “the discovery that athletes were leaders in the student drug culture and concern that drug use increases the risk of sports-related injury.” The purpose of the policy was to protect the health and safety of students. If a student tested positive they were placed in a drug assistance program or suspended from sports, but the records are not turned over to police. Strict procedures are followed to maintain confidentiality, and the records are not turned over to police. In a 6-3 the Court held the policy was constitutional. Drug testing is a search, as established in *Skinner v. Railway Labor Executives’ Assn*, as it is an intrusion. The question is whether it is reasonable. In the majority opinion, Scalia writes that a school’s power is equal to that of parents’ but while in school students are in the temporary custody of the state, “permitting a degree of supervision and control that could not be exercised over free adults.”<sup>169</sup> Students have a lesser expectation of privacy at school, and athletes have an even lesser expectation since they must sign sports waivers comply with the rules of the athletic program. Since, students have a lower level of privacy at school and the school has more control of the student affairs at school, the Policy was not intrusive or unconstitutional. Thus, a school can enforce rules and policies that they think is best for student safety even if the parents disagree. Also, the privacy interest is less because the urine samples are not that intrusive (public sports are not the most conservative thing) and the results are only known by limited authorities (not the

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<sup>168</sup> Ibid.

<sup>169</sup> *Vernonia School District v. Acton*. 515 U.S. Supreme Court 646. 1995.

police). Also, a suspicionless drug test is valid as compelling need was demonstrated for the program, as deterring drug use is important for the school district.<sup>170</sup>

Suspicionless drug testing of public school students was brought to the Court's attention again in *Board of Education v. Earls* (2002) when it was held that coercive drug testing imposed by school districts upon students who participate in extracurricular activities does not violate the Fourth Amendment. The School District implemented a drug testing policy of all middle and high school students in order to participate in extracurricular activities. The Court ruled 5-4 that "Because this Policy reasonably serves the School District's important interest in detecting and preventing drug use among its students, we hold that it is constitutional."<sup>171</sup> It is reasonable to conduct drug tests since such tests furthered an important governmental interest, a drug-free school environment. Participation in extracurricular activities (just like athletics) means a lower expectation of privacy and the actual drug test is minimally intrusive. This is because at school, the "student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety."<sup>172</sup> The plaintiffs contested that unlike *Vernonia* there was no pervasive data of drug abuse to justify suspicionless drug testing, The Court however pointed out that all that was needed was for the school to outline valid and compelling reason for the search, in this case safety, for suspicionless drug test to be allowed. The had been previously upheld in the administrative case, *National Treasury Employees Union v. Von Raab* (1989), where the government demonstrated a compelling interest in having

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<sup>170</sup> Ibid.

<sup>171</sup> *Board of Education v. Earls*. 536 U.S. Supreme Court 822. 2002.

<sup>172</sup> *Board of Education v. Earls*. 536 U.S. Supreme Court 822. 2002.

officials take drug tests to maintain safety,<sup>173</sup> an interest that outweighed any personal rights of privacy.<sup>174</sup>

## Electronic Surveillance

Another “special needs” area is that of surveillance. *Olmstead v. United States* (1928) was the first criminal conviction based on wiretapping to reach the US Supreme Court. In a 5-4 decision the Court ruled that the Fourth Amendment was not violated as wiretapping is not a search or seizure. This decision was based on the trespass doctrine, where recording a conversation is not a physical trespass on one of the protected areas of the Amendment: persons, houses, papers, and effects.<sup>175</sup> This was reversed in *Katz v. United States* (1967) where it was established that recording conversations is a search and a seizure as it violates one’s expectation of privacy to have a conversation recorded in a phone booth.<sup>176</sup> The reasonable expectation of privacy did not fully replace the trespass doctrine, which was still relied upon in 2012 in *United States v. Jones*, but combined with *Berger v. New York*, the Court created a clear blueprint for wiretapping legislation for Congress. Much of the language of legislation of wiretaps involves rhetoric that such surveillance is special when it comes to the warrant clause, however it would not be until *In re Directives [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, that the court would clearly state “foreign intelligence surveillance possesses characteristics that qualify it for such an exception.”<sup>177</sup>

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<sup>173</sup> *Skinner v. Railway Labor Executives’ Association*. 489 U.S. Supreme Court 602. 1989. Mandatory drug testing for railway crews helps keep the public safe from serious train accidents and is thus separate from warrant clause.

<sup>174</sup> *National Treasury Employees Union v. Von Raab*. 489 U.S. Supreme Court 656. 1989

<sup>175</sup> *Olmstead v. United States*. 277 U.S. Supreme Court 438, 452. 1928.

<sup>176</sup> *Katz v. United States*. 389 U.S. Supreme Court 347, 360. 1967.

<sup>177</sup> Foreign Intelligence Surveillance Court. 2008. PDF. 15.

The growth of Congressional legislation on electronic surveillance has been slow, but is the main sphere of limitations. During WWI, “Congress enacted the first federal wiretap statute as a temporary measure to prevent disclosure of government secrets . . . [and later making illegal] intercepting and divulging private radio messages in the Radio Act of 1927.”<sup>178</sup> The Court’s ruling in *Olmstead* led to the Federal Communications Act of 1934, which outlawed wiretapping but not machines that record conversations.<sup>179</sup> This led to eavesdropping cases, such as *Goldman v. United States* (1942), where the use of a machine to overhear a conversation in another room is not a physical trespass and thus not a search, and *Silverman v. United* (1961) where installing a recording device in a wall of a shared home is an intrusion. However, in *Berger* the Court invalidated a New York statute that was too broad as it lacked particularity of place, crime, duration, and the conversation to be seized and other limitations to prevent general searches such as making sure the invasion of privacy is limited to necessity, the officer must show on return how the order was executed and what was seized, and the conversation must be terminated after conversation sought has been seized.<sup>180</sup> This led to Congress passing the Title III of the Omnibus Crime Control and Safer Streets Act which was designed to meet the objections in *Berger*. Yet, these cases and laws centered on domestic surveillance cases.

In *United States v. United States District Court for the Eastern District of Michigan* (1972) the Court considered surveillance in the context of national security. Three defendants were charged with conspiracy to destroy government property and one of them with the bombing a Central Intelligence Agency office in Ann Arbor in the US District Court for the Eastern District of Michigan. The defendants filed a pretrial motion for the US to disclosure electronic

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<sup>178</sup> Stevens, Gina and Charles Doyle. “Privacy: An Overview of Federal Statutes Governing Wiretapping and Electronic Eavesdropping”. Report for Congress: 98-326. *CRS Web*. PDF. 2

<sup>179</sup> *Ibid*, 2.

<sup>180</sup> *Berger v. New York*. 388 U.S. Supreme Court 41, 58-61. 1967.

surveillance information and the US produced an affidavit from the Attorney General that agents had eavesdropped one of the defendant's conversation and claimed the Attorney General was acting under the President's national security authority. The U.S. government relied on Title III of the Omnibus Crime Control and Safe Streets Act which authorizes court-approved electronic surveillance for specific crimes and has a provision of in 18 U.S.C. § 2511(3) "that nothing in that law limits the President's constitutional power to protect against the overthrow of the Government or against 'any other clear and present danger to the structure or existence of the Government'." <sup>181</sup> In a unanimous decision the Court held that wiretaps were a violation of the Fourth Amendment, as domestic security surveillance cannot be conducted based solely on authorization from the Executive Branch and a judicial warrant must be issued before the government uses electronic surveillance of domestic threats to national security. <sup>182</sup> If the only approval necessary for wiretaps was from the Executive Branch this would undermine the separation of powers and be unacceptable under the Fourth Amendment such as the requirement of an impartial magistrate.

The Government's duty to safeguard domestic security must be weighed against unreasonable surveillances and their threat to individual privacy and free expression, however getting a warrant would not foil domestic security searches. <sup>183</sup> The fact that it is not a traditional investigation activity, goal is not to gather evidence for criminal prosecutions, but "directed primarily to the collecting and maintaining of intelligence with respect to subversive forces," does not mean a warrant is not needed. <sup>184</sup> The US argued that the Courts would not fully

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<sup>181</sup> *United States v. United States District Court for the Easter District of Michigan*. 407 U.S. Supreme Court 297, 302. 1972.

<sup>182</sup> *Ibid*, 298.

<sup>183</sup> *United States v. United States District Court for the Easter District of Michigan*. 407 U.S. Supreme Court 297, 302. 1972. 319.

<sup>184</sup> *Ibid*, 319.

understand the nuances of intelligence gathering and disclosure involved when asking for a warrant would undermine the need for secrecy. However, as the Court points out, “If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.”<sup>185</sup> The Supreme Court did not overturn Title III or the idea that there is a separation of ordinary crime from information gathering, but did rule that judicial approval is needed before such wiretappings and that Congress can outline such standards.

There was growing concern around electronic surveillance in the early 70s and Senator Frank Church and Senator Sam Ervin founded the U.S. Select Committee to Study Governmental Operations with Respect to Intelligence Activities, though it is normally just called the Church Committee, to investigate. The Supreme Court issued its decision in *United States v. U.S. District Court* and the Watergate scandal<sup>186</sup> prompted the Church Committee’s investigations, as well as the U.S. Senate Select Committee on Intelligence’s previous findings of intelligence agencies illegal actions and Seymour Hersh’s disclosure of leaked CIA documents in *The New York Times*.<sup>187</sup> The Committee was a mix of prominent congressman with different political leanings and over nine months, the committee interviewed over 800 officials, held 250 executive and 21 public hearings, probing widespread intelligence abuses by the CIA, FBI and NSA.<sup>188</sup> The Committee finding included information on Project Shamrock, which was a warrantless capture and analyzation of telegrams sent by Americans to international

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<sup>185</sup> Ibid, 320.

<sup>186</sup> The break in at the Democratic National Committee headquarters and SCOTUS’s decision in *US v. US District Court* only occurred 2 days from each other, though the scandal did not become full blown until 1973.

<sup>187</sup> *Intelligence Activities and the Rights of Americans*. “Book II: Final Report of the Select Committee to Study Governmental Operation with respect to Intelligence Activities United States Senate together with Additional, Supplemental, and Separate Views.” U.S. Government Printing Office. 26 April 1976. PDF.

<sup>188</sup> Ibid.

organizations by the NSA,<sup>189</sup> and HTLINGUAL, which was a mail interception program by the CIA. These findings led to the creation of the Foreign Intelligence Surveillance Court.

The Foreign Intelligence Surveillance Act created a special court, so secrecy could be maintained and since criminal investigations are different from intelligence gathering, but would still require judicial review of the executive branch's surveillance actions. The Act allows surveillance without a court order for up to one year, unless a United States person is involved, in which application for judicial authorization is required within 72 hours after the surveillance begins.<sup>190</sup> A "foreign power" is defined in the original act as any foreign government (so mostly not U.S. persons) and any entity direct or controlled by a foreign government. A "US person" is American citizens, legal residents, and US corporations. The intelligence must be compromised of foreign information, thus with the aim to protect the US from harm and support public security, the main aim of the intelligence gathering cannot be of criminal prosecution.<sup>191</sup> Also, anyone completing this electronic surveillance is liable both criminally and civilly.<sup>192</sup>

A warrant is not needed if there is no substantial likelihood that the surveillance will include communication from US persons. The Attorney General submits a certification that there and is not for a period longer than a year to the Foreign Intelligence Surveillance Court and a report on compliance to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence. Also, a warrant is not needed "for a period not to exceed fifteen calendar days following a declaration of war by the Congress."<sup>193</sup> This raises the issue of even if there was no substantial likelihood, surveillance of US persons without a court order is

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<sup>189</sup> Ibid.

<sup>190</sup> Foreign Intelligence Surveillance Act of 1978.

<sup>191</sup> Foreign Intelligence Surveillance Act of 1978.

<sup>192</sup> Ibid.. If an individual intentionally discloses information knowingly gained through illegal surveillance they could be fined up to \$10,000 or receive 5 years in jail or both. Also, if you are an individual who was illegally surveilled then damages of minimum of \$1,000 or \$100 per day can be awarded.

<sup>193</sup> Ibid.

possible. Also, there seems little incentive for the executive branch to self-report non-compliance.

The Foreign Intelligence Surveillance Court will approve an application from the executive branch for surveillance if there is probable cause the target is a foreign power or an agent of one, the places surveyed are used by that target, and there is a time limit (maximum time limit is a year but can receive an extension).<sup>194</sup> Also, the court has “minimization requirements” to protect U.S. persons.

The actual court is made up of eleven judges appointed by the Chief Justice of the United States to seven year terms. If the court declines an application for a court order it can be appealed to the Foreign Intelligence Surveillance Court of Review, which is a panel made up of three judges.<sup>195</sup> The constitutionality of the FISA Court was upheld in *United States v. Pelton* (1987).

The FISA court did not cover physical searches until the Aldrich Ames scandal. Ames was a CIA agent who sold information to the USSR. Executive Order 12949 was issued by President Clinton and authorized justice department officials to obtain warrants for physical searches through the FISA court after public concern over the warrantless surveillance of Ames to discover his crimes.<sup>196</sup> Later, in *United States v. Nicholson* (1997), Harold J. Nicholson would say he was inspired by Aldrich Ames when he was caught selling classified CIA document to Russia. Nicholson sued, claiming that the search and seizure of his home, office, car, safe deposit box, and personal effects violated the Fourth Amendment as the inclusion of physical searches added by Executive Order 12949 was invalid. The Court concluded that the “Fourth Amendment jurisprudence regards physical entry and electronic surveillance on an even plane, with each

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<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Executive Order 12949. February 9, 1995

subject to the reasonableness requirement of the Fourth Amendment.”<sup>197</sup> Also, the Court held that as precedent has established, FISA does not violate the Fifth or Sixth Amendment by occurring *ex parte in camera*, it does not violate the Fourteenth Amendment by treating domestic and foreign agents differently,<sup>198</sup> and it does not violate the violate Article III, the separation of powers, or political question doctrine, as judges are acting within the Constitution when sitting on the FISA Court.<sup>199</sup>

After the September 11 attacks many amendments were made to FISA in the interest of fighting the war on terror. The Patriot Act amended FISA in 2001 to included terrorist groups as part of the definition of “foreign agent.” This includes the “Lone Wolf Amendment” which includes a non-US person who engages or prepares for international terrorism who is separate from a government or terrorist group is also part of the definition of “foreign agent.”<sup>200</sup> This means that a connection between an agent and a foreign power does not need to be established, simply probable cause of engaging in terrorism.

The *New York Times* leaked that Bush administration had been doing warrantless searches in the name of fighting terrorism.<sup>201</sup> The executive branch contented that it held a wartime exemption the Fourth Amendment, but voluntarily the executive branch submitted its surveillance program to FISC. This created delays from the volume of requests so a little more than six months later, Congress passed Protect America of 2007 that exempted surveillance of agents reasonably to be believed foreign from the warrant requirement. Also, the act gave immunity to telecommunications companies retroactively. A year later after the Protect America

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<sup>197</sup> *United States v. Nicholson*. 144 F.3d 632 United States Court of Appeals, Tenth Circuit 1988.

<sup>198</sup> *United States v. Duggan*. 743 F.2d 59 United States Court of Appeals, Second Circuit 1984.

<sup>199</sup> *United States v. Cavanagh* 807 F.2d 787 (9th Cir. 1987) and *United States v. Johnson*. 457 U.S. Supreme Court 537. 1982.

<sup>200</sup> FISA 50 U.S.C. Section 1801 (b) (1) (C)

<sup>201</sup> Risen, James and Eric Lichtblau. “Bush Lets U.S. Spy on Callers Without Courts.” *The New York Times*. 16 December 2005. Web.

Act of 2007 the FISA Act of 2008 were passed. The Protect America Act of 2007 expired in February of 2008 but the FISA Amendments Act of 2008 had a much larger expiration date that varies from section.

A common criticism of the FISA Court is that it is too much part of the executive branch, and simply rubber stamps their orders. Since its establishment to 2006, 22,985 applications were approved and 5 were rejected, which is a very low percentage.<sup>202</sup> This is a valid criticism, however only the number of warrants applied, issued, and denied are published and the applications themselves must go through stringent judicial department requirements.<sup>203</sup>

The noticeable trend is that there is very little discussion around the FISA court except when documents are leaked. In the case of Edward Snowden he leaked a number of documents to *The Guardian*, the most notable being on a warrant requesting metadata from Verizon. The American Civil Liberties Union sued the NSA over the wiretapping programs on the ground that it violated FISA and the 4<sup>th</sup> Amendment. The 6<sup>th</sup> Circuit Court of Appeals granted a judicial stay and then ruled in a 2-1 decision that ACLU did not have standing as they could not show to be directly affected by any Fourth Amendment violations, The Supreme Court declined to hear the case.

The idea that the court can request a warrant to capture data such as phone number, time, and location is based on the Third Party doctrine and reasonable expectation of privacy. As established in *Smith v. Maryland* pen registers do not violate the reasonable expectation of privacy issue as one does not have an expectation of privacy of numbers dialed. The desire for privacy is the foundation for the Fourth Amendment. However, if what constitutes a search is not necessarily a physical trespass but a violation of a reasonable expectation of privacy, then what

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<sup>202</sup> “FISA Court Has Approved Majority of Surveillance Warrants.” *NPR All Things Considered*. 10 June 2013.

<sup>203</sup> *Ibid*.

counts as a search can change on what one has of a privacy expectation. This seemingly creates a paradox, for if one knows that the government can obtain a warrant for data that it does not have probable cause for then this creates an expectation of no privacy which helps enforce the suspicionless warrant. Wiretapping in the US had been occurring since the first wires, with telegrams but with the changes in the application of the Fourth Amendment it has resulted in a return to *Olmstead* where a warrant for electronic surveillance is a formality and not required.

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