WARRANTLESS SEARCH OF CELL PHONES:

WHERE DID THE FOURTH AMENDEMENT GO?

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WARRANTLESS SEARCH OF CELL PHONES: WHERE DID THE FOURTH AMENDMENT GO?

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I. Introduction

In America today people believe they have a real sense of privacy in their life. They hear about the protections of the Fourth Amendment to the Constitution,[1] and assume it's an all shielding protection from any government intrusion. In reality millions of Americans have their privacy invaded daily,[2] and they never even know it.[3] This silent invasion comes from the taking of our e-mail without notice,[4]to the search of our cell phone for numbers we call or receive.[5] The warrantless searches of cell phones are in

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[1] U.S. Const. amend. 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.

[2] Edward J. Markey, *Markey: Law Enforcement Collecting Information on Millions of Americans from Mobile Phone Carriers,* Congressman Ed Markey, July 9, 2012, http://markey.house.gov/press-release/markey-law-enforcement-collecting-information-millions-americans-mobile-phone-carriers (last visited Jan. 26, 2013).

[3] *Id.*; In the first-ever accounting of its kind, Congressman Edward J. Markey (D-Mass) has found that in 2011, federal, state and local law enforcement agencies made more than 1.3 million requests of wireless carriers for the cell phone records of consumers, and that number is increasing every year… after a report in the New York Times reported that law enforcement was routinely requesting consumers cell phone records, sometimes with little judicial oversight and no consumer knowledge.

[4] Required disclosure of customer communications or records, 18 U.S.C.§ 2703(b) (West 2012).

[5] *Smith v. Maryland*, 442 U.S. 735, 742 (1979).

direct conflict with the Fourth Amendment,[6] yet as of this writing, the Supreme Court has failed to provide guidance to our lower courts.

Our technology has advanced beyond the scope of our laws.[7] The cell phones today are no less than a personal computer. These devices are capable of receiving e-mail, text, phone numbers, photographs, internet service, and even video. Their demand is on the increase around the world.[8] Cell phones have changed the way people communicate with each other. They generate a vast amount of personal information about where the people have gone, who they communicate with, what they communicated, and where they are at any given time. The new cellular and smartphone technology is leading to real concerns among many citizens and elected officials, that the potential for gross infringements upon our rights is eminent.[9] These small containers are the equivalent of our ancestor's chests, drawers, and bureaus they kept their papers and effects in, and are the very type of thing the Fourth Amendment was created to protect.[10]

Part II of this Article will give a historic overview of the Fourth Amendment and the original intent for its inception. Part III will review the case of *Smith v. Maryland* and

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[6] *See* U.S. Const. amend. IV, *supra* note 1.

[7] Scott A. Fraser, *Making Sense of New Technologies and Old Law: A New Proposal for Historical Cell-Site Location Jurisprudence*, 52 Santa Clara L. Rev. 571, 621 (2012).

[8] *New research: Global surge in smartphone usage, UK sees biggest jump with 15% increase*, Google Mobile Ad Blog, Jan. 25, 2012, http://googlemobileads.blogspot.com/2012/01/new-research-global-surge-in-smartphone.html (last visited Jan. 26, 2012).

[9] Karen J. Kruger, *Warrantless Searches of Cellphones: Is the Law Clearly Established?,* Chief's Counsel, The Police Chief, 78 (July 2011): 12–13, http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2431&issue_id=72011 (Last visited Jan. 26, 2013).

[10] *See* U.S.Const. amend IV, *supra* note 1.

Katz v. U.S. and compare them with the new request the government makes for CSI (Cell Site Information) or CSLI (Cell Site Location Information). Part IV will examine the cases that allow a warrantless search of a cell phone and their reasoning. Part V, Remnants of Fourth Amendment Logic, will highlight cases that view an unwarranted search of a cell phone as unlawful. Part VI will conclude showing that the warrantless search of cell phones is in conflict with our constitution.

II. The Fourth Amendment and the Original Intent

The Bill of Rights, which contains the Fourth Amendment, was introduced to the House of Representatives by James Madison on September 24, 1789.[11] The Congress, on the very next day approved 12 amendments and sent them to the states for ratification.[12] On December 15, 1791 Virginia ratified the Bill of Rights, and 10 of the 12 proposed amendments became part of the U.S. Constitution,[13] The Fourth Amendment was indeed part of the Bill of Rights, but the reason for its creation began decades earlier.

The essence of the reasoning for the Fourth Amendment can be found based on three cases from the 1760's, two British cases and one from the Colonies.[14] These cases were famous not only to the men who wrote the Bill of Rights, but to the people of the Colonies as well.[15] The British cases, *Entick v. Carrington* from 1765 and *Wilkes v.*

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[11] Terry Jordan, *The U.S. Constitution and Fascinating Facts About It*, 30 (7th ed. 2007).

[12] *Id.*

[13] *Id.*

[14] William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L.J. 393, 396-97 (1995).

[15] *Id.*

Woods from 1763 were very similar and were about search and seizure of books and papers from their homes based upon suspicion they were authors of pamphlets that criticized the King's ministers.[16] The case from the Colonies was from 1761 in which James Otis Jr. represented 63 merchants in a petition against a writ of assistance,[17] claiming such writs should be issued to specified agents, to search specified places.[18]

A. *Entick v. Carrington*: 1765

In *Entick v. Carrington,* 95 Eng. Rep. 807 (K.B.1765), Entick sued the defendants who acted under a general warrant[19] issued by the Earl of Halifax, a Lord of the King's Privy Council, and one of his "principle Secretaries of State, that authorized them to take a constable to assist them to search through and seize papers, books, and charts, from his home that numbered in the hundreds.[20] The search lasted for four hours. During this time the agents of the Earl broke open boxes, drawers, and chests throughout Entick's home,

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[16] *Id.*

[17] Writ of Assistance: 3.*Hist*. In colonial America, a writ issued by a superior colonial court authorizing an officer of the Crown to enter and search any premises suspected of containing contrabanc..*The attempted use of this writ in Massachusetts—defeated in 1761—was one of the acts that led to the American Revolution, *BLACK'S LAW DICTIONARY* 1749 (9TH ed. 2009).

[18] Stephen J. Schulhofer, *MORE ESSENTIAL THAN EVER; The 4th Amendment in the 21st Century,* 29 (2012).

[19] General Warrants: 1. *Hist.* A warrant issued by the English Secretary of State for the arrest of the author, printer, or publisher of a seditious libel, without naming the persons to be arrested. *General warrants were banned by Parliament in 1766. *BLACK'S LAW DICTIONARY* 1723 (9th ed. 2009).

[20] *Entick v. Carrington,* 95 Eng. Rep. 807, 807-808 (K.B.1765). https://a.next.westlaw.com/Link/Document/FullText?findType=Y&cite=95ENGREP807&originatingDoc=I401bb79de7b711d98ac8f235252e36df&refType=IC&originationContext=document&transitionType=DocumentItem&contextData=%28sc.History*oc.Search%29; Entick v. Carrington, 19 Howell's State Trials 1029 (1765). http://constitution.org/trials/entick/entick_v_carrington.htm. (Last Visited 3/21/2013).

gaining access to all his secrets.[21] The warrant claimed Entick was the author of several weekly seditious papers that were published in pamphlets entitled *The Monitor* or the *British Freeholder.*[22]

The jury found for Entick, and the court, in 1765 stated in its opinion:

> A power to issue such a warrant as this, is contrary to the genius of the law of England, and even if they had found what they searched for, they could not have justified under it; but they did not find what they searched for, nor does it appear that the plaintiff was author of any of the supposed seditious papers mentioned in the warrant, so that it now appears that this enormous trespass and violent proceeding has been done upon mere surmise; but the verdict says such warrants have been granted by Secretaries of State ever since the Revolution; if they have, it is high time to put an end to them, for if they are held to be legal the liberty of this country is at an end; it is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study; but if having it in one's custody was the crime, no power can lawfully break into a man's house and study to search for evidence against him; this would be worse than the Spanish Inquisition; for ransacking a man's secret drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts . . .However frequently these warrants have

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[21] *Id.*

[22] *Id.* at 808.

> been granted since the Revolution, that will not make them lawful, for if they were unreasonable or unlawful when first granted, no usage or continuance can make them good; even customs which have been used time out of mind, have been often adjudged void, as being unreasonable, contrary to common right, or purely against law, if upon considering their nature and quality they shall be found injurious to a multitude, and prejudicial to the common wealth, and to have their commencement (for the most part) through the oppression and extortion of lords and great men…[23]

It is clear from the language of the Court that liberty and a person's right to privacy in their papers and effects were of the utmost importance even in the 1760's. This same case was quoted by Supreme Court Justice Scalia in January of 2012 recognizing the importance it represented then as well as now.[24]

B. *Wilkes v. Wood*: 1763

In the case of *Wilkes v. Wood,* 98 Eng. Rep. 489 (K.B.1763), Wilkes, a member of the Parliament[25] was accused of writing libelous remarks in a publication entitled, *The*

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[23] *Id.* at 812.

[24] *United States v. Jones*, 132 S. Ct. 945, 949 (2012). (Scalia stated in his opinion: "…*Entick v. Carrington,* 95 Eng. Rep. 807 (C.P. 1765), is a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law' " with regard to search and seizure.")

[25] Schulhofer, *supra* note 18, at 24

North Briton, No. 45.[26] In the transcripts of the trial it was testified to that several men and a constable, acting under the order of a general warrant arrived at Wilkes' home at around 9:00 am and took Wilkes from the home at around noon.[27] Further testimony proved that after Wilkes was taken from his home the men went through the rooms and ended up in Wilkes study. They brought sacks and took all papers that were easily picked up and placed them in the sacks. After getting all the papers in the room that were not locked up, the men sent for a locksmith and had the locked drawers of the bureau opened. The men took all the papers in the drawers and a pocket book of Mr. Wilkes, and placed these items in a sack and sealed it up.[28] The record reflected that the search lasted for about 2-1/2 hours and that no inventory was taken of the items seized from the house.[29]

In this case the Solicitor General argued that he could not understand why or how Mr. Wilkes could bring suit against Mr. Wood, who did not issue or authorize the warrant. That such General Warrants had been in existence since the revolution without consequence, and in no event should Mr. Wilkes be awarded damages.[30]

Lord Halifax, the same one from the *Entick* case, was called to testify. He said he had instructed his secretary to go execute the warrant he had issued, but the secretary was

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[26] *Wilkes v. Wood,* 98 Eng. Rep. 489, 493 (K.B.1763). https://a.next.westlaw.com/Link/Document/FullText?findType=Y&cite=98ENGREP489&originatingDoc=I401bb79de7b711d98ac8f235252e36df&refType=IC&originationContext=document&transitionType=DocumentItem&contextData=%28sc.History*oc.Search%29.

[27] *Id.* at 491.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 493.

too nervous to perform the task. Lord Halifax then got Mr. Wood to act as his agent and execute the general warrant.[31]

The evidence proved that Mr. Wood was the actor in charge of the search and seizure of Mr. Wilkes' papers and effects. There was no evidence that showed Mr. Wilkes was the author of the libelous writings in the No. 45 article, nor of a character to act in such a manner.[32]

The jury found for Mr. Wilkes and awarded him damages of One Thousand Pounds.[33] In today's exchange that would equal around 64,000 Pounds,[34] which is around $190,000 in today's money.[35] The result of damages was because of the severe invasion of Wilkes personal privacy in his papers and effects and probably because he was a Member of Parliament.

The Lord Chief Justice Pratt stated the question in the case was just how much power did a Secretary of State have to force a person's home to be entered, their locks being destroyed, and their papers seized, not upon a real cause, but only a mere suspicion of a crime by the power of his Lordships warrant.[36] The Lord Justice answered the

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[31] *Id.* at 494.

[32] *Id*. at 497.

[33] *Id*. at 499.

[34] Ed Crews*, How Much Is That in Today's Money: One of Colonial Williamsburg's Most Asked Questions Is among the Toughest,* CW Journal Summer 2002 (Feb. 15, 2013, 9:03 pm) http://www.history.org/foundation/journal/summer02/money2.cfm.

[35] Eric Ney, *Pounds Sterling to Dollars: Historical Conversion of Currency* (Feb. 15, 2013, 9:09 pm) http://uwacadweb.uwyo.edu/numimage/currency.htm.

[36] *Wilke*s, *supra* note 20, at 490.

question in affect saying this type of warrant and act went too far to infringe upon the liberty of freemen. The Justice declared:

> A strange question, to be agitated in these days, when the constitution is so well fixed, when we have a prince upon the throne, whose virtues are so great and amiable, and whose regard for the subject is such, that he must frown at every encroachment upon their liberty. Nothing can be more unjust in itself, than that the proof of a man's guilt shall be extracted from his own bosom. No legal authority, in the present case, to justify the action. No precedents, no legal determinations, not an Act of Parliament itself, is sufficient to warrant any proceeding contrary to the spirit of the constitution.[37]

In his address to the jury he exclaimed how the time had come to send a message to the government agents, that these general warrants would not be tolerated. That for too long the practice of invading a man's privacy without just cause had been tolerated, and now the time had come to turn the tides into the winds of justice. The Lord Justice stated:

> [T]hat they had now in their power the present cause, which had been by so much art and chicanery so long postponed. Seventy years had now elapsed, since the Revolution, without any occasion to enquire into this power of the Secretary of State, and he made no doubt but the jury would effectually prevent the question from being ever revived again. He

[37] *Id.*

> therefore recommends it to them to embrace this opportunity (least another should not offer, in haste) of instructing those great officers in their duty, and that they (the jury) would now erect a great sea mark, by which our State pilots might avoid, for the future, those rocks upon which they now lay shipwrecked.[38]

These two British Cases were examples of how much damage could be done to an innocent individual by the mere suspicion of a ranking government official, and how through the cases the people responded to such unjust and unreasonable acts against liberty.

C. James Otis Jr. and the Writs of Assistance case

This case has a historic significance and a limited source of information. The only record of this 1761 case is from the notes of John Adams, in his No. 44 Petition of Lechmere, who at the time was a young lawyer in his 20's.[39] As mentioned, this was a case of 63 Boston merchants petitioning against the use of a Writ of Assistance against them for search and seizure of their property. The case was argued for the merchants of Boston by Oxenbridge Thacher and James Otis Jr.[40]

The importance of this case is not in the outcome, but rather in the effect the words that James Otis spoke during the trial had upon the listeners there. The words Otis

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[38] *Id.*

[39] Schulhofer, *supra* note 18, at 30.

[40] *Legal Papers of John Adams* 107 (L. Kinvin Wroth & Hiller B. Zobel eds., The Belknap Press of Harvard University Press, Vol. 2 Cases 31-62, 1965).

spoke led John Adams to later write a letter to his student, William Tudaor, on March 29, 1817.[41] The letter was written as an effort to recreate the moments of his youth, and the importance of what had transpired that day. In the letter, Adams' wrote about that day the following:

> Every man of an [immense] crowded Audience appeared to me to go away, as I did, ready to take up Arms against [Writts of Assitants]. Then and there was the first scene of the first Act of Opposition to the arbitrary Claims of Great Britain. Then and there the child Independence was born.[42]

i. James Otis

Before the case or the words spoken at the trial are discussed, it would be beneficial to know a little about who James Otis was. James Otis became Advocate General of the Vice Admiralty Court when he was only 31 years of age.[43] He resigned this position to argue the reasons against the British Crowns arbitrary use and issuance of the writs of assistance.[44] Otis asserted that these writs went against the fundamental principles of law, that a man's house was his castle, and if these writs were allowed to remain in effect against the people, they would erode and erase the sanctity of one's

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[41] *Id.*

[42] *Id.*

[43] Thomas K. Clancy, *Annual Lecture Series*, 81 Miss. L.J. 1357 (2012).

[44] *Id.*

home.[45] Otis's words were where "the American tradition of constitutional hostility to general powers of search first found articulate expression."[46]

John Adams was inspired by the words spoken that day by Otis. This inspiration led him to draft "Article Fourteen of the Massachusetts Declaration of Rights of 1780, which served as the model for the Fourth Amendment."[47]

ii. The Writs of Assistance Case

The Writs of Assistance Case, also known as the Paxton case began when Paxton, a Massachusetts customs official applied for a writ of assistance, to the then Advocate General for the colony of Massachusetts, James Otis.[48] Otis resigned his position and was solicited to work for the merchants whom the writ was issued against. Otis accepted the position but refused any fee.[49] This legal dispute occurred in 1761 when 63 Boston merchants petitioned the Massachusetts Superior Court challenging the legality of these searches that went by the name of Writs of Assistance.[50] The cases of *Entick* and *Wilkes* had not been heard or decided at this time, so the Court rulings from England still showed favor to these invasive writs. It was against this governmental mindset that James Otis made his argument.

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Writs of Assistance Case. West's Encyclopedia of American Law. 2005. *Encyclopedia.com.* . http://www.encyclopedia.com/doc/1G2-3437704756.html (last visited March 10, 2013).

[49] *Legal Papers, supra* note 40, at 139.

[50] *Writs, supra* note 48.

James Otis captured a court room and ultimately a nation on the day he argued the case for the Boston merchants. From the beginning of his oration, to the conclusion, and throughout the argument, his words captured a vision and a spirit that survives in America to this very day.

Otis started off the argument expressing his part to assist these individuals in the pursuit of their liberties, and he exclaimed his zealous advocacy to the cause at hand by stating:

> I will to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand, and villainy on the other, as this writ of assistance is. It appears to me (may it please your [honours]) the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English Law-book.[51]

Otis continued by explaining his resignation of his Advocate General position was so that he could promote British liberty.[52] He orated that his stance in opposition to the writs was the kind favored by the people, as shown in the country's history when they saw the power of the kind the writs allowed, to "cost one King of England his head, and

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[51] *Legal Papers, supra* note 40, at 139-140.

[52] *Id.* at 140.

another his thrown."[53] He expressed he would put more pains into this cause than any he would ever take on again.[54]

James Otis was aware his opinion and stance against the writ put him at odds with his government and loyalist to the Crown. He knew many would think lowly of him as a scoundrel. He understood the consequences and yet went forward without regard to his safety or status.[55] Otis stated this clearly to the crowd:

> Let the consequences be what they will, I am determined to proceed. The only principles of public conduct that are worthy a gentleman, or a man are, to sacrifice estate, ease, health and applause, and even life itself to the sacred calls of his country. These manly sentiments in private life make the good citizen, in public life, the patriot and the hero. I do not say, when brought to the test, I shall be invincible; I pray God I may never be brought to the melancholy trial; but if ever I should, it would be then known, how far I can reduce to practice principles I know founded in truth.[56]

After these statements Otis went on to discuss legal writs, or what we would call a warrant. Otis acknowledged there was in fact a legally recognized writ, one that was

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[53] *Id*. at 141.

[54] *Id.*

[55] *Id.*

[56] *Id.*

understandable and acceptable on its face. He spoke of what was a *special writ*. Otis said of this special writ:

> I will admit, that writs of one kind may be legal, that is special writs, directed to special officers, and to search certain houses, &c. especially set forth in the writ, may be granted by the Court of Exchequer at home, upon oath made before the Lord Treasurer by the person, who asks, that he suspects such good to be concealed IN THOSE VERY PLACES HE DESIRES TO SEARCH.. . And in this light the writ appears like a warrant from a justice of peace to search for stolen goods.[57]

Otis went on to argue that in the modern books of the time, only these special writs were legal. His argument was that the writ of assistance being addressed was in fact illegal.[58] Otis made the statement that a writ such as this would place the liberty of every person in the hands of every petty officer given authorization without any oversight.[59]

There were four arguments addressed as to the illegality and wrongfulness of these writs of assistance. First Otis said the writs were universal, in that they were not directed to be executed by a specific officer. They were written to allow anyone given authority to become a legal tyrant. This authority could allow these agents to control, imprison, or perhaps even murder anyone resisting the writs application.[60]

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[57] *Id.*

[58] *Id.*

[59] *Id*. at 142.

[60] *Id.*

His second argument was that these writs were perpetual. They had no order of return, and no person enforcing a writ like these was held accountable for their actions. Otis said in regards to this second argument; "[E]very man may reign secure in his petty tyranny, and spread terror and desolation around him…"[61]

His third argument was the person holding the writ, could enter all houses, shops, and places at will, and this person could command anyone to assist in the search and seizure.[62]

The fourth argument Otis made contains the famous language recognized by most Americans. He stated basically that not only the sheriffs or their deputies had the authority, but any menial person could perform this act of invasion of a citizen's home. To understand the full meaning it is necessary to see what James Otis said of this fourth argument. He stated:

> Forth, by this not only deputies, &c, but even THEIR MENIAL SERVANTS ARE ALLOWED TO LORD OVER US—What is this but to have the curse of Canaan with a witness on us, to be the servant of servants, the most despicable of God's creation. Now one of the most essential branches of English Liberty is the freedom of one's house. A man's house is his castle: and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses

[61] *Id.*

[62] *Id.*

> when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and everything in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient.[63]

Otis concluded the argument saying that there were no Acts of Parliament that established such a writ as the one before the court that day. He said writs worded as that one, was in fact an act against the Constitution.[64] Otis restated that special writs issued under oath and with probable suspicion were legal, and that these were the only writs that should be allowed. In his conclusion Otis stated:

> . . .that an officer should show probable grounds, should take his oath on it, should do so before a magistrate, and that such magistrate, if he thinks proper should issue a special warrant to a constable to search the places. . . It is the business of this court to demolish this monster of oppression, and to tear into rags this remnant of Starchamber[65] tyranny--&c.[66]

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[63] *Id.*

[64] *Id*. at 144.

[65] *Star Chamber*: 1. *Hist.* An English court having broad civil and criminal jurisdiction at the king's discretion and noted for its secretive, arbitrary, and oppressive procedures, including compulsory self-incrimination, inquisitorial investigation, and the absence of juries. *The Star Chamber was abolished in 1641 because of its abuses of power. *BLACK'S LAW DICTIONARY* 1537 (9TH ed. 2009).

[66] *Id.*

iii. The Historical Impact on Today's Fourth Amendment

It has been 252 years since James Otis addressed the court on the writ of assistance, yet what he said then rings true today. Through his vision, and John Adams reflection on the oration at that trial, we have our Fourth Amendment. But what affect has it upon us today?

Our society advanced in technology. The culture urbanized and created metropolises. Our police forces developed professionally, and in these skilled hands the potential for abuse increased.[67]

The primary commitment of the people that lived at the time of the writs was to see some protection established to protect the autonomy of the people. They sought to add some layer of protection against the intrusive powers of a very aggressive government.[68] The protections sought then are the same ones desired by society today:

> [T]o constrain law enforcement discretion, to provide an independent judicial gatekeeper; to prevent improper searches at their inception; and to ensure accountability by requiring a "return" to the court, so that damage suits after the fact did not become the only means for discouraging abuse.[69]

The affect of our society's history on the Fourth Amendment is often difficult to express. Our Court has at times broadened the Fourth Amendment to restrict unlawful

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[67] Schulhofer, *supra* note 18, at 39.

[68] *Id*. at 36.

[69] *Id.*

searches, but then as with a perpetual spring, they narrow the same interpretation to inflict upon society what often can only be described as barbaric abuse against the autonomy of an individual citizen. The ultimate affect of history is to allow the instincts of the founders to resurface, so the unending debate can at least continue. Without such a clear history and clarity as to the thoughts of those envisioned people, tyranny would be the winner, allowed to rest as victor upon a population of indentured servants.

III. *Smith v. Maryland, Katz v. U.S.*, and the Request for Cell Site Locations

This section will examine the government's use of a pen registry. A pen registry is a device or process that can trace outgoing signals from a specific phone or computer to their destination. These pen registers are often used by law enforcement as an "advanced counterpart" of an outgoing call log. It produces a list of phone numbers or internet addresses a person has contacted, but it does not include substantive information that has been transmitted.[70]

There is a statue that regulates the use of a pen register.[71] The statute requires a warrant, but the threshold is low and notice to the person affected is not given. With the events of September 11, 2001, the Patriot Act expanded the pen register to include information about a person's Internet communications.[72] When serving a pen/trap order the police can get access to all the e-mail headers to whom an e-mail was sent or

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[70] *Pen Register*, www.law.cornell.edu/wex/pen_register (last visited Mar. 10, 2013).

[71] *Issuance of an order for a pen register or a trap and trace device*, 18 USC §3123 (West 2012).

[72] *Pen-Registers and Trap and Trace Devices*, ssd.eff.org, https://ssd.eff.org/wire/govt/pen-registers (last visited Mar. 10, 2013).

received, as well as the size of the e-mail.[73] The police also get the Internet Protocol of the sender and receiver with a timestamp of each communication.[74].

A. *Smith v. Maryland*

In *Smith*[75] a woman was robbed by a man. She described the robber and the 1975 car he drove. After the robbery she received threatening and obscene phone calls. The police were able to identify the defendant by the license plate of his car. After determining where the defendant lived, the police went to the phone company and requested a pen register be placed on the defendant's phone line. This was done without a warrant. The phone company complied with the request. The police took the results of the warrantless pen register and other evidence, and obtained a search warrant to search the defendant's residence.

The defendant was indicted for robbery. He moved for a motion to suppress the evidence gathered as a result of what he considered a Fourth Amendment violation, when they installed a pen register without a warrant.

The trial court denied the motion and the defendant was convicted and received a 6 year sentence. The trial court said there had not been a Fourth Amendment violation because of the warrantless pen register's application.[76] The defendant appealed, but the appellate court affirmed the trial court's ruling. The appellate court held:

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[73] *Id.*

[74] *Id.*

[75] *Smith v. Maryland*, 442 U.S. 735 (1979).

[76] *Id.*

> [T]here is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence no search within the Fourth Amendment is implicated by the use of a pen register installed at the central offices of the telephone company.[77]

The Supreme Court of the United States reviewed the case and used the test from the *Katz*[78] case to justify their affirmation of the lower state courts. The majority concluded that a person has no reasonable expectation of privacy in phone numbers they call. The Court stated because the phone company keeps this information for billing, and a customer can review it to ensure no overbilling takes place, the citizen has no reasonable expectation in privacy in numbers dialed.[79]

The Court went on to state that even if the defendant had some subjective expectation of privacy, such as the defendant's claim that all calls were placed by him in his private residence, it would not be an expectation society was likely to recognize as reasonable.[80] The Court said that when the defendant voluntarily used his phone, he gave the numerical information to the telephone company, thereby exposing him to the risk that the phone company would give the information to the police.[81] The Court viewed the switching equipment as a mere substitute to a live switchboard operator.[82] Any use of any

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[77] *Id*. at 738.

[78] *Katz v. United States*, 389 U.S. 347 (1967).

[79] *Smith, supra* note 75, at 742.

[80] *Id*. at 743.

[81] *Id*. at 744.

[82] *Id.*

phone had no expectation of privacy in regards to the police obtaining information about where the calls were placed from or where they were received.

It is clear that the majority believes there is neither undue danger nor a violation against a caller's Fourth Amendment rights, simply because in the Courts' mind the person freely used their phone. The Court somehow through is rhetoric, convinced itself that a citizen has no expectation of privacy in the numbers they call.

The dissent has the correct view as to the use of a pen register. Justice Stewart noted that numbers dialed from a private telephone are within the constitutional protection recognized in *Katz*.[83] He fully believed the information contained in a pen registry fit squarely with the customer's legitimate expectation of privacy. The information originated from a private citizens home or office, which are areas vigorously protected by the Fourth Amendment, and is applied to the states via the Fourteenth Amendment.[84]

Justice Marshal was also writing for the dissent in the *Smith* case. He thought that the Courts argument that the defendant in this case assumed the risk of the government obtaining the information, was at minimal misplaced.[85] He felt because the use of telephones was a necessity in the society, that the defendant could do nothing but accept

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[83] *Id.* at 747.

[84] *Id.*

[85] *Id.* at 749.

the risk.[86] Justice Marshal clearly stated: "It is idle to speak of "assuming" risks in contexts where, as a practical matter, individuals have no realistic alternative."[87]

Justice Marshal concluded by stating that just as a person who enters a phone booth and speaks into the phone has a reasonable expectation of privacy as was held in *Katz*,[88] this person has the same expectation of privacy in the numbers dialed from their home or office.[89] He concluded saying that law enforcement officials should be required to obtain a warrant before they enlisted phone companies to provide information about a customer that was otherwise beyond the governments reach.[90]

This ruling shows a divided Court. The majority was willing to allow warrantless searches of a citizens phone records simply on the illusion that the citizen assumed the risk of using the phone and exposing the numbers to the public. This mindset is the danger that lurks in today's age as well. The simple fact that the Court can make a blanket assumption to provide an exception to a warrant, by rationalizing the citizen took an assumed risk by engaging in communication that in reality is a necessity, clearly exposes the danger people face with the use of their cell phones.

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[86] *Id.*

[87] *Id*. at 750.

[88] *Katz*, *supra* note 78, at 352.

[89] *Smith, supra* note 75, at 752.

[90] *Id.*

B. *Katz v. U.S.*

The *Katz*[91] case is one of the most pro citizen rulings we have seen in the last 100 years. As seen in the *Smith v. Maryland*[92] case above, the subsequent Courts have attempted to chisel away at the protections the Justices in 1967 provide to the citizens of the United States.

In *Katz*, a defendant was convicted of transmitting wagering information from Los Angeles, Calif. to Miami and Boston.[93] The government introduced evidence of a recording of the defendant's phone conversations taken by a listening device placed on the outside of a phone booth used by the defendant, without the issuance of a warrant. The defendant appealed and lost. The appellate court said the defendant had not incurred a violation of his Fourth Amendment right because there was no physical entrance into the area the defendant occupied.[94] The Supreme Court of the United States granted certiorari to consider the constitutional question.[95]

The Court started off making it clear that the Fourth Amendment protects people not places.[96] They said a person making a call in a phone booth that closes the door and pays the cost of the call, is entitled to assume the words spoken there would not be

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[91] *Katz, supra* note 78.

[92] *Smith, supra* note 75.

[93] *Katz, supra* note 78, at 348.

[94] *Id*. at 348-349.

[95] *Id.*

[96] *Id.* at 351.

broadcast to the world.[97] This Court said: "To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."[98]

The Court found that the governments use of the electronic recording device to obtain the defendants words he spoke in the phone booth, where he had a reasonable expectation of privacy, constituted a search and seizure within the meaning of the Fourth Amendment.[99] The fact that the government did not penetrate the wall of the phone booth had no constitutional significance.[100]

The Court went on to say that because it was a search, the government was in violation of the Fourth Amendment.[101] The government did not observe specific limits established in advance by a magistrate, nor did they make a return to the magistrate of what was seized. The Court stated they had never upheld a search on the sole ground that the officers reasonably expected to find evidence of a crime, and they voluntarily acted in a manner that was the least intrusive.[102] The Court said such searches were per se unreasonable under the Fourth Amendment and subject to only a few specific exceptions.[103]

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[97] *Id.* at 352.

[98] *Id.*

[99] *Id*. at 353.

[100] *Id.*

[101] *Id*. at 356.

[102] *Id*.

[103] *Id*. at 357.

The government argued that there should be a new exception, one that in a case of this type of electronic surveillance, would allow this activity without authorization of a magistrate.[104] The Court responded in disagreement. They said to bypass such judicial authorization removed the safeguards provided by the objective review to find sufficient probable cause to invade the privacy of the citizen.[105] The Court recognized that without the safeguard of judicial review for a warrant, the public would be protected from Fourth Amendment violations only at the discretion of the police.[106]

The Court stated in regards to requirement for warrants that:

> These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.[107]

The Court reversed the conviction because of the violation the government had inflicted upon the defendant.[108] Justice Harlan, in concurrence stated the balancing test still used today to determine if a person has a right to the Fourth Amendment Protection. He stated the test clearly:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have

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[104] *Id* at 358.

[105] *Id.*

[106] *Id*. at 358-359.

[107] *Id*. at 359.

[108] *Id.*

exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'[109]

This Court in 1967, as a majority, recognized the dangers that police action without some safeguards posed to the general public. Their reversal would for a time curb the unlawful activities of the police in the United States.

C. CSLI (Cellular Site Location Information)

The two prior cases, *Katz*[110] and *Smith*[111], set the stage for our 21st century debate on the use of cell phone information. The government has become real interested in knowing where a suspect is at or has been. Though most new cell phones have GPS technology,[112] the government often wants to know where the person has traveled. This allows them to build a case against them or another party using information not readily available to the general public. Estimates from three years ago were that over 90% of cell phones then in use had GPS capabilities, through which the target phone could be located to within as little as 50 feet.[113]

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[109] *Id*. at 361.

[110] *Katz, supra* note 78.

[111] *Smith, supra* note 75.

[112] *911 Wireless Service*, www.fcc.gov, http://www.fcc.gov/guides/wireless-911-services (last visited Mar.11, 2013). A comprehensive overview of future requirements carriers must meet in identifying the location of a cellular phone when soliciting 911 services; *See also* David Lipscomb, Demand Media, *FCC Regulations Concerning Cell Phone GPS Tracking,* (Mar. 11, 2013, 6:55 PM), http://techchannel.radioshack.com/fcc-regulations-concerning-cell-phone-gps-tracking-1959.html.

[113] *See* Kevin McLaughlin, *The Fourth Amendment and Cell Phone Location Tracking: Where Are We?,* 29 Hastings Comm. & Ent. L.J. 421, 427 (2007).

i. In re Application of U.S. for & order

A good example of the ambition of the government can be seen in the case, In re Application of the United States.[114] The application by the government was in three parts. The government requested permission to install a pen register and trap and trace device, the disclosure of stored wire and electronic transactional records, and the disclosure of location based data.[115] The court granted the first two requests but ultimately denied the third request. The order addressed this third request of the application requesting cell site location information.[116]

In this case the government asked for the complete spectrum of CSLI (cellular site location information), in other words the entire spectrum was requested for inspection.[117] This was unusual as that usually such a request was more limited in prior cases. The government presented evidence in the form of an affidavit to demonstrate probable cause in support of the application, but the government said that probable cause was not required for this type of CSLI.[118] Instead they argued alternatively for use of a "hybrid theory approach".[119]

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[114] *In re Application of U.S. for & order:* (1) Authorizing Use of a Pen Register & Trap & Trace Device, (2) Authorizing Release of Subscriber & Other Info., (3) Authorizing Disclosure of Location-Based Services, 727 F. Supp. 2d 571 (W.D. Tex. 2010).

[115] *Id*. at 572.

[116] *Id.*

[117] *Id* at 574.

[118] *Id.*

[119] *Id.*

The hybrid theory was described by Judge Gorentein in a 2005 Order. In that Order, the theory proposed there was statutory authority to obtain CSLI with something less than probable cause because of the provisions of three statutes.[120] The Government argued that the Communications Assistance to Law Enforcement Act (CALEA) which states that "with regard to information acquired ***solely*** pursuant to the authority for pen registers and trap and trace devices (as defined in section 3127 of Title 18), such call-identifying information shall not include any information that may disclose the physical location of the subscriber." The argument rested on the premise that the word "solely" in the CALEA requirement above suggested if there was another statute along with the CALEA, it would not be "solely", and thus the location based information could be included.[121]

The government offers the SCA (Stored Communications Act) standard of "specific and articulable facts showing that there are reasonable grounds to believe that the records or other information sought are relevant and material to an ongoing criminal investigation."[122] The government argued that the pen/trap order was a necessary, but insufficient requirement for making the cell service provider disclose the CSLI. The argument ultimately presented by the government was once a pen/trap order was combined with an order pursuant to the SCA, the "hybrid theory" allows for the disclosure of CSLI without the need to establish probable cause.[123]

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[120] *Id*. at 575.

[121] *Id.*

[122] *Stored Communication Act*, 18 U.S.C.A. § 2703 (West 2012).

[123] *In re Application of U.S. for & order*, *supra* at note 113, at 575.

The Court decided the argument did not have any merit, stating that other courts had reviewed the theory and had ultimately concluded the theory could not support the "issuance of an order granting the government access to CSLI."[124] One major reason was because the SCA referred to "electronic communications",[125] where as the government's use of CLSI was where the cell phone was used as a "tracking device."[126]

Because the court found the cell phone as a tracking device, the court said that any issuance for a CSLI should comply with Rule 41 of Federal Criminal Procedure. Rule 41 states:

> **(C) Warrant for a Tracking Device.** A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:
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> **(i)** complete any installation authorized by the warrant within a specified time no longer than 10 days;

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[124] *Id*. at 575

[125] *Id.*

[126] *Mobile Tracking Device*, (b) Definition.—As used in this section, the term "tracking device" means an electronic or mechanical device which permits the tracking of the movement of a person or object.., 18 U.S.C.A. § 3117 (West 2012).

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.[127]

The court decided that to get permission for a CSLI, including historical data, the government would have to:

- Strictly comply with Federal Rules of Criminal Procedure Rule 41.
- A Warrant shall only be granted with a proper showing of Probable Cause.
- The Warrant may last only 45 days.
- Notice shall be given to the person who is having surveillance performed against them.
- Warrant must be returned to the magistrate that issued it.
- The Warrant for a CSLI must be a standalone document.
- Must be evidence in affidavit to establish probable cause to believe that tracking the phone will lead to evidence of a crime.
- Evidence that a person has a cell phone and is engaged in criminal activity is not enough to get a warrant. If this was the standard then there would never be a CSLI denied.[128]

The court said this new area of law would be built the "old fashioned way", on a case by case basis.[129]

[127] *Rule 41 Search and Seizure*, Fed. R. Crim. P. 41 (West 2012).

[128] *In re Application of U.S. for & order, supra* at note 113, at 584.

This case shows the brazenness of the government in their shameless reach to get the information they want without regard to the citizen's rights they are invading. It should be noted the government did not stop with the Western District of Texas, in another case, from the United State District Court D. Maryland, the government argued again for the use of CSLI , using the All Writs Act,[130] to be allowed access to the Location Data solely to locate a suspect to make an arrest.[131] This was an unprecedented act by the government found by some to be "chillingly invasive and unnecessary in the apprehension of defendants."[132] The court found that this type of issue was best left to the legislators or in appellate courts, and they denied the application by the government.[133]

Though it seems some courts are inclined to restrict the police and protect the people from unreasonable searches in regards to cell phone records and location data, it is just as clear other courts look for an exception to allow police to invade a person's rights to get at a "justified" end. Usually these cases involve drugs and horrible crimes, and the court spins their reason to allow police to do as they will to get the bad criminal. This mindset comes with a cost that is in reality to high for our society to bear. Every time our courts find an exception to the common sense application of our Fourth Amendment right, a right based upon historic reasons for its inception, our society sees erosion in

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[129] *Id.*

[130] *All Writs Act*, 28 U.S.C.A. § 1651 (West 2012).

[131] *In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, 849 F. Supp. 2d 526, 530 (D. Md. 2011).

[132] *Id.*

[133] *Id.*

what was obtained by the blood of our ancestors, a right that we may never entirely get back.

To highlight this erosion there are two recent cases that focus a spotlight upon just how far the courts will go to assist the police in the performance of what many consider justice.

ii. *U.S v Hardrick*

In *U.S v Hardrick*, a case from Oct. 2012, the police obtained CSLI information without a warrant.[134] Though there were earlier various District Court rulings that expressly required probable cause and a warrant from a neutral magistrate to uphold a CSLI search, this court found an exception.

The court found that the good-faith exception applied to the conduct of law enforcement in this case. The court listed the following reasons for the exception;

> a) it was objectively reasonable for the Government to believe that obtaining CLSI did not require a search warrant; (b) it was objectively reasonable for law enforcement to rely on the magistrate's Orders and independent determination that obtaining CLSI did not require a search warrant; and it was (c) objectively reasonable for law enforcement to use a state subpoena in this case.[135]

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[134] *United States v. Hardrick*, CRIM.A. 10-202, 2012 WL 4883666 (E.D. La. Oct. 15, 2012).

[135] *Id.*

Here the court decided not to provide any reason the defendant might prevail in getting the evidence suppressed or a reversal of the courts conviction. It is true the defendant deserved to be punished, but it is the danger that such rulings pose to society that make this judicial see-saw a cultural guillotine.

iii. *States v. Jones*

The last case to be reviewed in this section is the Supreme Court case of *United States v. Jones*, decided Jan. 2012. This case is about the gathering CSLI information, and about the use of GPS tracking of an individual. On the GPS tracking, the Supreme Court held that the use of the tracking device was a search under the Fourth Amendment.[136] The Court said a vehicle was an "effect" as was used in the Fourth Amendment.[137] The warrant was issued in the District of Columbia with the stipulation the device was to be placed on the vehicle within ten days. The law enforcement officials placed the device on the vehicle on the eleventh day in Maryland. The officers acted outside the authorization of the warrant, thus the action was in fact void when they installed the device.[138] Justice Scalia, writing for the Supreme Court, held that the government's attachment of a GPS device to the defendant's vehicle, and the monitoring of its location while traveling on public streets, was a search under the Fourth

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[136] *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

[137] *See* U.S. CONST. amend. IV, *supra* note 1.

[138] *U.S. v. Jones, supra* note 136, at 946.

Amendment.[139] Thus, the Court affirmed the court of appeals decision to reverse the conviction.

The ruling by the Supreme Court was unique considering how often the Court rules against the people's rights by concocting the exceptions or distinguishing minute elements to get the ruling they want.

The CSLI part of *U.S. v Jones*[140] involved the defendant's motion to suppress CSLI information that had been gathered over a four month period.[141] Jones argued that the government was required to obtain a warrant based upon probable cause prior to having the third party provider disclose the cell site location information.[142]

The government argued it believed the defendant was using his cell phone to further the crime of distributing narcotics. They went on to generalize that people engaged in narcotic trafficking use their cell phones in that line of business. The government said knowing these cell tower locations would greatly help law enforcement locate the places the drugs were distributed from, and provide relevant information that would assist law enforcement in the execution of their duties.[143]

After presenting their argument the government applied for and received an order from the magistrate for the CSLI data for a sixty day period. The government received

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[139] *Id.* at 954.

[140] *United States v. Jones*, CRIM.A. 05-0386 ESH, 2012 WL 6443136 (D.D.C. Dec. 14, 2012).

[141] *Id.* at* 1.

[142] *Id.*

[143] *Id.* at *2.

two further extensions that resulted in four months of cell site location information about the defendant.[144]

Jones argued that the Stored Communication Act[145] and 18 U.S.C.A. § 2703[146] did not allow the disclosure of the CSLI the government was seeking.[147] He also argued that the government obtained the records in violation of his Fourth Amendment right.[148]

The court acknowledges that the majority of courts deny the request such as the one presented here, requiring that Rule 41[149] be met showing probable cause. They also recognize a minority of courts view the SCA, when used with a subsequent statute, allows the disclosure on less than probable cause.[150]

The court ignored this issue by simply stating that the SCA did not provide for a remedy of suppression in its language.[151] They went on to state even if the government violated 18 U.S.C § 2703, the SCA "affords no suppression remedy for non-constitutional violations."[152]

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[144] *Id.*

[145] *Stored Communication Act, supra* note 122.

[146] *Required disclosure of customer communications or records*, 18 U.S.C.A. § 2703(West 2012).

[147] *Jones*, supra note 140, at *3.

[148] *Id.*

[149] *Rule 41 Search and Seizure, supra* note 127.

[150] *Jones, supra* note 140, at *3.

[151] *Id*. at *4.

[152] *Id.*

After side stepping the statue violation issue, the court discussed the Fourth Amendment issues raised by Jones. They acknowledge the debate among courts on the issue, leaning heavily upon their belief that the majority of courts held there was no need for probable cause in regards to historical cell site location information.[153] The court mentioned some reasoning based upon *Smith,*[154] implying there was no reasonable expectation of privacy in this case, just as there was none with Smith in the numbers he dialed from his phone.[155]

The court admitted to there being a real debate as to whether the Fourth Amendment applied to cell site data obtained from cellular providers, but they held steadfast that there had been no federal court to decide conclusively that they would suppress any type of cell site date obtained from a court order under SCA.[156] They went on to discuss the argument that though some courts had held that the statutes mentioned did not allow the government to get prospective cell site data, other courts reached the opposite conclusion.[157] The court explained because of this ambiguity, it was reasonable for an officer to seek an order from a magistrate for the information, and to rely on that order, even if it was wrong. The court said regardless of the legality, they would apply the good-faith exception[158] to dismiss the Fourth Amendment issue altogether.[159] The

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[153] *Id.* at *5.

[154] *Smith, supra* note 75, at 742.

[155] *Jones, supra* note 140, at *5.

[156] *Id.* at *7.

[157] *Id* at *8.

[158] *Good-faith exception:* An exception to the exclusionary rule whereby evidence obtained under a warrant later found to be invalid (esp. because it is not supported by probable cause) is nonetheless admissible if the

court denied the motion to suppress the evidence obtained in an objectionably questionable manner.[160]

This court decided it would ignore all the other courts that had decided it was best to uphold the Fourth Amendment right to protect the citizen, by at least making the government present probable cause before they went secretly investigating the cell site records. These records were ones the cell phone owner reasonably believed was not privy to prying government eyes without proper due process, yet because of the lack of clear, concise, unambiguous rulings by the Supreme Court on this matter, Jones was subject to the tyranny James Otis so forcefully argued against.

iv. Section Opinion

It is precisely because of rulings such as these regarding cell phone records that society is subjected to the unwarranted searches of cell phones taken during arrest. The courts simply stretch and shape preceding rulings to morph them into some type of rational reasoning to allow the tyranny[161] of government to lay its vial self upon the citizen of this great land. It must be clear that the fault lies not with our great law enforcement people, who do their job to the highest standards, but the fault lies in our judicial system that fails to give true guidance. The danger is clearly seen in the past,

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police reasonably relied on the notion that the warrant was valid*, BLACK'S LAW DICTIONARY* 762 (9TH ed. 2009).

[159] *Id*. at *9.

[160] *Jones, supra* note 140, at *10.

[161] *Tyranny:* 3. Arbitrary or despotic government: the severe and autocratic exercise of sovereign power, whether vested constitutionally in one ruler or usurped by that ruler by breaking down the division and distribution of governmental powers, BLACK'S LAW DICTIONARY 1660 (9TH ed. 2009).

when the people felt so imposed upon, there was but one option, to lift from their spirit the weight of the invasive governmental tyrant.[162]

IV. Cases Allowing Warrantless Search of Cell Phones

In this section the focus will be on decisions that have held it is constitutionally acceptable to have a government agent go through a private citizen's cell phone without a warrant. Most if not all of the cases involve an incident of arrest.

The cases that will be discussed will be from the U.S. Court of Appeals for the Fifth Circuit. The cases will be recent, but their underlying foundation will be to support government invasion into the defendant's Fourth Amendment right. The appellants are all criminals of various magnitudes. It is fair to say that society wants to see these abusers of our laws punished. The danger lies with the precedence the courts set that in many instances will be used against the misdemeanor class C citizen, exposing these people to the dangerous world of a justice system vacant of one or more constitutional protections.

A. United States Court of Appeals for the Fifth Circuit

This court has traditionally proven in the past and present to be reluctant to provide the citizens who reside under its jurisdiction the ample protections that are inherent with being an American. The following cases will prove this out in regards to cell phones and Fourth Amendment protection.

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[162] *Tyrant*, n. A sovereign or ruler, legitimate or not, who wields power unjustly and arbitrarily to oppress the citizenry; a despot, *BLACK'S LAW DICTIONARY* 1660 (9TH ed. 2009).

i. *U.S. v Finley*

This is a case about the distribution of a controlled substance. In August of 2005 officers with the Midland, Texas police department conducted a purchase of some drugs.[163] Finley was contacted by a friend to take him to a truck stop. Finley was driving his company's plumbing van.[164] It was shown that the person Finley picked up made a drug deal at the truck stop while in the truck. The deal was a set up by the police.[165]

After the transaction the police stopped the van, found marked money from the drug sale, and found some drugs in the van. Both Finley and the passenger were arrested.[166] Along with the money and drugs, there was a cell phone Finley had that belonged to the company. He was allowed to use it for personal business along with work related matters.

Both suspects were placed in a cruiser and transported to the passenger's residence. At the residence the police were executing a warrant to search for evidence.[167] While at the residence a Special Agent searched Finley's cell phone call records and text messages, some of which appeared to be evidence of selling and trafficking narcotics.[168] The agents then confronted Finley about some of the messages and he confessed that

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[163] *United States v. Finley*, 477 F.3d 250, 253 (5th Cir. 2007).

[164] *Id.*

[165] *Id.*

[166] *Id*. at 254.

[167] *Id.*

[168] *Id.*

most of the messages were about marijuana and not methamphetamines. He also admitted to distributing marijuana in the past.[169]

Finley, in his appeal, sought to suppress the cell phone evidence recovered during the warrantless search of his cell phone.[170] The court stated that the search was done incident to arrest. It was this fact that allowed officers to search for weapons, instruments of escape, and evidence of any crime the person arrested had on his person.[171] The court set the precedence that would be repeated in future cases when it stated; “The permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee's person.”[172] The court held the police could search all containers in an arrestees reach, whether the container was open or closed.[173] Thus the search of the cell phone by the agent was acceptable under the search incident to arrest exception.[174]

The court in this ruling opened the door to warrantless searches of cell phones. It gave cart blanch to the police departments in its jurisdiction to go through the personal effects and papers of a citizen, because the text writings in a cell phone are akin to the papers seized in the *Entick*[175] and *Wilkes* [176] cases from the 1760’s. This type of activity by the police was the very type of thing the Fourth Amendment[177] was created to protect.

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[169] *Id*. at 255.

[170] *Id.* at 258.

[171] *Id.* at 259-260.

[172] *Id.* at 260.

[173] *Id.*

[174] *Id.*

[175] *Entick, supra* note 20.

ii. *U.S. v Aguirre*

Here again is another drug related case. It originated from the United States District Court for the Western District of Texas. In this case the police had been watching a suspected drug dealer named Mendoza.[178] Previously Mendoza had been under surveillance by the DEA after making a cocaine sale to a police informant. The day of Mendoza's arrest the agents that were watching him believed he would make another deal later in the evening, by returning to his mobile home and retrieving more drugs.

An hour after Mendoza's arrest the police went to his residence to search for information and evidence. They knocked and announced but no one opened the door, instead they heard the bustling sound of people scurrying around inside. The police officers assumed it was because the people inside were destroying evidence. They entered prior to obtaining a warrant. They found drug paraphernalia in plain sight. [179]

The officers detained Aguirre, a female, and two other occupants of the mobile home for two hours while a DEA agent obtained a warrant. After the warrant arrived the officers discovered cocaine, marijuana, and other items related to drug trafficking.[180] Along with the drugs the police found weapons and fourteen cell phones. Aguirre's cell phone was lying in plain view on her bed and was seized along with the other cell phones

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[176] Wilkes, *supra* note 26.

[177] *See* U.S. CONST. amend. IV, *supra* note 1.

[178] *United States v. Aguirre*, 664 F.3d 606, 609 (5th Cir. 2011) cert. denied.

[179] *Id.* at 609.

[180] *Id.*

in the mobile home.[181] Aguirre's cell phone was password protected. The police managed to get Aguirre to give them her password and they performed a search of its contents. Inside the phone they found text messages containing the words "green" and "white", which the officers assumed referred to cocaine and marijuana.[182]

Aguirre moved to have all the evidence obtained in the search of the mobile home, including what was discovered in her cell phone suppressed. The district court denied the motion stating everything the officers had done was authorized by the exigent circumstances.[183] They further expressed the search and seizure of Aguirre's cell phone was performed as an incident to her arrest and with a valid warrant. A final statement by the court added that in any event, any evidence found would be admissible under the good-faith exception to the exclusionary rule.[184]

Aguirre appealed the ruling attacking the search and seizure of her cell phone on three grounds. She asserted that the seizure occurred prior to a warrant being issued, that the warrant was not based on probable cause, and the warrant did not meet the particularity requirement of the Fourth Amendment.[185] The district court rejected all three arguments.

The Fifth Circuit reviewed the appeal and concluded that Aguirre's claim that the search of her cell phone had occurred before the warrant was issued was simply an

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[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id* at 609-610.

[185] *Id* at 612.

allegation, one that the Special Agent denied. The district court believed the Special Agent over Aguirre, thus settling this issue.[186]

On the probable cause challenge, the court found probable cause in the affidavit that expressed the agents' opinion that drug traffickers keep documents and records at their home and it was a "fair probability" evidence such as this might be found. The court decided this was enough to provide a "substantial basis" for the magistrate to conclude such a probability existed.[187]

The court reasoned as to the particularity issue that "generic language" would suffice if detailed particularity was too difficult. They stated the details in the attachment to the affidavit listed "records…correspondence….personal papers…telephone directories…computers… used in drug trafficking organization."[188] The court admits that cell phones were not listed in the warrant affidavit.[189]

The Fifth Circuit said that the text messages and directories in a cell phone can be fairly characterized as the "functional equivalent" of several of the items listed in the attachment to the affidavit.[190] The court agreed with the Special Agent who said at the trial; "[c]ell phones are highly significant in that they record the transaction of—in some cases the buying and selling of drugs."[191] The consensus of the court was that this cell

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[186] *Id*. at 613.

[187] *Id* at 613-614.

[188] *Id* at 614.

[189] *Id.*

[190] *Id.*at 615.

[191] *Id.*

phone and the texts it contained served the "equivalent of records and documentation of sales or other drug activity."[192]

The Fifth Circuit found no error of the district court in denying the motion to suppress the evidence, and affirmed the conviction of Aguirre.[193]

Here we see the consistency of the Fifth Circuit in their reasoning and justification to further pierce the protection the Fourth Amendment provides for the citizens. This case is four years after *Finley,*[194] yet the mindset of the Court remains pro-law enforcement and anti-citizen. It should be noted that the term" functional equivalent" is not contained in the Texas Code of Criminal Procedure Art. 18.01. Search Warrant.[195] In Art. 18.02. Grounds For Issuance, it states as to personal writings, which are arguably what a text message is, the following:

> A search warrant may be issued to search for and seize:
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> (10) property or items, *except the personal writings by the accused*, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense;[196]

A Texas Court of Criminal Appeals decision defined these personal writings, yet this definition was completely ignored by the Fifth Circuit. The Criminal Appeals Court

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[192] *Id.*

[193] *Id*.

[194] *Finley, supra* note 163.

[195] Tex. Crim. Proc. Code Ann. art. 18.01 (West 2011).

[196] Tex. Crim. Proc. Code Ann. art. 18.02 (West 2011).

stated; "Personal writings refers to writings like diaries, memos, and journals that were not intended by the writer to be published to third parties."[197]

Cell phone communications are personal and the text writings are not made with an unreasonable expectation of privacy. It could be fairly stated every person that uses their cell phone believes what is communicated through the device will remain free of governmental prying eyes.

iii. Three More Cases Showing the Fifth Circuit is Consistent

It is apparent that regardless of the situation, if law enforcement personnel search a person's cell phone under the Fifth Circuits jurisdiction, it will be upheld by some rhyme or reason. These last three cases will be presented in brevity.

a. *United States v. Ochoa* (5th Cir. 2012).

In a case filed in January, 2012 the Fifth Circuit heard the appeal of Johnny Ochoa Jr. Ochoa was arrested for conspiracy to distribute cocaine and the unlawful use of a communication facility, a cell phone.[198] Ochoa alleged that there was a lack of probable cause to arrest him and the search of his cell phone was illegal.

The court went through its now standard reasons for a warrantless arrest.[199] It then addressed the issue of the illegal search of the cell phone. The Fifth Circuit stated it was the government's argument it was a legal search, and if it was not, that the information

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[197] *Mullican v. State*, 157 S.W.3d 870, 873 (Tex. App. 2005).

[198] *United States v. Ochoa*, 667 F.3d 643, 645 (5th Cir. 2012).

[199] *Id.* at 649.

would have been inevitably discovered. The court said they did not have to consider if the search was legal or not, because they agreed in the inevitable discovery[200] argument of the government.[201]

b. *United States v. Butler* (5th Cir. 2012)

This second case examines what happens when a district court does not follow what the Fifth Circuit has set as precedent. Even when faced with the stark truth, that the invasion of cell phone information is unacceptable, the court will not budge from its anti-citizen stance and allow the protections of the Fourth Amendment to be implemented.

In this case from May of 2012, multiple defendants, including a one William Hornbeak, were tried and convicted of participating in human trafficking of women and children to engage in prostitution.[202] The Vice Division of the Houston Police Department and the FBI worked together in response to complaints of minors being forced to work in Houston area brothels.[203]

The police called an advertisement they had acquired with the photo of a 17 year old girl on it. The officers set up a "sex date" with the young woman at a specified hotel. Hornbeak drove the girl to the hotel, where she was arrested in the hotel room, but not

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[200] *Inevitable discovery*; "The inevitable discovery doctrine applies if the Government demonstrates by a preponderance of the evidence that (1) there is a reasonable probability that the contested evidence would have been discovered by lawful means in the absence of police misconduct, and (2) the Government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation." *See United States v. Zavala,* 541 F.3d 562, 579 (5th Cir.2008).

[201] *Id.* at 650.

[202] *United States v. Butler,* 477 F. App'x 217, 218 (5th Cir. 2012).

[203] *Id.*

before placing a call to Hornbeak. Hornbeak tried to return the call, and when she did not answer he went to the room. The police arrested him and immediately searched his cell phone for recently made and received calls. The police did this without a warrant.[204]

"The district court drew a legal conclusion that the warrantless search of a cell phone's call data was unreasonable."[205] The Fifth Circuit vacated the district court's ruling on this. The court said the district court's decision was in direct contradiction to *Finley*.[206] The court reminded everyone what *Finley* represented;

- that no warrant was required to search an arrestees cell phone, including text messages and call records,
- Police are authorized to search electronic contents of a cell phone recovered from an area within an arrestee's immediate control.[207]

The Court failed to mention the other significant ruling established in *Finley*, that a cell phone is considered a container[208] that can be opened and rummaged through as a benefit of a warrantless search incident to arrest.

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[204] *Id.*

[205] *Id*. at 221.

[206] *Finley, supra* note 163.

[207] *Butler, supra* note 202, at 221.

[208] *Finley, supra* note 173.

c. *United States v. Rodriguez*, (5th Cir. 2012)

In this last case to be reviewed from the Fifth Circuit, the court took the opportunity to add what they had forgotten to include in *Butler* above. As with all these case, their consistency is reliable.

This case was filed in December of 2012. It is another drug trafficking case. Here one of the defendants, a Mr. Rodriguez, challenges the district court's decision to not suppress evidence from a warrantless arrest and warrantless search of his cell phone.[209]

Rodriguez and his co-defendant were stopped at a border checkpoint outside of Falfurrias, Texas. A drug dog indicated the presence of narcotics. They were arrested and found guilty.[210] They appealed many issues; the one of concern here was the motion to suppress the cell phone search.

Rodriguez argued that the cell phone was taken from the truck without a warrant and this violated his Fourth Amendment right under *Gant*.[211] He claimed the search of the cell phone after he had already been arrested was in violation of the ruling from *Gant*.[212]

The Fifth Circuit noted that the district court found the cell phone was actually seized from his person. This was based on testimony from border patrol officers in which

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[209] *United States v. Rodriguez*, 702 F.3d 206, 208 (5th Cir. 2012).

[210] *Id*.

[211] *Arizona v. Gant*, 556 U.S. 332, 339, (2009). (The scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. …If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.)

[212] *Rodriguez*, *supra* note 209, at 209.

one said he did not do the personal search of Rodriguez, but saw the evidence bag afterwards and a cell phone was in it. The other officer said he inventoried the evidence from the truck and the cell phone was not in it. The court gave an unsurprising deference to the district court's belief of the officers over the defendant.

The Fifth Circuit concluded that *Finley* set the precedence and was controlling on the issue.[213] The court, adding what it had forgotten in *Butle*r stated:

> In *United States v. Finley,* we held that a search incident to arrest of the contents of a cell phone found on an arrestee's person for evidence of the arrestee's crime was allowable, analogizing it to a search of a container found on an arrestee's person.[214]

The Court concluded based on Finley, the search of Rodriguez's cell phone was permissible.[215]

B. Section Opinion

The Fifth Circuit has set forth a clear set of rules it uses to justify the invasion of a citizens Fourth Amendment right to be free of unlawful searches of their papers and effects.

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[213] *Id.*

[214] *Id*. at 209-210.

[215] *Id*. at 210.

The list that has been built over time consists of;

- That no warrant was required to search an arrestees cell phone, including text messages and call records.[216]
- Police are authorized to search electronic contents of a cell phone recovered from an area within an arrestee's immediate control.[217]
- That a cell phone was to be considered a container, and as such searching of its contents was allowable.[218]
- That an affidavit did not have to be specific and particular in the description of the items to be searched or seized. The only requirement was it should consist of a "generic language" and this would be a "functional equivalent."[219]
- That the search of a cell phone from a defendant's car was allowable because of the inevitable discovery that would subsequently occur.[220]
- That anytime a lower district court ruled incorrectly as to the Fifth Circuits desires, attempting to uphold the citizens rights, that precedence would rule the day and vacate a correct decision to fit the scheme of the Fifth Circuits agenda.[221]

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[216] *Finley, supra* note 163.

[217] *Id.*

[218] *Id.*

[219] *Aguirre, supra* note 178.

[220] *Ochoa*, *supra* note 198.

[221] *Butler ,supra* note 202.

- When a U.S. Supreme Court ruling gets in the way, ignore it and proceed with the container ruling of *Finley*.[222]

The Fifth Circuits bias towards assisting law enforcement is patently clear. One can understand this somewhat, in that the cases reviewed were of a significant blight upon society. The clear and present danger lies in the very precedence this court seeks to see upheld. When an ordinary citizen is trapped in this prism that ignores the Fourth Amendment protection, and they are subjected to an unlawful search and seizure of their personal cell phones, causing them great emotional or financial damage, they will find they have no recourse. The Fifth Circuits rulings, and other courts with opposite results, have not been reviewed by the Supreme Court of the United States. The citizens are left to the subjective discretion of the courts, cloaked in a sham of objective reasoning. This judicial shell game results in a violation of their rights and liberties so valiantly protected centuries ago in the Fourth Amendment.

V. Remnants of Fourth Amendment Logic

There are many examples from courts establishing the issue of cell phone searches is a dark and muddy area of the law. In this section, cases that uphold the Fourth Amendment protection will be reviewed. The judicial mindset of these courts will at least shine a light of hope in the damp and despicable realm of other courts shunning of protections so long ago fought for.

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[222] *Rodriguez*, *supra* note 209.

A. *United States v. Wall,* (S.D. Fla. Dec. 22, 2008)

In a case from 2008 out of the U.S. District Court of S.D. Florida, the defendant, Aaron Wall, was seeking to suppress the evidence seized from his cell phone in a search without a warrant.[223] This was a drug trafficking action in which undercover DEA agents were working to make a transaction with the defendants.[224] After the attempted sale transpired Wall was arrested and two cell phones he had on his person were confiscated. During the booking process the DEA special agent searched Wall's cell phone and discovered photographs and text messages on the phone.[225]

The court performed an analysis discussing the Fourth Amendment and the exceptions to it.[226] The court noted at the time there was not much case law on this issue. In the analysis the court recognized the ruling from *Finley*[227] and stated; "The search of the cell phone cannot be justified as a search incident to lawful arrest.[228] The court went on to find:

- The search was not contemporaneous with the arrest.[229]

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[223] *United States v. Wall,* 08-60016-CR, 2008 WL 5381412, at *1 (S.D. Fla. Dec. 22, 2008) aff'd, 343 F. App'x 564 (11th Cir. 2009).

[224] Id.

[225] Id.

[226] *Id.* at *2.

[227] *Finley, supra* note 163.

[228] *Wall,* supra note 223,at *3.

[229] *Id.*

- The context of the text presented no "danger to the arresting officer or others.[230]
- The search of information on a cell phone was analogous to a search of a sealed letter, which requires a warrant.[231]
- The search of text messages does not "constitute an inventory search… Surely the Government cannot claim that a search of the text messages on Wall's cell phones was necessary to inventory the property in his possession. Therefore the search exceeded the scope of an inventory search and entered the territory of general rummaging."[232]

The court concluded that the only reason the agent was searching through Wall's phone was to find incriminating evidence. The actions were outside the scope of an inventory search, and a search incident to a lawful arrest. The court said that rummaging through cell phones during a booking process was an unconstitutional search. The court's last statement made clear there were not exigent circumstances.[233] The court granted the motion to suppress the cell phone evidence.

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[230] *Id.*

[231] *Id*.

[232] *Id*. at *3, *4.

[233] *Id*. at *4.

B. *State v. Smith*, 2009-Ohio-6426: A State Supreme Court Ruling

In one of the only state Supreme Court rulings upholding Fourth Amendment protections for citizens against warrantless cell phone searches, Ohio set a high bench mark for others to follow.

In this case the defendant, Smith, was arrested for selling cocaine. During the arrest officers seized a cell phone.[234] At some point officers searched the cell phone and discovered call records and phone numbers proving Smith had called a co-defendant in regards to a drug sale. There is some indication the search occurred during the booking process. The police had neither permission nor a warrant to search through the phone.[235]

Smith filed a motion to suppress the cell phone evidence. The district court ruled it would allow the call records and phone numbers into evidence. They based their decision on *Finley'*s[236] ruling that cell phones were like containers and subject to search for evidence at trial.[237] Smith was found guilty and appealed. The court of appeals affirmed the trial court's denial of the motion to suppress the evidence.[238]

The Supreme Court of Ohio noted the exception for a warrantless search incident to arrest, observing this exception is for an officer's safety.[239] They also acknowledge searches may extend to personal effects of an arrestee, referencing the U.S. Supreme

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[234] *State v. Smith*, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, 950 at ¶3.

[235] *Id*. at ¶ 4.

[236] *Finley, supra* note 163.

[237] *Smith, supra* note 234, at ¶5 and ¶6.

[238] *Id.* at ¶ 8.

[239] *Id*. at ¶ 11.

Court ruling in *Illinois v. Lafayette* (1983)[240] allowing the search of any container in person's possession if performed following established inventory procedures.[241]

The court recognized that there had not been a ruling from the United States Supreme Court on how a cell phone was to be characterized. The court mentioned the Fifth Circuits ruling in *Finley*, that a cell phone was a container.[242] They also acknowledged the United States District Court for the Northern District of California, where they disagreed with the *Finley* ruling.[243] This California court stated that the new cell phones "have the capacity for storing immense amounts of private information and they likened them to laptops, which have significant privacy interests.[244]

The Ohio court discussed the fact that cell phones do not meet the definition of containers established by the United States Supreme Court from their ruling in *Belton.*[245] [246] In *Belton*, the Court said a container was one capable of containing another physical object.[247] The Ohio court stated that all the prior cases characterizing a cell phone as a container was wrong.[248]

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[240] *Illinois v. Lafayette*, 462 U.S. 640 (1983).

[241] *Smith, supra* note 234, at ¶ 13.

[242] *Id*. at ¶ 16.

[243] *Id.* at *¶ 17.* Referencing *United States v. Park,* CR 05-375SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007).

[244] *Smith, supra* note 234, at ¶ 18.

[245] *New York v. Belton*, 43 U.S. 218 (1973).

[246] *Smith, supra* note 234, at ¶ 19.

[247] *Id.* at ¶ 19.

[248] *Id*. at ¶ 20.

The court firmly concluded in the case that:

> A search of the cell phone's contents was not necessary to ensure officer safety, and the state failed to present any evidence that the call records and phone numbers were subject to imminent destruction. We therefore hold that because a cell phone is not a closed container, and because an individual has a privacy interest in the contents of a cell phone that goes beyond the privacy interest in an address book or pager, an officer may not conduct a search of a cell phone's contents incident to a lawful arrest without first obtaining a warrant.[249]

The Court's ***final rule of law*** that would govern Ohio was ***"a warrantless search of data within a cell phone seized incident to a lawful arrest is prohibited by the Fourth Amendment when the search is unnecessary for the safety of law-enforcement officers and there are no exigent circumstances.***[250]

C. *U.S. V. Davis*, 787 F.Supp.2d (2011)

In this case from the United States District Court, D. Oregon, the court takes a brave stance against the state. This was a case in which the defendant was charged with sex trafficking of minors.[251] The defendant was arrested after the car he was in crashed

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[249] *Id*. at ¶ 24.

[250] Id. at ¶ 29.

[251] *United States v. Davis,* 787 F. Supp. 2d 1165, 1168 (D. Or. 2011).

while attempting to outrun the police. The police walked over to the wrecked car and found a cell phone. They also found pictures of kids in high heels.[252]

While driving back to the station, one of the officers heard the cell phone ring, so he answered it. After answering it and hanging up, the officer called the number back and discovered it was to a local motel.[253] Believing the driver or passenger of the crashed car could be found there, the officer went to the motel. At the motel it was discovered that the co-defendant had rented a room there. Inside the room were two minor females that were discovered to be listed as missing in the law enforcement database.[254]

The court addressed the issues raised as follows:

i.Initial Seizure

- The officer claimed it was the policy of the department to collect any valuable objects from a vehicle before it was towed.
  - The court responded by stating an inventory search does not authorize an officer to search the contents of a cell phone.[255]

The court addressed the ***justifications*** that the government presented to allow the warrantless search of the cell phone.

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[252] *Id.*

[253] *Id*. at 1169.

[254] *Id.* at 1170.

[255] *Id. See also Wall*, supra note 223, at *3-*4. (declining to justify search of cell phone as an inventory search because the officers had no need to document the phone numbers, messages, and other data to properly identify the suspect's property).

ii. Automobile Exception

- The government argued that the officer could search the entire contents of the cell phone as he chose to find evidence or the identity of any of the actors to the crime.[256]
    - The court responded the government was wrong. They found that the defendant was already in custody and being taken to the station when the officer illegally answered the defendant's cell phone.[257]

iii. Exigent Circumstances

- The government argued the officer was in "hot pursuit" of the driver of the crashed car. That if the driver remained at large he could pose a danger to the community.[258]
    - The court said that "hot pursuit" required some sort of chase. In the present case the chase had ended and the defendant was in custody. The court stated: "The government cannot establish a '"real immediate and serious

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[256] *Id.*at 1171. (The government contends that "Officer Doran could search the entire contents of the cell phone for physical addresses of the suspect/owner, incoming and outgoing calls, photographs to determine the identify and or location of the suspect who committed the traffic offenses and or prove his attempt to elude on foot.).

[257] *Id.*

[258] *Id.* at 1172.

consequence'" to justify the warrantless search in this case.[259]

iv. Plain View

- The government presented the explanation that the search and seizure was allowed under the Plain View Exception[260].
  - The court answered that though the exception allows seizure of incriminating evidence, it did not authorize a warrantless search of an item for concealed evidence.[261]

v. Inevitable Discovery

- The government asserts it would have inevitably obtained statement by the minor females at the motel without the search of the cell phone.[262]
  - The court stated that the government did not establish by a preponderance of evidence the unlawfully obtained information would have been discovered by other lawful means. It reasoned the improper search of the cell phone is

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[259] *Id.*

[260] *Plain View Exception: See Minnesota v. Dickerson,* 508 U.S. 366, 375 (1993). (Under the plain view doctrine, law enforcement officers may seize items if (1) the officers are lawfully in a position from which they view an object, (2) the incriminating character of the object is immediately apparent, and (3) the officers have a lawful right of access to the object.).

[261] *Davis, supra* note 251, at 1172.

[262] *Id*. at 1173.

> what specifically directed the officers to the motel and the minor witnesses.[263]

The court ultimately granted the motion to suppress all the physical evidence and statements by the minors on the day it occurred.[264]

D. Texas and Rhode Island Court of Appeals 2012 cases

These last two cases highlight recent rulings, from different courts, at diverse spectrums of the continent and political mindsets. They represent not only the division seen earlier in this writing, but also that with two diverse judicial bodies, some courts and judges still find the Fourth Amendment an important right for our citizens.

i. *State of Texas v. Granville* (2012)

This case was decided by the Court of Appeals of Texas, Amarillo, in July 2012. The case involved a high school student that was indicted for improper photography or visual recordings.[265]

The student had become involved in a disturbance at the school and was arrested and jailed. While he was in official custody, an officer having nothing to do with the arrest acquired the student's cell phone. This officer had heard the day before this same student had taken a picture of another student urinating in a urinal at school. Base on this allegation, this officer went to the jail, took the cell phone from the property room, and

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[263] *Id.*

[264] *Id.*

[265] *State v. Granville*, 373 S.W.3d 218, 220 (Tex. App. 2012), petition for discretionary review granted (Oct. 10, 2012).

scrolled through it eventually finding the picture.[266] It was this discovery that led to the indictment against the student.

The court addressed all the arguments the government placed up as reason for the warrantless search. The first conclusion the court found was that this was indeed a search. It went on to address the defenses for the Fourth Amendment violations.[267]

The government, after losing in the trial court, argued that the search was not incident to arrest, but rather "…simply a probable cause search of jail property that is a person's effects when they go to jail…basically you don't' have any expectation of privacy" in your property or your cloths.[268] The court responded that this argument was invalid because it was not raised in trial.[269]

The government argued it had probable cause to search the phone.[270] The court responded there was NO AUTHORITY that allowed the State to search property merely because an officer had probable cause to think a crime had occurred, and that in the officer's mind, evidence of that crime could be found on the property to be searched.[271]

The last argument the government made was that the defendant had no expectation of privacy. The court addressed this in a series of analysis.

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[266] *Id.*

[267] *Id.* at 221.

[268] *Id.*

[269] *Id. See Ford v. State,* 305 S.W.3d 530, 533 (Tex.Crim.App.2009) (recognizing that the need to preserve objections is founded upon the policy of affording the trial court the first opportunity to correct purported mistakes).

[270] *Id.*

[271] *Id* at 222.

Expectation of Privacy for an arrestee:

- The government said no inmate has any expectation of privacy in their jail property. They said looking at the cell phone data was no different than going through a defendant's cloths.[272]
    - The court said as to inmates this was globally inaccurate. They found an inmate still had some expectations of privacy, but they were diminished.[273]

Expectation of Privacy in electronically stored data in a Cell Phone:

- The court recognized the phone was taken during booking. It noted that cell phones have the capability to memorialize personal thoughts, plans, information and the like. They acknowledge this type of private information led to the development of passwords and encryptions to prevent its disclosure.
    - The court stated:

> Given this, we cannot but hold that a person (whose category encompasses Granville) has a general, reasonable expectation of privacy in the data contained in or accessible by his cell, now "smart," phone . . .And that expectation is subject to

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[272] *Id.*

[273] *Id.*(And, we cite it to *Oles v. State,* 993 S.W.2d 103 (Tex.Crim.App.1999), where our Court of Criminal Appeals said that arrestees still retain some level of privacy interest in personal effects or belongings taken from them after arrest. *Id.* at 108. Instead of having none, their expectations of privacy are "diminished." *McGee v. State,* 105 S.W.3d 609, 617 (Tex.Crim.App.2003)).

protection under both the Fourth Amendment of the United States Constitution and article 1, § 9 of the Texas Constitution.[274]

- The court concluded this sections analysis stating that the power button of a cell phone was analogous to a door of a house, and as such, a closed door was enough to prove there was an expectation of privacy in the cell phone contents.[275]

The court granted the order of suppression for the defendant. In its final statements about the case, the court said to the State: "A cell phone is not a pair of pants."[276]

ii. *State v. Patino*-Rhode Island (2012)

This last case deals again with a defendant having a reasonable expectation of privacy in their cell phone. It is a case of note for anyone seeking detailed information on this subject. The court case is encapsulated in 75 pages of text, providing great detail and insight into the courts reasoning's.

This was a murder case where a man was accused of killing his girlfriend's six year old son. The case was largely built upon cell phone text messages the State claimed

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[274] *Id.* at 223.

[275] *Id.* at 224. (Evidence of the phone being off has other import, as well. That evinces some precautionary measure being taken to secure the data from curious eyes. The power button can be likened to the front door of a house. When on, the door is open and some things become readily visible. When off, the door is closed, thereby preventing others from seeing anything inside.).

[276] *Id* at 227. (While assaults upon the Fourth Amendment and article I, § 9 of the United States and Texas Constitutions regularly occur, the one rebuffed by the trial court here is sustained. A cell phone is not a pair of pants.).

were sent by the defendant to his girlfriend. The defendant claims the texts were obtained without a warrant, and that he did not intend to hurt, nor kill the child.[277]

The court held a month long series of evidentiary hearings, and in the middle of them the defendant moved for a Franks hearing, arguing the evidence hearing had produced multiple false statements in dozens of sworn affidavits.[278] The court found that the defendant had a reasonable expectation of privacy in his cell phone that was searched and seized, that evidence was presented to suppress the States evidence for use at trial, and that there was a preliminary showing that numerous sworn statements in affidavits were either deliberately false or made in reckless disregard of the truth.[279]

The highlights of the court's decision will be discussed briefly, but before addressing the issues, the most notable and outstanding element of this case is the words the judge wrote at the opening of the opinion:

> DECISION
>
> SAVAGE, J. When the precious rights of individuals to keep private the expression of their innermost thoughts collides with the desire of law enforcement to know all at all costs, this Court must take special care to ensure that what it says today is fair game for police conduct does not

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[277] *State v. Patino*, 2012 R.I. Super. LEXIS 139, *1 (R.I. Super. Ct. 2012).

[278] *Id* at *2.

[279] *Id*. at *3.

sacrifice on the altar of tomorrow the rights that we hold most dear under our state and federal constitutions.[280]

The basic facts of the case are the mother of the child called 911 early on the morning of October 9th, 2009, her child was unresponsive. Paramedics arrived and found the child in full cardiac arrest. He died at 6:30 am that morning.[281] Police started an investigation at 6:20 am at the apartment of the child. The defendant was there with the boy's 14 month old sibling sister. The officer observed vomit on the toilet, and a bed stripped of linen.[282]

The officer observed four cell phones in the apartment. He questioned the defendant about what had happened over night and the defendant said he did not know because he had not spent the night. The officer asked him when the mother had called him to come over. The defendant said she did not call him, that he did not own a cell phone.[283]

During this interview, one of the cell phones made a beeping noise. The officer said the defendant did not move to answer it, so feeling it was a family member calling, the officer went to the phone. The screen showed an incoming text message but it could not be viewed because of lack of credit on the phone. The officer said he hit a button to stop the beeping, and the phone opened up to a list of messages with the most recent

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[280] *Id*. at *1.

[281] *Id*. at *6.

[282] Id at *7.

[283] Id. at *11.

having the word “hospital” at the top of it.[284] He opened the message. It basically said; what do I do if I take him to the hospital, what about the marks on his neck.[285]

The defendant was arrested based upon what some of the cell phone texts contained. The detective told the defendant about the texts, “they’re on your phone, even the ones sent back.”[286] The defendant denied striking the child, but said he was teaching him to stand up for himself. The detective read from the text: "tell that bitch to man up, I didn't hit him that hard."[287]

This court went on in great details of what transpired. They ultimately discussed some of the reasons they disallowed the cell phone evidence.

The court stated that a cell phone is not a container, citing the definition provided in *Belton.*[288] They said a person maintains an expectation of privacy in their text messages, just as the defendant in *Katz*[289] had an expectation of privacy in the phone booth.[290] The court’s opinion on cell phone text messages was stated:

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[284] Id. at *12.

[285] *Id.*

[286] *Id*. at *20.

[287] *Id.*

[288] *Id*. at *96. (In *New York v. Belton*, the Supreme Court defined a container as "any object capable of holding another object." 453 U.S. 454, 460768 (1981)).

[289] *Katz, supra* note 78.

[290] *Patino, supra* note 277, at *100. (Though text messages, unlike oral telephone conversations, are meant to be read rather then listened to, they implicate the same issues. What Defendant "sought to exclude when he [allegedly sent text messages to that phone]" was not the "uninvited ear" but the "intruding eye." Id. He did not "shed his right simply because he [allegedly sent his texts] to a place that [they] might be seen." . . ."One who [sends a text] is similarly entitled to assume that [the] words [that [101] he or she writes] will not be broadcast to the world." Id. "To read the Constitution more narrowly is to ignore the vital role that [text messaging] has come to play in private communication.").

> It is this Court's view that if text messages were not afforded privacy protection, regardless of their form or method of discovery, the wall of protection provided by the Fourth Amendment would be rendered 10 feet high by 10 feet long—an impotent defense from unreasonable search and seizure.[291]

The court noted that there are copies of most texts that could be accessed from other phones of people not a party to the investigation. The texts are contained on the sending phone, the receiving phone, and the possibly the service provider. This in effect could be used to "work around" the low wall the government would like to see be the Fourth Amendment.[292]

The court concluded;

- The defendant had a reasonable expectation of privacy in the text messages, regardless of if they were sent or received.[293]
- The officers viewing of the text messages did not fall under any exceptions[294]

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[291] *Id.* at *102.

[292] *Id.* at 103. (Absent a grant of standing in the text messages themselves, law enforcement, in effect, would possess an easily effectuated and legally substantiated workaround to the core privacy protections of the Fourth Amendment. The aggrieved party before the court would lack standing, while the other participating party, for all practical purposes, would lack the motivation to challenge the constitutional violation on account of burdens including, but not limited to, obtaining an attorney, paying legal fees, spending time in court, and potentially derailing the prosecution of a crime. It further follows that the government's violation would, in some scenarios, be likely to escape review because the party whose cell phone was actually searched might lack knowledge of the violative conduct, might not be able to prove it, or might perceive any injury from a violation as unworthy of pursuit.).

[293] *Id*. at *308.

- Almost all the evidence obtained by the police department was "tainted" by the illegal searches.[295]

The court held that the motion to suppress the cell phone evidence gathered by a warrantless and illegal search would be granted.[296]

E. Section Opinion

These courts upheld what the Fourth Amendment was written to protect. Freedom, provided to the citizens, from government invasion into the thoughts and writings of the citizen without the oversight of a neutral magistrate and a valid warrant.

The case conclusion from all the courts shows that people have a reasonable expectation of privacy in the contents of their cell phone. That the government cannot rummage through a cell phone on a fishing expedition hoping to discover some criminal conduct. The exceptions to the Fourth Amendment are in place to assist law enforcement, but a warrantless search of a cell phone will not occur solely because of; a search incident to arrest, for an inventory search, as an exigent circumstance, nor under a justification of plain view.

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[294] *Id* at*309. (Sgt. Kite's actions to view the text messages on the LG cell phone did not fall within the exigent circumstances, plain view, or consent exceptions to the warrant requirement, and as such, were objectively unreasonable under the circumstances. In addition, the searches and seizures of the police of all of the cell phones in evidence and their contents were illegal as warrantless or in excess of the warrants obtained.).

[295] *Id.* (Thirdly, almost all the evidence the Cranston Police Department obtained during the course of its investigation into the death of Marco Nieves was "tainted" by the illegal search made by Sgt. Kite or the other illegal searches and seizures of cell phones and their contents. Accordingly, this Court holds that this bountiful harvest of illegally collected evidence and poisonous fruit is inadmissible at trial.).

[296] *Id* at *311.

It is courts such as these that will provide arguments and hopefully the grounds to see that the United States Supreme Court will hear cases such as these, and rule in a manner consistent with the intent of the author of the Fourth Amendment.

VI. Warrantless Search of Cell Phones and the Constitution

The basis of the Fourth Amendment was developed in great part on three cases[297] of government invasion upon the citizen's private property in their homes or business. It was unconscionable to have strangers rummage through ones private thoughts that were put to paper.[298]

Cell phones are the modern equivalent to a sealed letter in a desk drawer or filing cabinet.[299] As such they deserve protection. The cell phone is not a container used to conceal tangible objects[300]; they are instruments that convey and store thoughts, pictures, and messages of a personal nature.[301]

Ultimately, there are rarely any exceptions that the government truly can meet that would allow for the warrantless search and seizure of cell phones under the Fourth Amendment.[302]

Justice Savage, of the Superior Court of Rhode Island, Providence, wrote the quote every court should use to guide their decision when facing warrantless cell phone

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297 *See Entick supra* note 20, *Wilkes*, *supra* note 26, *Legal Papers of John Adams, supra* note 40.

298 *Wall, supra* note 232.

299 *Id. supra* note 231.

300 *Smith, supra* note 247.

301 *Granville, supra* note 274.

302 *Smith, supra* note 250.

search issues. In September of 2012, in the case of *State v Patino*, Justice Savage wrote these words in his opening opinion of the case;

> When the precious rights of individuals to keep private the expression of their innermost thoughts collides with the desire of law enforcement to know all at all costs, this Court must take special care to ensure that what it says today is fair game for police conduct does not sacrifice on the altar of tomorrow the rights that we hold most dear under our state and federal constitutions.[303]

[303] *Patino, supra* note 280.