Third Party Doctrine

Fourth Amendment considerations of obtaining Digital Evidence

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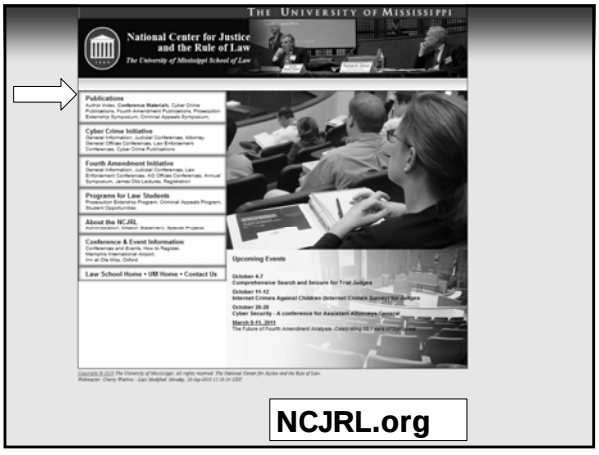

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Fourth Amendment Initiative

Promotes awareness of search and seizure principles

- **Conferences for state judges**
- **Computer Searches and Seizures**
- **Annual Symposium / published lectures**

publications at www.NCJRL.org

Cyber Crime and Digital Evidence Publications / Projects

lots **on line at www.NCJRL.org**

including:

Email delivered Cyber Crime Newsletter

Internet Victimization Symposium

Materials on computer-related crime

WEBINARS on Internet Technology

Web Browsing 101

Hiding Tracks on the Web

Interactive Media

Mobile Devices

Peer-to-Peer Technologies

Emerging Uses/Cutting Edge Technologies

recorded/ live at NCJRL.org

Grant-funded Judicial courses

- **Comprehensive Search and Seizure for Judges**
- **Searches and Seizures of Computers and Digital Devices**
- **Internet Crimes Against Children**

structure of 4th Amendment analysis

IN EVERY CASE, ...

1. Does the 4th Apply?

A. Gov't activity: "Search" or "Seizure"
B. Protected interest

2. Is it Satisfied?

[3. Remedies?]

analytical structure of applicability question

1. Protected interest is necessary but not sufficient condition
focus: *individual's* interest -- privacy

2. Must be gov't invasion – "search"– of that interest.
focus: *governmental actions.*

This session assumes step #2 and focuses on step #1.

protected interests

4th:

"The right of the people to be SECURE in their persons, houses, papers, and effects . . . ."

step #1: is object on list?

person, house, paper, or effect

step #2: quality protected?

does defendant have protected interest in that object implicated by gov't activity?

objects protected

only four objects protected: persons, houses, papers, and effects

step #1: is object on the list?

(ex) open fields – not on list

(ex) "house" -- includes apts, hotel rooms, businesses

step #2

Privacy: main interest protected

"The ***principal*** ***object of the Amendment is the protection of privacy . . . "***

Soldal

Gov't Activity: "SEARCH"

Reasonable expectation of privacy test

1. person exhibits **actual, subjective expectation of privacy**

2. society recognizes that expectation as **Justified / Reasonable / Legitimate**

Smith v. Maryland, 442 U.S. 735, 740 (1979)

If either prong missing, no protected interest

How to find "legitimate" expectation of privacy?

look to:

1 real property law

2 personal property law

3 "understandings that are recognized or permitted in society"

California v. Ciraolo, 476 U.S. 207 (1986)
Rakas v. Illinois, 439 U.S. 128 (1978)

1990s battleground

"standing" : Guests in houses

1. ***Olson***

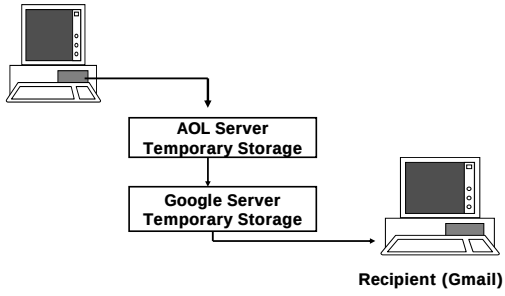
   -stayed overnight

2. ***Carter***

   - bagged cocaine for a couple hours

21st Century battleground

obtaining evidence



two fundamental considerations

1. **Content vs. Non-Content:**

   Fourth Amendment does not protect NON-content from gov't search

2. **location of search for content:**

   Where does one have reasonable expectation of privacy so as to be able to object when gov't obtains Content ?

type of information is gov't seeking

content:
the communication itself

non-content:
addressing information

Obtaining NON - content

- by "Search"
- Fourth Amendment DOES not apply

NON-content is not protected by Fourth Amendment

Pen register recorded numbers dialed by telephone

Smith v. MD, 442 U.S. 735 (1979):

- robber kept calling victim
- Amendment does NOT protect non-content
- no REP in numbers dialed
  - -- voluntarily conveyed info to 3rd party
  - -- assumed risk of disclosure

Pen Register / Trap & Trace: gets non-content

18 U.S.C. §§ 3121-3127

- get "dialing, routing, addressing, or signaling information"
- Not a search under 4th Amendment

  U.S. v. Forrester, 512 F.3d 500 (9th Cir. 2008)

  - to/from addresses
  - IP addresses of websites visited
  - volume of info to/from his account

Non-content Information

- Dialing, routing, addressing, or signaling information
- Basic customer or subscriber records
- Transactional information

same definitions as in SCA

Email Info with Pen/Trap

- get most e-mail header information
  - "To", "From"
  - IP address & port
  - For both source & destination
- But not
  - "Subject" line of e-mails
  - Content of downloaded file

Post-Cut Through Dialed Digits

- numbers dialed after call initially set up
- includes acct #s, pin numbers, ID #s, social security #, credit card #s

Content or Non-content?

- In re Application, 515 F. Supp. 2d 325 (E.D.N.Y. 2007):

  "functional equivalent of the human voice"

URLs (uniform resource locators)

- Content or not?

www.biosupplies.com / mailorder / Anthrax.htm

host — path or "file path"

In re application, 396 F. Supp. 2d 45 (D. Mass. 2005):
same as post-cut through digit extraction

Legal requirements for Pen / Traps

- gov't can get order when 18 U.S.C. § 3123
  1. authorized attorney applies under oath for order and
  2. assert that "information likely to be obtained is relevant to an ongoing criminal investigation"
- no independent judicial determination of 2

In re application

Obtaining Content

- substance of communication
- **fundamental question:**

  does person objecting to search have reasonable expectation of privacy (REP) in info / data in location where it is found ?

information held by third parties

general rule: never have standing to challenge disclosure of information held by third party

ex: records of deposit at bank

***U.S. v. Miller,* 425 U.S. 435 (1976)**

only exception to date?

hospital records of medical tests of pregnant women indicating drug use given to law enforcement by hospital --- BUT premised on assumption woman did not consent to test

***Ferguson v. City of Charleston,* 532 U.S. 67 (2001)**

Traditional F/A doctrine: non-digital world

No F/A Protection from 3rd Party Disclosures to Gov't

Rationale: ***Risk Analysis -- Voluntary Exposure***

- **misplaced belief to whom voluntarily confides will not reveal secret**

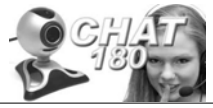
  Miller
- **such "risk" is "probably inherent in the conditions of human society"**

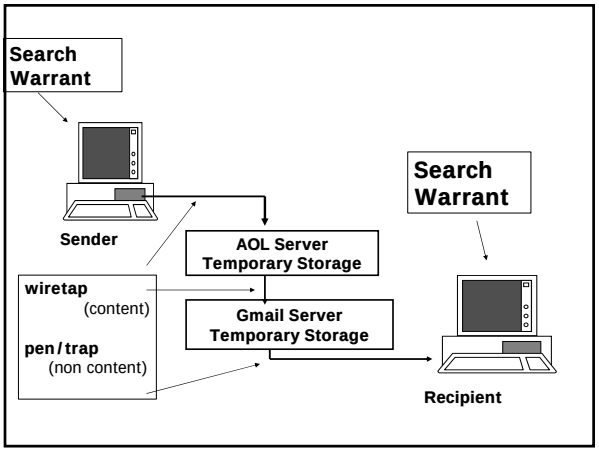
  Hoffa
- **vol. exposure to public eliminates F/A protection**

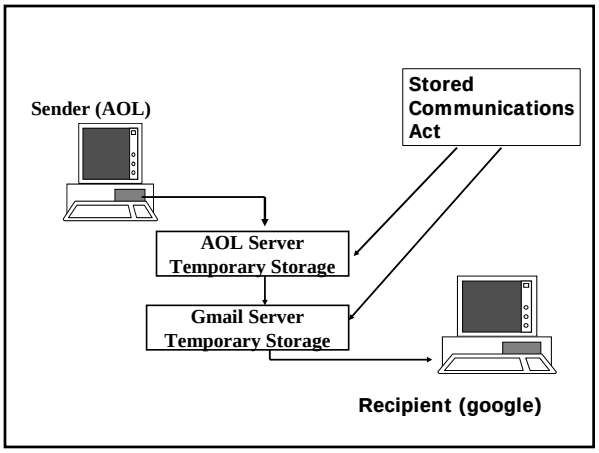
  Katz

21st century battleground !

assume risk / voluntary exposure ???







application of Fourth Amendment principles to --

1. Virtual worlds

2. cloud computing

3. web based data storage

4. email / data in transit

what are relevant considerations?

lower courts fairly uniform --

obtaining content --- No F/A protection

1. Email recovered from recipient

2. Internet chat rooms

3. Posting Info on a Website

doctrines:

- voluntary exposure
- assume risk

City of Ontario v. Quon, 130 S. Ct. 2619 (2010):
some answers?

- cop sent text messages to wife, mistress via gov't issued pager
- agency reviewed printouts obtained from provider to determine if needed more capacity for police business

issues:

1. Quon have REP in messages?
2. Wife / mistress have REP in messages?
3. Was search Reasonable ?

***See* memo on line for summary**

police pager policies

Formal Written Policy

- explicitly said user had no REP
- could audit, monitor, or log all activity
- not for personal use
- Quon aware of and signed

"Informal Policy"

- Lt. Duke: you pay overages, will not audit

Quon: NO answers

- "case touches issues of far reaching significance"
- concern: "broad holding" on REP "might have implications for future cases that cannot be predicted"

Therefore:

1. assumed Quon / women had REP
2. search reasonable

dicta on REP analysis -- *possible* factors

- Duke's statements change in policy?
- did Duke have "fact or appearance" of authority to change / guarantee REP
- should public/ private employees be treated differently
- gov't had interests to review messages:
  - performance evaluations
  - litigation on lawfulness of police actions
  - comply w/ open records laws

- Rapid changes in communication
- many employers expect / tolerate personal use
- **employer policies "especially" when "clearly communicated"**
- some state statutes require employers to notify when monitoring electronic communications
- uncertain evolution of **workplace norms** / law's treatment

- Cell phone / text messaging pervasive -- hence:
  - one view:

    "essential means or necessary instruments for self-expression, even self-identification"

  - another view:

    due to ubiquity / affordability employees can buy own

Scalia, concurring

- Applicability discussion "unnecessary" & "exaggerated"
- rejects "implication" about electronic privacy that Ct should decide less –

  The-times-they-are-a-changin' is a feeble excuse for disregard of duty.

- **courts/ litigants likely to use dicta as "heavy-handed hint about how they should proceed"**

The Court's standard

"is (to put it mildly) unlikely to yield objective answers"

Sotomayor concurring in *U.S. v. Jones,* 132 S CT 945 (2012)

Privacy does not equal secrecy

- **reconsider 3rd party doctrine: "ill suited to the digital age"**
- **people reveal great deal of info to 3rd parties to carry out mundane tasks**
  - **phone numbers dialed / text to cellular providers**
  - **URLs visited**
  - **e-mail addresses to ISPs**
  - **books, groceries, and medications purchased online**

Sotomayor concurring

- **Doubts people accept warrantless disclosure to Gov't list of Web sites visited in last week, or month, or year**
- **Does not assume all info voluntarily disclosed to some member of public for limited purpose is, for that reason alone, disentitled to F/A protection**

Smiling Bob meets the 6th Circuit

Is email obtained from ISP protected by Fourth Amendment?

Warshak #1,

532 F.3d 521 (6th Cir. 2008) (en banc)

QUESTION not ripe:

privacy expectations

- **"may well shift over time"**
- **"shifts from internet-service agreement to internet-service agreement"**
- **requires knowledge about ever-evolving technologies**

variety of agreements

Service providers ....

- **will "not ... read or disclose subscribers' e-mail to anyone except authorized users"**
- **"will not intentionally monitor or disclose any private email message" but "reserves the right" to do so in some cases**
- **right "to pre-screen, refuse or move any Content that is available via the Service"**
- **e-mails will be provided to government on request**
- **other individuals will have access to email / can use information**
- **no REP in any communications**

U.S. v. Warshak (#2),
631 F.3d 266 (6th Cir. 2010)

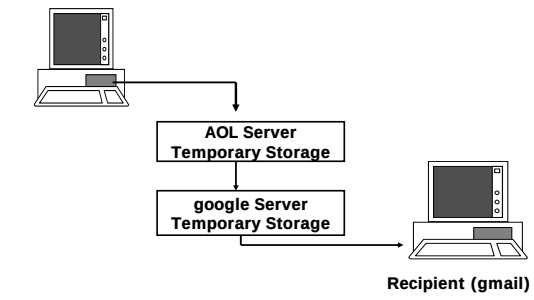
SCA subpoena on less than probable cause violates 4th Amend

- analogy to letters / phone calls
- ISP = post office / telephone company

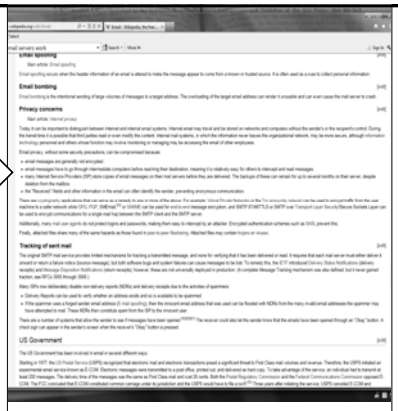
- **subscriber agreement: limited access only to protect ISP**

- **not holding: subscriber agreement will *never* be broad enough to snuff out REP .... if ISP intends to "audit, inspect, and monitor" emails, might be enough**

Where email can be read



wikipedia



solutions?

data in transit *or* stored

stored data

Compelling Content Production: warrants

Search Warrant: gets everything !

- ***may*** **always be needed when content sought**
- **safer course: Get warrant for *any* content**

The Fourth Amendment

Its History and Interpretation

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Cyber Crime and Digital Evidence: Materials and Cases

- **LexisNexis (2011)**
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Power points other materials available at:

WWW. NCJRL.org

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