

6.805/6.806/STS.085, Ethics and Law on the Electronic Frontier
**Lecture 4: Fourth Amendment Foundations and the First
Century of Electronic Surveillance**

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Fourth Amendment

Over the next few weeks, we will focus on how technical change and technology has manifested itself. We will look at the basics of the 4th Amendment and the Communications Act. We will also examine private activity and a debate over encryption technology.

The 4th Amendment is an enormous body of law. At most law schools, this topic is covered in one or several courses that deal with criminal law.

- I. Historical Background
 - A. Judicial disputes used to be resolved by the king or queen, but this became too taxing for the king and queen
 - B. Then disputes were delegated to the courts.
 - C. Semayne's Case (old English case, 1604) – Jist of story: There was no process. The bailiff must have some type of notice. (Today this is called a warrant.) The notice must establish a given reason (probable cause). The reason must be announced as to why the search will occur.

- II. Fourth Amendment (4A)
 - notice (warrant)
 - reason (probable cause)
 - announce (knock and announce)
 - property (this only extends to your own home or property)
 -
 - general search or secret
 -
 - "detached and neutral magistrate"

The British were always concerned about a secret search going on aimed towards the target of the search. Wiretapping is an interesting topic because putting the above mechanisms in place will jeopardize evidence.

This announce and knock clause was to the benefit of the person being asked to have his property searched. It is assumed that the person will open his door voluntarily.

These fundamental things form the basis of the 4th Amendment, which is the law of search and seizure.

Real action in this case refers to real property.

Communications Privacy

We will look at how this extends to Communications Privacy.

Communications Privacy –

1. distinct from search and seizure law
2. also distinct from information data policy

*Note: This is about communications privacy and does not extend to information policy. This is a narrow focus.

As we work through the evolution of law, hopefully you will see how law enforcement and the judicial system use these methods.

Olmstead vs. United States

The 5th Amendment process crosses the 4th Amendment line in the Boyd case. Chief Justice Taft ends the discussion with the case ex party Jackson. Telephones didn't have the constitutional status like the mail did at this time. In Jackson, the mail was considered your property or documents, and it was expected that this mail property would be protected. The expectation was created, so Jackson stated this was covered by your 4th Amendment rights.

<u>protect</u>	<u>tech</u>	<u>crime</u>	<u>metaphors/talismans</u>	<u>4A</u>
1928 -		bootlegging	property, trespass	yes
1967-68	Phone cause- mass market Title III (1968)	Gambling organized crime	persons not places -subjective expectation -objective expectation	probable
1984-86 ECPA	email/elect. Comm. store & forward	-----	1 st class mail	
1994	transactional record	terroism	reas. artic. susp.	CALEA

Taft was trying to create an argument that he had hoped would be a progressive view of the boundaries of the 4th amendment.

The dissent:

Justice Brandeis says this a constitution we are expanding as opposed to the law.

What are Brandeis' arguments about the telephone?

There is no difference between the telephone and the sealed letter and uses the same cases that Taft cites.

In the modern court, the majority opinion reserves the right to include the dissenter's opinion.

Katz vs. United States

This was a case surrounding organized crime.

J. Edgar Hoover was director of the FBI, but taped lots of people's phones and was thought to influence the political process. As a result, since Hoover all FBI directors were judges (except the current director).

General requirement of a "detached and neutral magistrate": To get the warrant, you must prove probable cause to a detached, neutral magistrate. Their job is to access whether the need for a warrant is valid.

Even though there is a subjective expectation of privacy, there may be other factors that overrule this expectation. The objective expectation can overrule the subjective because of the laws of society. Subjective – how they feel, and objective – how far the society is willing to grant permissions. Potter Stuart wrote this opinion.

The Supreme Court has really changed the whole way that the courts look at the 4th Amendment.

Potter Stuart's opinion is pretty accepted but also heavily criticized.

Those that are associated with someone expected of criminal activity also had their privacy violated. So the civil liberties union was opposed to wire tapping.

Title III sets out a careful set of rules that ultimately end at creating a level of protection beyond the 4th Amendment rights.

Title III sets out regulations for using wiretapping, which include when other investigative methods are not working. Other judicial officials must approve the wiretaps besides the FBI.

Part of the procedures specify that there are 2 teams that review the discussions of wiretap. This is done in real time and procedural safeguards are put into place to protect those that are not the target of the investigation. (i.e. discussion of golf as opposed to criminal activity)

The 4th amendment can be preempted by extensis evidence. Meaning the evidence will vanish or someone will be murdered so must act quickly.

Title III- Inventory requirement, provision that you will get account of what's going on either before or after the wiretapping

Title III was originally authorized for only specified types of crimes- gambling, racketeering.

The process of wiretapping has become cheaper but the wiretaps have gone up. However, there appears to be only a few wiretap requests that have been rejected.

The vast majority of wiretapping cases in the 90s were for drug-related criminal cases.

In order to tap a phone there has to be either a Title III court order or FISA court order.

The 4th Amendment applies to U.S. citizens and is regulated within our country.

Electronics Communications Privacy Act

By the mid 80's, electronic services were becoming popular.

The communications in the mid 80s were considered store and forward communications, not wired communications. This application to the 4th Amendment looked questionable.

The email/electronic communications was treated like 1st class mail and the statute ECPA was created. This statute is more complicated than the Title III law.

The technology industry was proactive during this process. There was a trend from a small number of providers to a much larger number of service providers.

ECPA was created because Congress thought that they were following Brandeis' precedence.

The Electronics Communications Privacy Act (ECPA) applies to mail in transit, or mail that has not yet been received by the addressee.

Doing electronic surveillance is now a lot cheaper than the way it used to be because you are dealing with an electronic data stream. The low cost of storage has changed the dynamics of companies who now choose to keep lots of electronic communications as opposed to deleting it and figuring out where the data is located.

The ECPA worked for about 10 years and there was little dispute during the time.

The cordless phones were oddly left out of Title III and ECPA originally. CALEA closed that gap and addressed a new artifact in internet and digital communication. The transactional record was not being protected in Title III or ECPA.

The transactional records consisted of the log files (who sent what to whom) as opposed to the content. These records consist of the date, time, and some subject information. The transactional records were subject to a greater access requirement than toll records.

The Terry vs. Ohio case

Serial window shoppers so this would be considered suspicious. The police officer had enough experience (35 years) to have reasonable articulable suspicion that a crime might be taking place or about to take place.

There is a procedure that law enforcement has to follow in order to intrude on a person's rights and privacy under the 4th amendment.

The court orders that use this metaphor from Terry vs. Ohio must do so *ex parte*.