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The Eroding Fourth Amendment

By Greta Shope

Introduction

"I agree that constitutional rights apply to situations that were unforeseen in 1791 or 1868— such as applying the [...] Fourth Amendment.[160]" So wrote Supreme Court Justice Brett Kavanaugh, whose method for interpreting the United States Constitution is ostensibly rooted in the document's original meaning[161]. This internal contradiction demonstrates the difficult task that contemporary judges face when assessing the historic document with modern circumstances. The Fourth Amendment of the Bill of Rights is perhaps the best example of this tension. The amendment reads:

> 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[162].

In the intervening centuries, the Supreme Court has developed a significant body of Fourth Amendment jurisprudence, defining a 'seizure' under the amendment[163], protecting officials who perform unconstitutional searches in 'good faith[164],' and otherwise regulating the surveillance capabilities of law enforcement. These precedents have been created by conservative and liberal courts alike, using textual analysis and 'original public meaning[165],' as well as the more abstract concept of a living constitution that adapts to contemporary circumstances, to hone the Fourth Amendment's meaning. Regardless of the mode of constitutional interpretation, however, a study of Fourth Amendment case law demonstrates one clear trend: the Supreme Court fails to keep up with modern surveillance technology, creating bigger and bigger constitutional gaps as new modes of search and seizure are classified under 'no search' exceptions[166]. While this erosion of Fourth Amendment rights is not reliant on a particular mode of constitutional interpretation, it often plays out against the backdrop of 'national threats,' or periods of public fear[167]. Throughout the 20th and 21st centuries, these threats have shifted from the 'war on drugs' to the 'war on terror,' and finally to fears about domestic civil unrest. While judicial interpretation of the Constitution changes, the Court habitually bends to the political will of domestic crime-stopping and national security; both politicians and judges are keen to treat hypothetical

[160] Dobbs et. al v. Jackson Women's Health Organization et. al, 597 S. Ct. 215-423, 340 (June 24, 2022).
[161] Brett M. Kavanaugh, "Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution," *Notre Dame Law Review* 89, no. 5 (2014), 1907.
[162] U.S. Const. amend. IV.
[163] Roxanne Torres v. Janice Madrid, No. 19-292, slip op. at 10-11 (Mar. 25, 2021).
[164] United States v. Alberto Antonio Leon et. al, 104 U.S. 897 (June 5, 1984).
[165] Ute Römer-Barron and Clark D. Cunningham, "Applied Corpus Linguistics and Legal Interpretation: A Rapidly Developing Field of Interdisciplinary Scholarship," *Applied Corpus Linguistics* 4, no. 1 (2024), 1-2, https://doi.org/10.1016/j.acorp.2023.100080.
[166] Phillip Heymann, "An Essay on Domestic Surveillance," *Journal of National Security Law and Police* 8 (2016), 425.
[167] *Ibid.,* 435.

future threats as inevitable, "despite the fact that their actual appearance in the world has not occurred[168]."

This article will begin with a brief overview of the major 'schools' of constitutional interpretation available to the Supreme Court, followed by a section outlining the origins of the Fourth Amendment and the early jurisprudence that created procedural privacy. Advancing chronologically, the article will discuss the erosion of the Fourth Amendment through exceptions created for new technologies, beginning with physical technologies invented to combat the 'war of drugs,' then novel digital surveillance technology weaponized in the aftermath of the 9/11 terrorist attacks, and finally, the exponential rise in information sharing and metadata surveillance brought about in responses to fears about civil unrest. Throughout, these exceptions will be explained in reference to their legal and political arguments to demonstrate that the Supreme Court, regardless of its political ideology or preferred mode of constitutional interpretation, ultimately sacrifices Americans' Fourth Amendment rights in the name of domestic and foreign threats.

I. Schools of Constitutional Interpretation

The most formidable school of constitutional interpretation is originalism. Focused on jurisprudence that follows the intentions of the Constitution's Framers, it was conceived the oppose the liberal 'excesses' of the liberal Warren and New Deal Courts[169], both of which focused on the expansion of civil rights and participation in government[170] and tended to place emphasis on the consequences of their rulings rather than the Framers original intentions. While originalism is often linked to conservative political movements[171], analysis of the Framer's original intentions when drafting the Constitution can lead to wildly different conclusions, as most constitutional provisions are the product of fearsome debate between the Constitutions drafters[172] and have no quantitatively singular meaning[173]. Even before the 'school' of originalism sprung up in the late 20th century, many Justices interpreted the Framer's intentions and linguistic choices. In the context of the Fourth Amendment, there is no consensus on the Framer's intentions[174]; while some suggest it was written with extremely narrow tailoring to solely protect the 'persons, houses, papers, and effects' it names without room for expansion[175], others claim the amendment includes a broader right to procedural privacy outside of its mere 54 words[176].

[168] Lauren Martin and Stephanie Simon, "A Formula for Disaster: The Department of Homeland Security's Virtual Ontology," *Space and Polity* 12, no. 3 (2008), 286, https://doi.org/10.1080/13562570802515127.
[169] Ruth Marcus, "Originalism Is Bunk. Liberal Lawyers Shouldn't Fall for It," *Washington Post* (DC), December 1, 2022.
[170] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Knopf Doubleday Publishing Group, 2007), 10-11.
[171] Lee J. Strang, "Originalism and Conservatism: An American Story," *Foundational Principles* 94 (February 2024), 3.
[172] Stephen D. Solomon, "Madison-Jefferson Letters on Advisability of a Bill of Rights, 1787-1789," First Amendment Watch, New York University, last modified February 2, 2018.
[173] Erwin Chemerinsky, *Worse than Nothing: The Dangerous Fallacy of Originalism* (New Haven: Yale University Press, 2022).
[174] Erwin Chemerinsky, *We the People: a Progressive Reading of the Constitution for the Twenty-first Century* (New York: Picador, 2018), 29: "Not even Justice Scalia could find an eighteenth-century English law precedent about whether the use of cellular technology is a search within the meaning of the Fourth Amendment."
[175] Sophia Z. Lee, "The Reconciliation Roots of Fourth Amendment Privacy," *University of Chicago Law Review* 91, no. 8 (2024), 2144.
[176] United States v. Olmstead, 277 U.S. 438, 478 (June 4, 1928).

The loose interpretation of the Constitution originalists fear, generally termed 'living constitutionalism,' is also highly malleable. Living constitutionalists often debate the meaning of the Constitution's preamble, for example, or what common law rights are unalienable despite their omission from the Constitution[177]. Many judges who do not consider themselves originalists–including the Supreme Court's newest member, Ketanji Brown-Jackson– believe "it's appropriate to look at the original intent…" when interpreting the Constitution[178]. From this analysis, it becomes clear that modes of constitutional interpretation are much more fluid than their naming conventions suggest. Judges across the political spectrum use every weapon in their 'toolkit[179],' from original intent to future consequences to, as this article argues, erode the Fourth Amendment's protections.

II. Origins of the Fourth Amendment and Early Jurisprudence

The Fourth Amendment was born out of colonists' outrage over British writs of assistance, a form of general warrant used to carry out searches for contraband en masse and violate the sanctity of Americans' homes[180]. Many Constitutional Framers, including its main drafter James Madison, viewed the Bill of Rights as unnecessary[181], though states' rights activists at the Constitutional Convention were ardent about its inclusion; Virginian Patrick Henry warned that "they may, unless the General Government be restrained by a Bill of Rights […] go into your cellars and rooms, and search, ransack and measure, everything[182]…" The amendment was ratified three years later. However, the definition of searches and seizures was not discussed thoroughly during debates on the Bill of Rights, making the original intent or meaning of the Fourth Amendment 'nearly impossible' to define[183].

Less than a century later, President Lincoln systematically violated Fourth Amendment protections during the American Civil War[184], one of the earliest examples of civil liberties being suspended in the face of extraordinary circumstances[185]. Rights litigation exploded post war with jurisprudence to accompany it[186]. *Boyd v. United States,* though its definition of a search was still rooted in the trespass of tangible property, declared the Fourth Amendment "relate[s] to the personal security of the citizen," and is not implicated only after an intrusion into the home[187]. *Boyd's* reliance on both an originalist definition of a search and adapting the Fourth Amendment to modern circumstances is contradictory on its face and is only explained by the

[177] Chemerinsky, *We the People* 183.
[178] Andrews Koppelman, "Ketanji Brown Jackson's Originalism," *The Hill* (DC), April 10, 2022.
[179] Breyer, *Active Liberty*, 8.
[180] James Otis, *Collected Political Writings of James Otis*, comp. Richard Samuelson (Indianapolis, IN: Liberty Fund, 2015), 11-14.
[181] James Madison to Thomas Jefferson, October 17, 1788.
[182] Jonathan Elliot, comp., *The Debates in the Several State Conventions* (1836), 3, 301.
[183] Orin S. Kerr, "The Curious History of Fourth Amendment Searches," *The Supreme Court Review* 2012, no. 1 (2013), 71, https://doi.org/10.1086/670228.
[184] Lee, "The Reconciliation," 2169.
[185] Duncan Hunter and Malcolm N. MacDonald, "Arguments for Exception in US Security Discourse," *Discourse & Society* 28, no. 5 (2017), 496, https://doi.org/10.1177/0957926517710978.
[186] Thomas McIntyre Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union Thomas McIntyre Cooley*, 5th ed. (Union, N.J: Lawbook Exchange, 1999), 299-308.
[187] Boyd v. United States, 116 U.S. (Feb. 1, 1886), 616.

pressure the Court caved to from Congress about overreaching governmental power, as well as calls from Southern Democrats to limit governmental power during Reconstruction[188].

At the turn of the 20th century, the Fourth Amendment was strengthened through the creation of the exclusionary rule[189], though the Court also created significant carveouts for warrantless searches of non-physical evidence[190] and any evidence collected under the plain view doctrine[191]. While it is far from the 'states of exception' to be discussed in later sections, it is worth noting that these cases centered around alcohol smuggling which had created significant public moral panic.

In 1967, however, the Court moved away from its property-based understanding of the Fourth Amendment in *Katz v. United States*, a decision which explicitly condemned an originalist interpretation of the Fourth Amendment and declared non-physical searches–in this case, a payphone call– as requiring warrant protection[192]. This decision revolutionized Fourth Amendment jurisprudence, removing the physical intrusion requirement outlined in Boyd and replacing it with a 'reasonable expectation of privacy' standard[193]. This standard is the basis on which many of the cases in the following sections are based, whether their reasoning is explicitly originalist or not.

III. Physical Searches and the 'War on Drugs'

Throughout the final decades of the 20th century, the Supreme Court heard more Fourth Amendment challenges than ever before, the result of which was "considerable expansion, beyond what existed prior to *Katz*, of the power of police and other authorities to conduct searches[194]." Many of these decisions are based on an originalist definition of a 'search' rooted in physical trespass, ignoring the *Katz* reasonableness test laid out decades prior. *California v. Ciraolo*, which found warrantless surveillance of an enclosed yard with an airplane to be constitutional, cited Katz but reaffirmed the importance of physical trespass as the Framers would have understood it[195]. Likewise, *United States v. Ross*, one of many cases allowing for warrantless vehicle searches, found its reasoning in early Congressional actions, applying early rules for the smuggling of bootleg alcohol to distribution of narcotics[196]. Ross explicitly disagreed with the Court's previous decisions which to protect American's procedural privacy within their vehicles, writing that "there is no evidence at all that [the Framers] intended to exclude from protection of the Clause all searches occurring outside the home[197]." Justice Marshall's dissent in *Ross,* however, condemned the majority as "far from being 'faithful to

188 Lee, "The Reconciliation," 2139.
189 Fremont Weeks v. United States, 232 U.S. 383 (Feb. 24, 1914).
190 *Olmstead*, 277 U.S. 438.
191 Hester v. United States, 265 U.S. 57 (May 5, 1924).
192 Katz v. United States, 389 U.S. 347, 352-3 (Dec. 18, 1967).
193 *Ibid.*, 360.
194 Congressional Research Service, Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 117-117-12, 2d Sess. 1619-20 (June 30, 2022).
195 State of California v. Ciraolo, 476 U.S. 207, 226. (May 19, 1986).
196 United States v. Ross, 456 U.S. 798, 804-6 (June 1, 1982).
197 *Ibid.*, 798.

the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history[198],'" demonstrating how the question of Fourth Amendment protections was far from settled, even within the originalist paradigm.

Many other decisions that created exceptions to the Fourth Amendment's warrant requirement, however, were rooted in *Katz's* 'reasonable expectation' standard. By 1992, the Court had used the reasonableness doctrine[199] to permit warrantless searches in schools[200], border crossings[201], and nearly all searches of a vehicle and the containers therein[202]; all these exceptions were found to be constitutional when related to drug possession and distribution. This change in Supreme Court jurisprudence, then, seems far from related to changes in the Court's preferred interpretive framework, but rather part of a larger push to increasingly criminalize drug use. These cases were decided at the same time as 'mandatory minimums' for drug crimes at state[203] and federal levels[204], as well as massive public fears about drug abuse as the nation's "number one enemy[205]".

IV. Digital Technology and the War on Terror

By the early 2000s, however, the government and the Court refocused its attention on growing fears of foreign enemies. Driven by the horrors of the 9/11 attacks, the 'war on terror' was declared by President George W. Bush with massive political and judicial support[206]. Justice Douglas had warned in his concurrence in *Katz v. United States* that the Court may eventually allow "for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels "national security" matters[207]." This statement proved prescient in the aftermath of the attack on American soil, as the massive public fear created in response allowed law enforcement to take unprecedented surveillance actions "commensurable to the threat presented[208]." The PATRIOT Act, drafted in secret and expediently passed in 2001[209], allowed for unprecedented data collection by intelligence agencies whenever "a significant purpose of the investigation is foreign intelligence[210]." This included pen register and tap and trace (PR/TT) devices which allow for searches of non-content communication information like phone numbers and call times, information

[198] *Ibid*., 835.
[199] Congressional Research Service, "Constitution of the United States of America" 1613.
[200] State of New Jersey v. T.L.O., 469 U.S. 325 (Jan. 15, 1985).
[201] United States v. Cortez, 449 U.S. 411 (Jan. 21, 1981).
[202] State of California v. Acevedo, 500 U.S. 565 (May 30, 1991).
[203] Mason B. Williams, "How the Rockefeller Laws Hit the Streets: Drug Policing and the Politics of State Competence in New York City, 1973–1989," *Modern American History* 4, no. 1 (2021), 67, https://doi.org/10.1017/mah.2020.23.
[204] United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System, H.R. Rep. (Aug. 1991).
[205] Richard Nixon, "Remarks about an Intensified Program for Drug Abuse Prevention and Control.," speech presented in Washington D.C., American Presidency Project, University of California Santa Barbara, last modified June 17, 1971.
[206] Coalition of Information Centers, "The Global War on Terrorism: The First 100 Days," US Department of State: Archive, last modified 2002.
[207] *Katz*, 389 U.S. 347, 360.
[208] Hunter and MacDonald, "Arguments for Exception," 501.
[209] *Anti-Terrorism Investigations and the Fourth Amendment after September 11, 2001: Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 108th Cong., 1st Sess. (2003) (statement of Jerrold Nadler), 10.
[210] *Anti-Terrorism Investigations* (statement of Viet Dinh), 16.

which is not governed by the Fourth Amendment's probable cause standard and instead only requires "specific and articulable facts showing [...] reasonable grounds to believe that the contents [...] are relevant and material to an ongoing criminal investigation[211]".

Seven years later, Section 702 of the Foreign Intelligence Surveillance Act passed through Congress with bipartisan support. Section 702 "authorizes the government to target non-U.S. persons, reasonably believed to be located outside the United States, in order to collect foreign intelligence information using the compelled assistance of U.S. electronic communications service providers[212]," and compels those providers, including mobile carriers and internet service companies, to assist in compiling foreign intelligence[213]. All this information is collected without a warrant and does not have to meet the probable cause standard in found in the Fourth Amendment. While Section 702 has been reauthorized several times, including under President Biden in 2024[214], its critics have pointed out the Fourth Amendment implications: namely, that it allows for the indirect surveillance of US persons who fall under the Fourth Amendment's warrant protection.

The Privacy and Civil Liberties Oversight Board, which conducts external reviews of the government's invocation of 702, notes that "Once collected [...] U.S. person information may be queried, analyzed, disseminated in intelligence reports, retained, and used as evidence[215]." While intelligence agencies with access to Section 702 surveillance information must follow querying rules when searching for US persons' communications–also known as 'backdoor searches[216]'– The FBI and other intelligence agencies frequent violate these procedures[217]. Rather than querying US persons under 702 only when 'specific and articulable facts[218]' related to foreign intelligence are presented, the FBI often uses 702 queries as a 'first resort' to find initial evidence of a crime[219] and their querying compliance incident rate reached nearly 40%[220]. These queries implicate not only Americans' Fourth Amendment rights to be free from warrantless surveillance but also have the potential to chill their rights of association and speech protected under the First Amendment when communicating with non-US persons[221].

[211] Requirements for Government Access, 18 U.S.C. § 2703 (Jan. 23, 2000).
[212] Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, 2, September 28, 2023.
[213] Congressional Research Service, *Foreign Intelligence Surveillance Act (FISA): An Overview*, report no. IF11451, 1 April 11, 2024.
[214] Associated Press, "Biden Signs Reauthorization of Surveillance Program into Law Despite Privacy Concerns," *National Public Radio*, April 20, 2024.
[215] *Report on the Surveillance Program*, 10.
[216] *Fixing FISA: How a Law Designed to Protect Americans Has Been Weaponized Against Them: Hearings Before the House Judiciary Subcommittee on Crime and Federal Government Surveillance*, 118th Cong. 2-3 (2023).
[217] Office of the Director of National Intelligence, *Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act (FISA) Joint Assessments*, 61, December 21, 2022.
[218] *Report on the Surveillance Program*, 94.
[219] *Ibid.,* 14.
[220] *Ibid.,* 142.
[221] Manu Singh Bedi, "Social Networks, Government Surveillance, and the Fourth Amendment Mosaic Theory," *Boston University Law Review* 94 (December 3, 2014), 1849-50.

The Supreme Court has avoided ruling on the constitutionality for 702 despite calls from free speech and privacy advocates to do so. In 2013, the Court ruled against petitioners in *Clapper v. Amnesty International*, declaring that "the plaintiffs–various attorneys and human rights organizations–lacked standing to challenge section 702 [...] because they could not show that future injury was "certainly impending[222]." Truthfully, the plaintiffs could not show imminent injury, partially because the FBI and other intelligence agencies do not provide figures on the number of Americans surveilled under Section 702 and claim they have no way of doing so[223]. However, discovery in *Clapper* revealed that, among other procedural abuses, the FBI had not been following regulations requiring it to notify aggrieved parties when warrantless surveillance under Section 702 was to be presented in a trial or proceeding[224], and had lied about doing so[225]. This limited the evidence available to plaintiffs in claiming injury, though the Supreme Court dismissed their concerns as being based in "no specific facts[226]." This ruling, rather than being based on any specific constitutional interpretive doctrine, was a simple balancing between the government's law enforcement abilities and its interest in civil liberties[227].

Part of the Supreme Court's reasoning in *Clapper* was that there was already a judicial check on the federal government's warrantless surveillance; the Foreign Intelligence Surveillance Courts (FISC)[228]. FISC does not approve individual acts of data collection under 702; the Attorney General and the Director of National Intelligence jointly authorize 702 surveillances of anyone 'reasonably believed' to be non-US persons outside the United States[229]. FISC need only approve agencies' targeting, minimization, and querying procedures, all of which attempt to keep U.S. persons information safe in line with the Fourth Amendment. As previously mentioned, violations of these procedures are frequent, and the FISC enforces remedies of these violations with concerning infrequency. In 2009, FISC approved the National Security Administration's regulatory procedures for 702 collections, only for the NSA to overstep its authority nearly a dozen times to collect millions of improperly collection communications[230]. Despite FISC's demands for remedy, the NSA continued to collect domestic communications without requesting a warrant. FISC judge John Bates noted that the collections "raise questions as to whether NSA's targeting and minimization procedures comport with FISA and the Fourth Amendment[231]," despite FISC having approved their procedures.

[222] Clapper et. al v. Amnesty International USA et. al, 568 U.S. 398, 399 (Feb. 26, 2013).
[223] *Report on the Surveillance Program*, 2.
[224] Foreign Intelligence Surveillance Act, 50 U.S.C. § 1806.
[225] *Report on the Surveillance Program*, 24.
[226] Clapper, 568 U.S. 398, 412.
[227] Kerr, "The Curious," 94.
[228] Clapper, 568 U.S. 398, 410.
[229] Electronic Privacy Information Center, "Foreign Intelligence Surveillance Court (FISC)," EPIC, last modified 2024.
[230] James Risen and Eric Lichtblau, "E-Mail Surveillance Renews Concerns in Congress," *New York Times*, June 16, 2009.
[231] Foreign Intelligence Surveillance Court, *Declassified- Memorandum Opinion*, by John D. Bates, 40, October 2011.

It is difficult to assess FISC judges' methods of interpreting the Fourth Amendment, as, even when they note constitutional violations, judges rarely give advice on how to make 702 surveillances align with American's privacy protections. The FISC has proven itself to be inefficient in providing constitutional remedies for these abuses; in 2016 it said "the Court was not in a position to assess[232]" the constitutionality of the NSA's 702 procedures despite the agency reporting significant non-compliance. In 2021, FISC Judge Contreras attributed flagrant violations of the FBI's procedures to a 'lack of understanding[233]' and ordered an internal revision of the agency's procedures, which he deemed to be constitutional when followed[234]. This proved fruitless, as in 2022 Judge Contreras once again noted the FBI's 'habitual[235]' and 'pervasive[236]' violations including 278,000 non-compliant queries by FBI agents[237]. Nevertheless, he once again declared their procedures to be constitutional[238].

Near universal approval of Section 702 surveillance is not linked to any particular mode of constitutional interpretation, nor to any political party. Current FISC judges, all of whom also served as District Court judges, were nominated to their positions by Presidents Bush, Clinton, Obama, and Trump[239] and their judicial records place them throughout the political spectrum. Since its enactment, Section 702 has enjoyed bipartisan support as the 'state of emergency' caused by terrorist threats drags on, leading Professor Alex Sinha to lament that "the current political climate is even less likely to lead to significant oversight than it was in 2005 and 2006, as administrations of both parties have now formally endorsed the FAA, thereby illustrating their commitment to the NSA program[240]."

The apolitical, blanket prioritization of national security over civil liberties is eloquently illustrated by the dissolution of the US-EU Privacy Shield. In 2020, the European Court of Human Rights overturned the Privacy Shield which had previously allowed for the free flow of data across the Atlantic, condemning U.S. intelligence programs as "not limited to what is strictly necessary and [...] a disproportionate interference with the rights to protection of data and privacy [...] since they do not sufficiently limit the powers conferred upon US authorities[241]." Following the decision, US Senate hearings focused on the risks the national security caused by the Privacy Shield's dissolution, rather than updating American privacy protections[242]. Justice Douglas's fears in *Katz* have proven true not only for the Executive branch in response to national security threats; it now appears that legislative and judicial officials are willing to defer to intelligence officials even when surveillance is in

[232] Foreign Intelligence Surveillance Court, *Declassified: Memorandum Opinion and Order*, by Rosemary M. Collyer, 4, April 26, 2017.
[233] Rudolph Contreras, *Declassified: Order in Response to Querying Violations*, 9, September 2, 2021.
[234] *Ibid.*, 14.
[235] Rudolph Contreras, *Declassified: Memorandum Opinion and Order*, 24, April 21, 2022.
[236] *Ibid.,* 26.
[237] *Ibid.,* 31.
[238] *Ibid.,* 16.
[239] Foreign Intelligence Surveillance Court, "Current Membership - Foreign Intelligence Surveillance Court," *USCourts.gov*, last modified May 2024.
[240] G. Alex Sinha, "NSA Surveillance since 9/11 and the Human Right to Privacy," *Loyola Law Review* 59 (2013), 945.
[241] Alexander Henrik Mildebrath, "The CJEU Judgment in the Schrems II Case," news release, September 15, 2020.
[242] *The Invalidation of the EU-US Privacy Shield and the Future of Transatlantic Data Flows: Hearings Before the Committee on Commerce Science, and Transportation*, 116th Cong., 2d Sess. (2020).

violation of international treaties, or the Constitution.

V. Information Sharing and Civil Unrest

Another huge source of potential Fourth Amendment violations comes from private data brokers who amass huge profiles of individual's data and sell it on to domestic government agencies. While this data collection is carried out by private companies, intelligence agencies weaponize it as a 'mechanism of state surveillance[243].' The judiciary has been incredibly permissive of private data collection, rubber stamping collection under the 'third-party doctrine.' While early Fourth Amendment warrant exceptions were based in originalist interpretation, the third-party doctrine, which allows for warrantless government collection of data voluntarily disclosed to a non-governmental entity, is built off the 'reasonable expectation of privacy' standard outlined in *Katz*[244]. Even judicial critics of the third-party doctrine like former Supreme Court Justice Brennan use a living constitutionalist doctrine, arguing that a modern interpretation of the Constitution must consider the "accelerated [...] ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds[245]." Brennan's grievances with the third-party doctrine, now more than 40 years old, is even more relevant today. Bank statements[246] and call records[247], the information that was originally excepted from the Fourth Amendment's warrant requirement under third-party doctrine, have been replaced with technology that can create an "exhaustive chronicle of location information [...] every day, every moment" over a long period of time[248].

Brennan's concerns about the third-party doctrine were brought into the 21st century in *Carpenter v. United States*, a case in which the Court held that law enforcement could not collect cell-site location information (CSLI) without a warrant, even though the 12,898 locational data points collected by Carpenter's cell provider and turned over to law enforcement was ostensibly collected with his consent[249]. Echoing Brennan's dissent in *Miller*, the Court majority found that the data available through CSLI was far too personal to be disclosed without a warrant[250]. Unlike Brennan, however, Justice Roberts invoked the Founder's original intentions, writing in for the majority in *Carpente*r that, "We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools[251]" while also referring to *Katz's* 'reasonable expectation of privacy' standard[252]. Both originalist and living constitutionalist rhetoric were used to protect CSLI from warrantless collection; however, the high specificity of the Court's language did not significantly alter the third-party doctrine.

[243] Hunter and MacDonald, "Arguments for Exception," 508.
[244] Smith v. State of Maryland, 442 U.S. 735, 742 (June 20, 1979).
[245] United States v. Miller, 425 U.S. 435, 425-6 (Apr. 21, 1976).
[246] Miller, 425 U.S. 435.
[247] Smith, 442 U.S. 735.
[248] Congressional Research Service, *Abortion, Data Privacy, and Law Enforcement Access: A Legal Overview*, 2, July 8, 2022.
[249] Ben Vanston, "Putting Together the Pieces: The Mosaic Theory and Fourth Amendment Jurisprudence since Carpenter," *West Virginia Law Review* 124, no. 2 (2022), 669.
[250] Congressional Research Service, *Supreme Court Takes Fourth Amendment Case about Cell Phone Location Data*, 1, June 26, 2018.
[251] Carpenter v. United States, No. 16-402, slip op. at 6 (June 22, 2018).
[252] *Ibid*., 15.

Lower courts have struggled to apply Carpenter as it did not provide an applicable standard for electronic surveillance as *Katz* did for non-physical searches[253]. The Eleventh Circuit Court declined to extend protections to emails sent through cloud services or IP addresses stored in messaging apps[254]; while the Court noted the potential for this data to reveal locational information, they held that Carpenter created a 'narrow' exception to third-party doctrine[255]. State courts have extended *Carpenter's* protections to drone photographs [256] and medical records[257] in Michigan and Ohio respectively. While the former relied upon the Framer's understanding of private spaces and cited British Common law jurisprudence dating as far back as 1765[258], the latter called for "a modern and more nuanced approach to the third-party doctrine[259]." These decisions seem contradictory as they use opposite interpretive frameworks to reach nearly identical conclusions, but a report in the Harvard Law Review suggests there may be a simple answer. Upon analyzing nearly 300 state court opinions referencing *Carpenter*, the report found that, regardless of political affiliation or preferred mode of constitutional interpretation[260], courts with popularly elected judges, including the Appeals Courts in Michigan and Ohio mentioned above, were more likely to find surveillance
required warrant protection under *Carpenter's* precedent[261].

Meanwhile, the Department of Homeland Security (DHS) has interpreted Carpenter limitedly as "only applying to location data obtained through compulsory legal process and that Carpenter does not apply to data purchased by the government[262]" and has such has not ceased buying or otherwise acquiring data from private third parties. The Domestic Security Alliance Council, for example, continues to "facilitate strong, enduring relationships among its private sector member companies [..] and with the Department of Homeland Security (DHS) [...] in addition to other federal government entities to detect, prevent, and deter criminal acts[263]." While data brokers were forced to stop selling CSLI data to law enforcement after the ruling in *Carpenter*, there are many other forms of data collection that law enforcement agencies purchase from brokers, including social media handles[264] and locational software that can track every cell phone entering a particular location[265]. Public-private contracts, as well as the 'dissolution of institutional boundaries' between agencies at the state and federal level constitute important steps in the suspension of

[253] Matthew Tokson, "The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law, 2018-2021," *Harvard Law Review* 135, no. 7 (2022), 1828.
[254] Vanston, "Putting Together," 672.
[255] United States v. Scott Joseph Trader, No. 23-13189, slip op. at 11 (11th Cir. Nov. 25, 2020).
[256] Long Lake Township v. Maxon, No. 349230, slip op. (Mar. 18, 2021).
[257] State of Ohio v. Eads (May 6, 2020).
[258] Long Lake Township, No. 349230, 4-5.
[259] Eads, No. 2805, 11.
[260] Matthew Tokson, "The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law, 2018-2021," *Harvard Law Review* 135, no. 7 (2022), 1794.
[261] *Ibid*., 1845-6.
[262] Defense Intelligence Agency, *Unclassified: Clarification of Information Briefed during DIA's 1 December Briefing on CTD*, by William Stuart, 1, January 15, 2021.
[263] Domestic Security Alliance Council, "About DSAC," DSAC, Federal Bureau of Intelligence.
[264] Faiza Patel, Rachel Levinson-Waldman, and Harsha Panduranga, *A Course Correction for Homeland Security*, 11, April 20, 2022.
[265] Bennett Cyphers, "How the Federal Government Buys Our Cell Phone Location Data," Electronic Frontier Foundation, last modified June 13, 2022.

civil liberties, including those included in the Fourth Amendment[266]. These contracts are preemptively justified under the third-party doctrine, even though much of the information is not really 'publicly available' and is compiled by private data firms for exclusive government use[267]. In 2023, Georgetown Professor Laura Moy testified in front of the House Committee on Energy and Commerce that law enforcement used third party data brokers to "make an end run around the Fourth Amendment" and collect data that they could not otherwise obtain without a warrant, including location data for more than 250 million devices[268] which may have been obtained without robust checks for accuracy or Fourth Amendment privacy considerations[269].

This massive amount of information sharing also implicates innocent Americans' rights to speech, assembly, and political and civil association, especially as warrantless data collection often targets Americans that openly express political and social opinions. Additionally, most of this data originates from electronic communications where people are more likely to express themselves freely[270], thus implicating all Americans' "ability to choose [their] paths slowly and deliberately[271]" when records of their actions may be collected and sold to law enforcement. This collection, like much of the surveillance discussed above, is justified in the name of protecting against potential terrorism or domestic crimes[272], even when the opinions in question fall under protected First Amendment speech.

There is no better example of the dangerous potential of warrantless data collection and sharing than the national network of fusion centers, whose abuse is often closely tied to instances of legal civil protest. Fusion centers, hubs of intelligence sharing between federal and state officials and nongovernmental stakeholders erected in all 50 states[273], derive their legitimacy from the Homeland Security Act of 2002[274] as a response to the 9/11 terrorist attacks[275]. Counterterrorism is the explicit mission of fusion centers, but they have proven wholly inefficient at producing significant intelligence to prevent terrorist attacks[276], to the point where DHS officials "expressed amazement at the poor quality of reporting[277]." As such, most fusion centers focus on lesser crimes including local crime rings and crimes in schools[278]. This implicates the data of Americans in their day-to-day activities, including their involvement in social movements and civil protest.

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[266] Hunter and MacDonald, "Arguments for Exception," 508.
[267] Carey Shenkman et al., *Legal Loopholes and Data for Dollars: How Law Enforcement and Intelligence Agencies Are Buying Your Data from Brokers*, 7, December 2021.
[268] *Who Is Selling Your Data: A Critical Examination of the Role of Data Brokers in the Digital Economy: Hearings Before the Subcommittee on Oversight and Investigation of the Committee on Energy and Commerce*, 118th Cong., 1st Sess. (2023).
[269] *Ibid.*, 11.
[270] John A. Bargh, Katelyn Y. A McKenna, and Grainne M. Fitzsimons, "Can You See the Real Me? Activation and Expression of the 'True Self' on the Internet," *Journal of Social Issues* 58, no. 1 (2002), 44-6, https://doi.org/10.1111/1540-4560.00247.
[271] Heymann, "An Essay," 421.
[272] Committee on the Judiciary, Financial Surveillance in the United States: How Federal Law Enforcement Commandeered Financial Institutions to Spy on Americans, H.R. Rep. (Mar. 6, 2024).
[273] Patel, Levinson-Waldman, and Panduranga, *A Course*, 5.
[274] Committee on Homeland Security and Governmental Affairs, Federal Support for and Involvement in State and Local Fusion Centers, S. Rep., 12 (Oct. 3, 2012).
[275] Department of Justice, *Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era*, 10, 2007.
[276] Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Federal Support for and Involvement in State and Local Fusion Center, H.R. Rep. No. 112, 2d Sess., 26 (Oct. 3, 2012).
[277] *Ibid.*, 32.
[278] *Ibid.*, 4.

Intelligence officials, though they claim to be bound by the First and Fourth Amendments, often surveil legal protestors under the guise of crime stopping; in reality, the only suspected crimes are graffiti or minor damage during protests[279]. A fusion center in Austin, Texas disseminated personal data including social media handles and addresses of organizers involved in 'peaceful motorcycle ride[s]' and 'music and spoken word performances' as well as Black Lives Matter protests[280], claiming that surveillance was necessary to monitor "potential use of incitement rhetoric could be used to instigate acts of violence[281]." An ongoing investigation into Oregon's fusion center alleges the center "used surveillance software to track the physical location of social media users posting the 'Black Lives Matter' hashtag[282]" even when those users were not suspects in a criminal investigation[283] and no warrant had been issued. Even when surveillance didn't reveal any illegal activity, a lack of clear data purging procedures means that information about Americans' constitutionally protected activity is often stored indefinitely[284]. Given the first federal guidance on fusion centers cites 'legal and cultural' concerns related to free speech and privacy as 'obstacles' to fusion centers' missions[285], it is unsurprising that they continue to exploit the third-party through a narrow reading of *Carpenter* and *Katz*, further eroding Fourth Amendment protections.

VI. Conclusion

The erosion of American's procedural privacy is not directly linked to originalism, nor living constitutionalism, nor any political party. Both modes of constitutional interpretation have led to carveouts in the Fourth Amendment's warrant requirement, and warrantless surveillance has only increased in the name of protecting the country against internal and foreign threats. In the face of these threats, whether they be an uptick in drug use, fears about terrorist attacks on American soil, or the potential unrest caused by civil protest, the government has argued both in the Courts and legislature that "conditions of extraordinary danger require a response that is commensurable to the threat presented[286];" these conditions often flagrantly violate the Fourth Amendment as has been demonstrated above. As technology advances, be it physical or digital surveillance technology or increasing communication channels to share surveillance data, the gap between all searches available to law enforcement constitutionally protected searches continues to widen.

[279] Patel, Levinson-Waldman, and Panduranga, *A Course*, 7.
[280] Memorandum by Austin Regional Intelligence Center, "ARIC Informational Bulletin June 2020 Week 3," June 18, 2020.
[281] *Ibid.,* 1.
[282] Farrell-Smith et. al v. Oregon Department of Justice, No. 21CV47809, *Complaint for Declaratory Judgement and Injunctive Relief* 3, (Dec. 14, 2021).
[283] Patel, Levinson-Waldman, and Panduranga, *A Course*, 2.
[284] Permanent Subcommittee on Investigations, *Federal Support for and Involvement*, 58.
[285] Department of Justice, *Fusion Center*, 9.
[286] Hunter and MacDonald, "Arguments for Exception," 501.

BIBLIOGRAPHY

Anti-Terrorism Investigations and the Fourth Amendment after September 11, 2001: Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary, 108th Cong., 1st Sess. (2003) (statement of Jerrold Nadler). https://commdocs.house.gov/committees/judiciary/hju87238.000/hju87238_0f.htm

Associated Press. "Biden Signs Reauthorization of Surveillance Program into Law Despite Privacy Concerns." *National Public Radio*, April 20, 2024. https://www.npr.org/2024/04/20/1246076114/senate-passes-reauthorization-surveillance-program-fisa

Austin Regional Intelligence Center. Memorandum, "ARIC Informational Bulletin June 2020 Week 3," June 18, 2020. https://www.documentcloud.org/documents/20417901-aric-informational-bulletin-june-2020-week-3/

Bargh, John A., Katelyn Y. A McKenna, and Grainne M. Fitzsimons. "Can You See the Real Me? Activation and Expression of the 'True Self' on the Internet." *Journal of Social Issues* 58, no. 1 (2002): 33-48. https://doi.org/10.1111/1540-4560.00247

Bedi, Manu Singh. "Social Networks, Government Surveillance, and the Fourth Amendment Mosaic Theory." *Boston University Law Review* 94 (December 3, 2014): 1809-80. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533099

Boyd v. United States, 116 U.S. (Feb. 1, 1886). https://www.loc.gov/item/usrep116616/

Breyer, Stephen. *Active Liberty: Interpreting Our Democratic Constitution*. Knopf Doubleday Publishing Group, 2007.

Carpenter v. United States, No. 16-402 (June 22, 2018). https://www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf

Chemerinsky, Erwin. *We the People: a Progressive Reading of the Constitution for the Twenty-first Century*. New York: Picador, 2018.

———. *Worse than Nothing: the Dangerous Fallacy of Originalism*. New Haven: Yale University Press, 2022.

Clapper et. al v. Amnesty International USA et. al, 568 U.S. 398 (Feb. 26, 2013). https://www.loc.gov/item/usrep568398/

Coalition of Information Centers. "The Global War on Terrorism: The First 100 Days." US Department of State: Archive. Last modified 2002. https://www.georgewbushlibrary.gov/research/topic-guides/global-war-terror

Committee on Homeland Security and Governmental Affairs, Federal Support For and Involvement In State and Local Fusion Centers, S. Rep. (Oct. 3, 2012). https://www.loc.gov/item/2014500009/

Committee on the Judiciary, Financial Surveillance in the United States: How Federal Law Enforcement Commandeered Financial Institutions to Spy on Americans, H.R. Rep. (Mar. 6, 2024). https://www.govinfo.gov/app/details/GOVPUB-Y4_J89_1-PURL-gpo223375 Interim Staff Report.

Congressional Research Service. *Abortion, Data Privacy, and Law Enforcement Access: A Legal Overview*. Report no. LSB10786. July 8, 2022. https://crsreports.congress.gov/product/pdf/LSB/LSB10786

———. Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 117-117-12, 2d Sess. (June 30, 2022). https://www.govinfo.gov/app/details/GPO-CONAN-2022/

———. *Foreign Intelligence Surveillance Act (FISA): An Overview*. Report no. IF11451. April 11, 2024. https://crsreports.congress.gov/product/pdf/IF/IF11451/4

———. *Supreme Court Takes Fourth Amendment Case about Cell Phone Location Data*. June 26, 2018. https://crsreports.congress.gov/product/details?prodcode=LSB10157

Contreras, Rudolph. *Declassified: Memorandum Opinion and Order*. April 21, 2022. https://www.intelligence.gov/assets/documents/702%20Documents/declassified/21/2021_FISC_Certification_Opinion.pdf

———. *Declassified: Order in Response to Querying Violations*. September 2, 2021. https://www.intel.gov/assets/documents/702%20Documents/declassified/21/FISC_Sept2_2021_Order_In_Response_To_Querying_Violations.pdf

Cooley, Thomas McIntyre. *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union Thomas McIntyre Cooley*. 5th ed. Union, N.J: Lawbook Exchange, 1999.

Cyphers, Bennett. "How the Federal Government Buys Our Cell Phone Location Data." Electronic Frontier Foundation. Last modified June 13, 2022. https://www.eff.org/deeplinks/2022/06/how-federal-government-buys-our-cell-phone-location-data#:~:text=Federal%20law%20enforcement,-The%20FBI%20released&text=According%20to%20the%20Wall%20Street,targets%20in%20the%20company%27s%20dataset

Defense Intelligence Agency. *Unclassified: Clarification of Information Briefed during DIA's 1 December Briefing on CTD*. By William Stuart. January 15, 2021. https://int.nyt.com/data/documenttools/dia-memo-for-wyden-on-commercially-available-smartphone-locational-data/d7d41dccdd1d46b0/full.pdf

Department of Justice. *Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era*. 2007. https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/fusion_center_guidelines.pdf

Dobbs et. al v. Jackson Women's Health Organization et. al, 597 S. Ct. 215-423 (June 24, 2022). https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf

Domestic Security Alliance Council. "About DSAC." DSAC. Federal Bureau of Intelligence. https://www.dsac.gov/about

Electronic Privacy Information Center. "Foreign Intelligence Surveillance Court (FISC)." EPIC. Last modified 2024. https://epic.org/foreign-intelligence-surveillance-court-fisc/

Elliot, Jonathan, comp. *The Debates in the Several State Conventions*. Vol. 3. 1836. https://oll.libertyfund.org/titles/elliot-the-debates-in-the-several-state-conventions-vol-3

Farrell-Smith et. al v. Oregon Department of Justice, No. 21CV47809 (Dec. 14, 2021). https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/61bb7484b5d3234af35ca694/1639675023280/2021-12-14+Oregon+Complaint+FILESTAMPED.pdf
Complaint for Declaratory Judgement and Injunctive Relief

Fixing FISA: How a Law Designed to Protect Americans Has Been Weaponized Against Them: Hearings Before the House Judiciary Subcommittee on Crime and Federal Government Surveillance, 118th Cong. (2023). https://www.congress.gov/event/118th-congress/house-event/115812/text

Foreign Intelligence Surveillance Act, 50 U.S.C. § 1806. https://www.law.cornell.edu/uscode/text/50/1806

Foreign Intelligence Surveillance Court. "Current Membership - Foreign Intelligence Surveillance Court." USCourts.gov. Last modified May 2024. https://www.fisc.uscourts.gov/current-membership-foreign-intelligence-surveillance-court

———. *Declassified- Memorandum Opinion*. By John D. Bates. October 2011. https://www.dni.gov/files/documents/0716/October-2011-Bates-Opinion-and%20Order-20140716.pdf

———. *Declassified: Memorandum Opinion and Order*. By Rosemary M. Collyer. April 26, 2017. https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf

Fremont Weeks v. United States, 232 U.S. 383 (Feb. 24, 1914). https://www.loc.gov/item/usrep232383/

Hester v. United States, 265 U.S. 57 (May 5, 1924). https://www.loc.gov/item/usrep265057/

Heymann, Phillip. "An Essay on Domestic Surveillance." *Journal of National Security Law and Police* 8 (2016): 421-35. https://jnslp.com/2016/06/06/essay-domestic-surveillance/

Hunter, Duncan, and Malcolm N. MacDonald. "Arguments for Exception in US Security Discourse." *Discourse & Society* 28, no. 5 (2017): 493-511. https://doi.org/10.1177/0957926517710978

The Invalidation of the EU-US Privacy Shield and the Future of Transatlantic Data Flows: Hearings Before the Committee on Commerce Science, and Transportation, 116th Cong., 2d Sess. (2020). https://www.govinfo.gov/content/pkg/CHRG-116shrg52856/pdf/CHRG-116shrg52856.pdf

Katz v. United States, 389 U.S. 347 (Dec. 18, 1967). https://www.loc.gov/item/usrep389347/

Kavanaugh, Brett M. "Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution." *Notre Dame Law Review* 89, no. 5 (2014): 1906-28.

Kerr, Orin S. "The Curious History of Fourth Amendment Searches." *The Supreme Court Review* 2012, no. 1 (2013): 67-97. https://doi.org/10.1086/670228

Koppelman, Andrews. "Ketanji Brown Jackson's Originalism." *The Hill* (DC), April 10, 2022. https://thehill.com/opinion/judiciary/3263173-ketanji-brown-jacksons-originalism/

Lee, Sophia Z. "The Reconciliation Roots of Fourth Amendment Privacy." *University of Chicago Law Review* 91, no. 8 (2024): 2239-28. https://lawreview.uchicago.edu/print-archive/reconciliation-roots-fourth-amendment-privacy#:~:text=In%20other%20words%2C%20Fourth%20Amendment,of%20newly%20freed%20Black%20men

Long Lake Township v. Maxon, No. 349230 (Mar. 18, 2021). https://www.courts.michigan.gov/siteassets/case-documents/uploads/opinions/final/coa/20210318_c349230_47_349230.opn.pdf

Madison, James. Letter to Thomas Jefferson, October 17, 1788. https://founders.archives.gov/documents/Madison/01-11-02-0218

Marcus, Ruth. "Originalism Is Bunk. Liberal Lawyers Shouldn't Fall for It." *Washington Post* (DC), December 1, 2022. https://www.washingtonpost.com/opinions/2022/12/01/originalism-liberal-lawyers-supreme-court-trap/

Martin, Lauren, and Stephanie Simon. "A Formula for Disaster: The Department of Homeland Security's Virtual Ontology." *Space and Polity* 12, no. 3 (2008): 281-96. https://doi.org/10.1080/13562570802515127

Mildebrath, Alexander Henrik. "The CJEU Judgment in the Schrems II Case." News release. September 15, 2020. https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/652073/EPRS_ATA(2020)652073_EN.pdf

Nixon, Richard. "Remarks about an Intensified Program for Drug Abuse Prevention and Control." Speech presented in Washington D.C. American Presidency Project. University of California, Santa Barbara. Last modified June 17, 1971. https://www.presidency.ucsb.edu/documents/remarks-about-intensified-program-for-drug-abuse-prevention-and-control#axzz1PCJydjl5

Office of the Director of National Intelligence. *Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act (FISA) Joint Assessments*. December 21, 2022. https://www.intelligence.gov/assets/documents/702%20Documents/declassified/24th-Joint-Assessment-of-FISA-702-Compliance.pdf

Olmstead v. United States, 277 U.S. 438 (June 4, 1928). https://www.loc.gov/item/usrep277438/

Otis, James. *Collected Political Writings of James Otis*. Compiled by Richard Samuelson. Indianapolis, IN: Liberty Fund, 2015. https://oll.libertyfund.org/titles/collected-political-writings.

Patel, Faiza, Rachel Levinson-Waldman, and Harsha Panduranga. *A Course Correction for Homeland Security*. April 20, 2022. https://www.brennancenter.org/our-work/research-reports/course-correction-homeland-security

Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Federal Support for and Involvement in State and Local Fusion Center, H.R. Rep. No. 112, 2d Sess. (Oct. 3, 2012). https://www.loc.gov/item/2014500009/

Privacy and Civil Liberties Oversight Board. *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*. September 28, 2023. https://www.pclob.gov/Oversight

Requirements for Government Access, 18 U.S.C. § 2703 (Jan. 23, 2000). https://www.law.cornell.edu/uscode/text/18/2703

Risen, James, and Eric Lichtblau. "E-Mail Surveillance Renews Concerns in Congress." *New York Times*, June 16, 2009. https://www.nytimes.com/2009/06/17/us/17nsa.html

Römer-Barron, Ute, and Clark D. Cunningham. "Applied Corpus Linguistics and Legal Interpretation: A Rapidly Developing Field of Interdisciplinary Scholarship." *Applied Corpus Linguistics* 4, no. 1 (2024). https://doi.org/10.1016/j.acorp.2023.100080

Roxanne Torres v. Janice Madrid, No. 19-292 (Mar. 25, 2021). https://www.supremecourt.gov/opinions/20pdf/19-292_21p3.pdf

Shenkman, Carey, Sharon Bradford Franklin, Greg Nojeim, and Dhanaraj Thakur. *Legal Loopholes and Data for Dollars: How Law Enforcement and Intelligence Agencies Are Buying Your Data from Brokers*.

December 2021. https://cdt.org/wp-content/uploads/2021/12/2021-12-08-Legal-Loopholes-and-Data-for-Dollars-Report-final.pdf

Sinha, G. Alex. "NSA Surveillance since 9/11 and the Human Right to Privacy." *Loyola Law Review* 59 (2013): 861-946. https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1371

Smith v. State of Maryland, 442 U.S. 735 (June 20, 1979). https://www.loc.gov/item/usrep442735/

Solomon, Stephen D. "Madison-Jefferson Letters on Advisability of a Bill of Rights, 1787-1789." First Amendment Watch. New York University. Last modified February 2, 2018. https://firstamendmentwatch.org/history-speaks-madison-jefferson-letters-on-advisability-of-a-bill-of-rights-1787-1789/

State of California v. Acevedo, 500 U.S. 565 (May 30, 1991). https://www.loc.gov/item/usrep500565/

State of California v. Ciraolo, 476 U.S. 207 (May 19, 1986). https://www.loc.gov/item/usrep476207/

State of New Jersey v. T.L.O., 469 U.S. 325 (Jan. 15, 1985). https://www.loc.gov/item/usrep469325/

State of Ohio v. Eads, No. 2805 (May 6, 2020). https://law.justia.com/cases/ohio/first-district-court-of-appeals/2020/c-190213.html

Strang, Lee J. "Originalism and Conservatism: An American Story." *Foundational Principles* 94 (February 2024): 1-35. https://www.heritage.org/sites/default/files/2024-02/FP94.pdf

Tokson, Matthew. "The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law, 2018-2021." *Harvard Law Review* 135, no. 7 (2022): 1790-852. https://harvardlawreview.org/print/vol-135/the-aftermath-of-carpenter/

U.S. Const. amend. IV. https://constitution.congress.gov/constitution/amendment-4/

United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System, H.R. Rep. (Aug. 1991). https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf

United States v. Alberto Antonio Leon et. al, 104 U.S. (June 5, 1984). https://tile.loc.gov/storage-services/service/ll/usrep/usrep468/usrep468897/usrep468897.pdf

United States v. Cortez, 449 U.S. 411 (Jan. 21, 1981). https://www.loc.gov/item/usrep449411/

United States v. Miller, 425 U.S. 435 (Apr. 21, 1976). https://www.loc.gov/item/usrep425435/

United States v. Olmstead, 277 U.S. (June 4, 1928). https://tile.loc.gov/storage-services/service/ll/usrep/usrep277/usrep277438/usrep277438.pdf

United States v. Ross, 456 U.S. 798 (June 1, 1982). https://www.loc.gov/item/usrep456798/

United States v. Scott Joseph Trader, No. 23-13189 (11th Cir. Nov. 25, 2020). https://www.govinfo.gov/app/details/USCOURTS-ca11-17-15611

Vanston, Ben. "Putting Together the Pieces: The Mosaic Theory and Fourth Amendment Jurisprudence since Carpenter." *West Virginia Law Review* 124, no. 2 (2022): 657-86. https://researchrepository.wvu.edu/wvlr/vol124/iss2/12/

Who Is Selling Your Data: A Critical Examination of the Role of Data Brokers in the Digital Economy: Hearings Before the Subcommittee on Oversight and Investigation of the Committee on Energy and Commerce, 118th Cong., 1st Sess. (2023). https://www.govinfo.gov/content/pkg/CHRG-118hhrg55269/pdf/CHRG-118hhrg55269.pdf

Williams, Mason B. "How the Rockefeller Laws Hit the Streets: Drug Policing and the Politics of State Competence in New York City, 1973–1989." *Modern American History* 4, no. 1 (2021): 67-90. https://doi.org/10.1017/mah.2020.23