Stanford Technology Law Review

Symposium: Beyond a Physical Conception of the Fourth Amendment:
Search and Seizure in the Digital Age

Associate Professor Paul Ohm
University of Colorado School of Law

Title: The Olmsteadian Seizure Clause

The Fourth Amendment's Seizure clause is mired in the Eighteenth century. Its counterpart, the Search clause, has evolved through a steady progression of Supreme Court cases from *Katz* to *Berger* to *Kyllo*, no longer to be confined to the property-based notions of privacy embodied in *Olmstead v. United States*. Instead it is sensitive to modern privacy concerns by extending Constitutional protection to situations that satisfy the reasonable expectation of privacy test. While imperfect, the evolved Search clause has kept the protections of the Fourth Amendment relevant in an age of digital evidence, ubiquitous communication networks, and increasingly sophisticated and invasive surveillance capabilities.

In contrast, the Seizure clause is in an *Olmsteadian* holding pattern, consistently interpreted to protect only physical property rights and to regulate only the deprivation of tangible things. In particular, Courts interpreting the clause rarely consider what "deprivation" means when we are talking about intangible property such as digital evidence, and voice and data communications.

In this essay, Professor Ohm argues for a Twenty-First century definition of Constitutionally-proscribed property deprivation. He argues that a Constitutionally significant "Seizure" occurs whenever the State obtains the original or a copy of personally-owned, non-public data. By copying the data, the State deprives the owner of the property of the ability to delete or alter the State-possessed copy of the data. In addition, modern Intellectual Property rules, and in particular Copyright, acknowledge other harms caused by an unauthorized copy.

The Supreme Court has already opened the door to this definition, in *Berger* and *Katz,* by holding in no uncertain terms that voice conversations are both searched and seized when recorded by the police. Professor Ohm traces lower-court cases that came before and after *Berger* and *Katz* and recognizes that most lower courts have ignored these Supreme Court's Seizure holdings.

Embracing a modern interpretation of the Seizure clause is consistent with the Framers' intent, because copying affects the property rights of owners of intangible property in many of the same ways that physical dispossession deprived property owners at the time the Fourth Amendment was adopted.

Reconceiving the seizure clause in light of modern concerns about intangible property rights helps solve many vexing Fourth Amendment puzzles that arise if the sole test is the reasonable expectation of privacy. For example, does a bit-by-bit copy of a computer's hard drive implicate the Fourth Amendment, if the human operator does not "view" the contents as they are copied? Could the government lawfully capture all of the communications traversing a network without a warrant so long as they did not look at the contents without a subsequent warrant? Do government-run network intrusion detection systems implicate the Fourth Amendment?

Viewed as possible violations of the Search clause, these are frustrating, metaphysical inquiries; if a bit falls in a packet sniffer, has it been searched? In contrast, under the new definition of Seizure, these questions result in straightforward answers. In every one of these situations, a seizure has occurred. The owner of the information has lost the ability to delete, modify, secrete, or contextualize a copy of the information, even though he may have retained his own copy. No less than when the police commandeer an automobile or grab a box of records, the owner of the intangible property has lost dominion and control over his property. A seizure has occurred, and the Fourth Amendment should proscribe these acts absent warrant or exception.