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Fourth Amendment Standing: Flat on Its Face

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FOURTH AMENDMENT STANDING: FLAT ON ITS FACE

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I. INTRODUCTION

The United States Supreme Court has recently reevaluated its concept of standing for claims involving violations of the fourth amendment. The apparent purpose for reevaluation of this fundamental constitutional principle was the Court's desire to respond to the debate currently raging over the scope of the exclusionary rule. Whether one perceives the fourth amendment as second to none in importance in the Bill of Rights or views it as a nuisance is not the issue here. Rather, the issue is whether, in its effort to limit the exclusionary rule, the Court has stripped the people of the United States of the protections guaranteed by the fourth amendment which the Court has historically recognized. A close inspection of the Court's recent decisions concerning fourth amendment standing reveals that the Court's desire for reform has resulted in a failure to follow precedent. The Court has taken the logic and reasoning from prior cases and liberally construed them to reach different results.

Rights under our Constitution and remedies to vindicate violations of those rights are personal. Thus, individuals, in general, do not have the right to complain in the courts about violations of the legal rights of others or to invoke remedies for vindication of those rights.[1] The right of an individual to raise issues concerning a violation of his or her own rights in a court and to benefit from a remedy designed to vindicate such a violation is termed "standing."

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[1] Wong Sun v. United States, 371 U.S. 471 (1963) (rights cannot be vicariously asserted). *Cf.* United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980). The issue in this novel case was whether a non-party at a criminal trial can assert a privacy interest to restrict public access to papers seized from a non-party. The Court held that the non-party (Church of Scientology) had significant privacy and property interests in the papers, and that the trial court was the only forum that could grant relief.

When the government violates the Constitution (or other law) it is not always clear whether it has violated the rights of A or of B or of both. For example, where governmental authorities obtain evidence against both defendant A and defendant B through an illegal search of A's car, has the government violated the Constitutional rights of A or of B or of both? Should the government benefit from its wrongdoing in B's prosecution, when it could not profit from its actions in A's prosecution? Answers to these questions go beyond mere evidentiary rulings to the heart of the issue of standing.

Narrow construction of the scope of an individual's rights promotes the government's ability to violate the Constitution and impedes the citizenry's ability to curtail such violations through the courts. Governmental violations of the laws, especially the fundamental laws, are serious threats to the preservation of freedom in a democratic society. Any court decision that allows the government to violate the Constitution with *de facto* impunity is inconsistent with the political philosophy of our government.[2] The Court's recent "standing" cases reflect this inconsistency.

The following is an examination of recent Supreme Court cases on fourth amendment standing. In order to set the precedential stage, this Article initially explores the meaning of the fourth amendment as expressed by predecessors of the current Court. Recent Supreme Court and circuit court cases are also cited to demonstrate the implications of the limited scope now afforded to standing.

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[2] *See* Olmstead v. United States, 277 U.S. 438, 478, 485 (1927) (Brandeis, J., dissenting). Brandeis writes:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued to civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the fourth amendment.

Id. He concludes:

> In a government of laws, [the] existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Id. at 485.

II. The Meaning of the Fourth Amendment

In the words of Justice Frankfurter in *Graves v. New York ex rel. O'Keefe*,[3] "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."[4] Similarly, in *Weems v. United States*,[5] Justice McKenna wrote that the language of the Constitution stands for principles of wide application lest "rights declared in words might be lost in reality."[6]

Thus, whatever one's view as to the proper role of the Court in constitutional interpretation, argument should not be necessary to illustrate that if the Constitution is to be enforced, the enforcers must look to the document itself to determine what is to be enforced. If the principles of the Constitution are to have vitality over an extended period of time, then the Constitution "must be capable of wider application than the [specific] mischief[s] which gave it birth."[7]

The text of the fourth amendment provides:

> 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.[8]

Surely there are many different interpretations which follow from a reading of this passage. What may be reasonable to those who favor a limited application of the fourth amendment will be different from that which is reasonable to those who support the basic thrust of the amendment. In the words of Justice Frankfurter: "A decision [of a fourth amendment claim] may turn on whether one gives that amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime."[9]

In spite of this problem, the words of the amendment acknowledge "the right of the people to be secure in their persons, houses, papers, and effects" and command that this right shall not be violated by unreasonable searches and seizures. It is not necessary in this Article to determine the parameters of "the right of the people to be secure." Indeed, if one adopts the basic principles of our Declaration of Independence, these

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[3] 306 U.S. 466, 491-92 (1939) (concurring opinion).
[4] *Id.* at 491-92.
[5] 217 U.S. 349 (1910).
[6] *Id.* at 373.
[7] *Id.*
[8] U.S. Const. amend. IV.
[9] Harris v. United States, 331 U.S. 145, 157 (1947) (dissenting opinion).

parameters will be constantly expanding as technology improves our ability to enjoy life, liberty, and the pursuit of happiness.

When determining the meaning of the fourth amendment, one is not stranded on the island of plain meaning and common sense. The plain meaning of the amendment and common sense are merely the starting point. One would be misguided to ignore the wisdom of past Supreme Court decisions on the construction to be given the fourth amendment, the Bill of Rights generally, and the function of the Court in our constitutional framework.

In a 1961 decision, *Mapp v. Ohio*,[10] Justice Clark summoned the wisdom of an earlier Court. Justice Clark stated that seventy-five years earlier, in *Boyd v. United States*, the Court held that the doctrines of the fourth and fifth amendments "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and privacies of life."[11] As Justice Clark pointed out, the *Boyd* Court stated that "constitutional provisions for the security of person and property should be liberally construed."[12] Less than thirty years after *Boyd*, the Court, in *Weeks v. United States*,[13] concluded that the fourth amendment limits and restrains the power and authority of the United States and federal officials.[14] Specifically dealing with the use of unconstitutionally seized evidence, the Court in *Weeks* argued that "the efforts of the courts and their officials to bring the guilty to punishment . . . are not aided by the sacrifice of those great principles established by years of endeavor. . . ."[15]

In another fourth amendment case, *Schneckloth v. Bustamonte*,[16] Justice Stewart stated that the "protections of the [f]ourth [a]mendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial," but rather reflect the concern of our society to be let alone.[17] Finally, in *Coolidge v. New Hampshire*,[18] Justice Stewart again recalled Mr. Justice Bradley's admonition in *Boyd v. United States* that "a close and literal construction deprives them [the amendments] of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than substance."[19]

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[10] 367 U.S. 643 (1961).
[11] *Id.* at 646.
[12] *Id.* at 647.
[13] 232 U.S. 382 (1914).
[14] *Id.* at 391.
[15] *Id.* at 393.
[16] 412 U.S. 218 (1973).
[17] *Id.* at 242.
[18] 403 U.S. 443 (1971).
[19] *Id.* at 453-54.

III. THE *RAKAS*, *SALVUCCI* AND *RAWLINGS* DECISIONS

Against this background, a striking contrast is provided in *Rakas v. Illinois*,[20] *United States v. Salvucci*,[21] and *Rawlings v. Kentucky*.[22] This trilogy demonstrates the Court's desire to restrict the use of the exclusionary rule by narrowing fourth amendment standing. The Court, in the process of accomplishing its desired result, sacrificed precedent and logic. Such a sacrifice was apparent to the dissent in *Rakas*: "In the rush to limit the applicability of the exclusionary rule somewhere, anywhere, the Court ignores precedent, logic, and common sense to exclude the rule's operation from situations in which, paradoxically, it is justified and needed."[23]

In *Rakas*, petitioners were on trial for armed robbery. Citing a lack of standing, the trial court denied petitioners' objections to the admission into evidence of a sawed-off shotgun and shells. The evidence had been seized by police during a search of the locked glove compartment and the area beneath the front passenger seat of the automobile in which petitioners had been passengers. Prior to the search, petitioners were ordered out of the car by police. The Supreme Court affirmed the trial court's denial of standing.

The Court first rejected the past terminology of "standing":

> For we are not at all sure that the determination of a motion to suppress is materially aided by labeling the inquiry identified in *Jones* as one of standing, rather than recognizing it as one involving the substantive questions of whether or not one of the proponents of the motion to suppress has had his own fourth amendment rights infringed by the search and seizure which he seeks to challenge.[24]

Throughout the opinion, the Court maintained that constitutional rights are personal and may not be vicariously asserted. However, the mere

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[20] 439 U.S. 128 (1978) (5-4 decision) (Individual claiming a fourth amendment violation must show the violation was of his own privacy expectations in the place searched or the objects seized).

[21] 448 U.S. 83 (1980) (overruling Jones v. United States, 362 U.S. 257 (1960), automatic standing in possessory offenses now a possessory interest subordinate to legitimate expectation of privacy).

[22] 448 U.S. 98 (1980) (property interests are subordinate to privacy expectations in determining standing to challenge fourth amendment violations).

[23] *Rakas*, 439 U.S. at 169 (dissenting opinion).

[24] *Id.* at 133. *See* Jones v. United States, 362 U.S. 257 (1960). In *Jones*, the Court held that a defendant could establish standing by demonstrating ownership or possession of the seized property, legitimate presence on the premises at the time of the search, or a proprietary or possessory interest in the premises searched. *Jones* also held that automatic standing was granted to a defendant charged with a possessory crime.

recitation of this principle of law does not materially aid the inquiry into the fundamental issue of whether the petitioners' rights were violated. Therefore, as the Court recognized, the fundamental inquiry "in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the [f]ourth [a]mendment was designed to protect."[25] Furthermore, if the vitality of the fourth amendment and precedents are to control, "[t]he ultimate question, is whether one's claim to privacy from government intrusions is reasonable in light of all surrounding circumstances."[26]

Rakas shifts the inquiry to the defendant's "legitimate expectations of privacy" in the area searched. The reasonableness standard requires case by case determinations. However, certain criteria that may be relied upon by the courts in determining which expectations of privacy are reasonable, emerges from a close analysis of *Rakas* and preceeding cases. Some of these criteria are: (1) legitimate presence on the premises searched;[27] (2) "automatic" standing where possession of the items seized is an element of the offense charged;[28] (3) the target theory—one against whom the search was directed;[29] (4) interest in either the place searched *or* the property seized;[30] and (5) whether the party took precautions to maintain his privacy:

> [T]he Court has examined whether a person invoking the protection of the fourth amendment took normal precautions to maintain his privacy—that is, precautions customarily taken by those seeking privacy. . . . Similarly, the Court has looked to the way a person has used a location to determine whether the [f]ourth [a]mendment should protect his expectation of privacy. . . . The Court on occasion also has looked to history to discern whether certain types of government intrusion were perceived to be objectionable by the Framers of the [f]ourth [a]mendment . . . . And, as the Court states today, property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and, therefore, should be considered in determining

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[25] *Rakas*, 439 U.S. at 140.

[26] *Id.* at 152 (Powell, J., concurring).

[27] Jones v. United States, 362 U.S. 257, 267 (1960).

[28] *Id.* at 264. The automatic standing rule was developed by the Court to relieve the defendant of the dilemma that in order to assert a challenge to a search or seizure, the defendant had to establish standing by admitting to an essential element of the alleged possessory offense.

[29] *See* Alderman v. United States, 394 U.S. 165 (1969) (those against whom a search is directed should be included as among those who may object). *Compare Rakas*, 439 U.S. 128 at 134 (where the Court refuses to sustain petitioner's "target theory") *with* United States v. Evans, 572 F.2d 455 (5th Cir.) (corporate officer as defendant has standing because seizure was directed at him as well as at corporation), *cert. denied*, 439 U.S. 870 (1978).

[30] *Jones*, 362 U.S. at 266, 261.

whether an individual's expectations of privacy are reasonable.[31]

Rakas does not involve the "automatic standing" doctrine. The complexities of the "target" theory of standing and the Court's rejection of this theory are not fully discussed in this Article. For the present, attention is focused on criteria 1, 4 and 5 above. Number 2 will be addressed in the later discussion of *United States v. Salvucci*.[32]

In *Rakas*, it was undisputed that the petitioners were passengers in the subject automobile with permission of the owner-driver and, therefore, were legitimately present in the place searched. The fact that they were ordered out of the car against their will by the police cannot possibly have any effect on the legitimacy of their presence. It is axiomatic that legitimate presence means legitimate "use of" the space occupied including the immediately surrounding area. The extent to which legitimacy can be conferred is, to a great extent, determined by the individual who originally granted permission to be present. Is it then an unreasonable expectation of privacy to expect to be secure from *unreasonable* government searches in a private area where one has a right to be? It is important to note that this does not mean that the government cannot search the area; it simply means that the government must first meet the fourth amendment requirements of reasonableness for the search.

It follows that if an individual has the right to use an area in which she has a reasonable expectation of privacy, that individual also has a right to be secure from unreasonable government searches in his or her use of the area. The fact that unlawful acts may be accomplished in privacy is irrelevant to any determination of whether the expectation of the privacy is reasonable. Obviously a person cannot reasonably expect fourth amendment protection where there is no privacy. The proper inquiry has to be "whether a person invoking the protection of the [f]ourth [a]mendment took normal precautions customarily taken by those seeking privacy."[33] This is precisely what the petitioners in *Rakas* did. Placing

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[31] *Rakas*, 439 U.S. at 152-53 (Powell, J., concurring).

[32] 448 U.S. 83 (1980).

[33] *Id.* This emphasis on "normal precautions customarily taken by those seeking privacy" has required the courts to spend a great deal of time deciding what is "normal": *Compare* United States v. Haydel, 649 F.2d 1152 (5th Cir. 1981) (defendant has a protected privacy interest in records secreted into parents' home and placed under parents' bed), *cert. denied*, 455 U.S. 1022 (1982), *with* Lee v. Gilstrap, 661 F.2d 999 (4th Cir. 1981) (defendant has no standing to challenge search of house he occupied but which was owned by mother-in-law), *cert. denied*, 456 U.S. 907 (1982). For consideration of various containers see: United States v. Hargrove, 647 F.2d 411 (4th Cir. 1981) (no expectation of privacy in paper bag found in plain view on back seat of car); United States v. Sutton, 636 F.2d 96 (5th Cir. 1981) (no expectation of privacy in paper sack in plain view; however, expectation does exist in locked briefcase in trunk); United States v. Goshorn, 628 F.2d 697 (1st Cir. 1980) (no expectation in triple-bagged items). *Compare* United States v. Cleary, 656 F.2d 1302

shells in a locked glove compartment and a sawed-off shotgun under the front passenger seat were the precautions taken by Rakas and his friend in order to maintain their "privacy" in these items. As passengers in a car driven by the owner, it cannot be doubted that the petitioners had permission to be in the car; indeed, they were engaged in a joint enterprise with the owner.

The Court's logic about the diminished expectation of privacy in an automobile is disingenuous. While it is true that courts have held that there is a diminished expectation of privacy in an automobile,[34] such holdings are relevant only to the issue of the reasonableness of a search. They cannot be relevant to the determination of the applicability of the fourth amendment unless the Court is now implying that the expectation of privacy in an automobile is diminished to the point where it has no fourth amendment significance. No court has held that there is *no*

(9th Cir. 1981) (legitimate expectation in canvas bag even with broken zipper), *vacated,* 457 U.S. 113 (1982), *with* United States v. Weber, 668 F.2d 552 (1st Cir. 1981) (legitimate expectation in rolled-up rainslicker containing walkie-talkie), *cert. denied,* 457 U.S. 1105 (1982). In some decisions, the court's reasoning focuses on the place of hiding, not the container. *See* United States v. Hershenow, 680 F.2d 847 (1st Cir. 1982) (legitimate expectation in box which was sealed and taped but not in barn where it was hidden, thus defendant had no right or interest of exclusive access); United States v. Ross, 456 U.S. 798 (1982)(if police suspect that container in auto may conceal object of search, then warrantless search of container is allowed pursuant to legitimate auto search). Open land presents some ambiguities as well; see United States v. Van Dyke, 643 F.2d 922 (4th Cir. 1981) (legitimate expectation of privacy in home and yard enclosed by fence); U.S. v. Dunn, 674 F.2d 1093 (5th Cir. 1982) (legitimate expectation in ranch enclosed by fences). *But cf.* United States v. Long, 674 F.2d 848 (11th Cir. 1982) (with no residence on land, no expectation of privacy in yard around barn); United States v. Rucinski, 658 F.2d 741 (10th Cir. 1981) (millyard of lumber company surrounded by barbed wire fence and no residence within, no expectation), *cert. denied,* 455 U.S. 939 (1982).

[34] Coolidge v. New Hampshire, 403 U.S. 443 (1971) (warrantless search of car unjustified when car is parked, defendant arrested and no likelihood of car's removal; expectation diminished by mobility of auto). Rakas v. Illinois, 439 U.S. 128 (1978) (does not end the ambiguity of car searches and fourth amendment claims). *Compare* United States v. McCulley, 673 F.2d 346 (11th Cir. 1982) (defendants had no standing as to search of auto rented by co-defendant when interest was only to share expenses) *with* United States v. Posez, 663 F.2d 37 (7th Cir. 1981) (defendant had legitimate expectation in auto when under his exclusive control with owner's permission), *cert. denied* 455 U.S. 959 (1982) *and* United States v. Ochs, 595 F.2d 1247 (2d Cir.) (defendant had key, therefore had possible dominion and control and a legitimate expectation of privacy), *cert. denied,* 494 U.S. 955 (1979); United States v. Ramapurian, 632 F.2d 1149 (4th Cir. 1980) (no expectation if car appears to be abandoned in open field, even if defendant owned the car), *cert. denied,* 450 U.S. 1030 (1981). *Compare McCulley,* 673 F.2d 346 *with* United States v. Perez, 689 F.2d 1336 (9th Cir. 1982) (although not owners, defendant agreed formally to transport contraband in truck driven by accomplice, defendants had legitimate expectation of privacy because they kept truck under surveillance from another vehicle or rode in the truck).

legitimate expectation of privacy in an automobile; in fact, the cases hold precisely the opposite.[35]

To limit the applicability of fourth amendment standing, the Court in *Rakas* effectively had to overrule *Jones* on the issue of legitimate presence. The Court held that "the phrase 'legitimately on premises,' coined in *Jones*, creates too broad a gauge for measurement of fourth amendment rights."[36] But the Court interpreted the phrase "legitimately on premises" to "permit a casual visitor who has never seen, or been permitted to visit the basement of another's house to object to a search of the basement if the visitor happened to be in the kitchen of the house at the time of the search."[37]

"Legitimately on premises" clearly means presence on premises to which one has been given (legitimate) access. Using the Court's example, when the ordinary person permits a casual visitor, who has never seen or been permitted to visit his basement to be in his kitchen, he is not thereby giving access to his basement. Contrary to the Court's position, a casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends should be able to contest the legality of the search if he had been given legitimate access to the house."[38]

If the above means a search in areas of the house in which the casual visitor was *not* legitimately present, then the visitor would *not* have

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[35] *See* United States v. Ross, 456 U.S. 798 (1982); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[36] Rakas v. Illinois, 439 U.S. 128, 142 (1978).

[37] *Id.*

[38] *Id.* The ambiguity of the Court's opinion on "legitimacy of presence" has fostered a line of cases with results that could be labeled capricious and arbitrary. *Compare* United States v. Perez, 700 F.2d 1232 (8th Cir. 1983) (overnight guest, not casual visitor, has a reasonable expectation of privacy in personal belongings and bags left in home of host) *with* United States v. Robinson, 698 F.2d 448 (D.C. Cir. 1983) (although a guest in house, defendant fails to establish privacy expectation when no indication of length of stay or relationship to host is given; no privacy expectation when guest in home which housed seven or eight other guests). *Compare* United States v. Ladd, 704 F.2d 134 (4th Cir. 1983) (no expectation of privacy in contraband put in house without knowledge or consent of owner) *with* United States v. Haydel, 649 F.2d 1152 (5th Cir. 1981) (defendant has privacy interest in records secreted in parents' home and placed under parents' bed), *cert. denied*, 455 U.S. 1022 (1982) *and* Lees v. Gilstrap, 661 F.2d 999 (4th Cir. 1981) (no expectation of privacy in house occupied by defendant but owned by mother-in-law), *cert. denied*, 456 U.S. 907 (1982). It has also been held that guests of a registered hotel guest have no legitimacy of presence. *See* United States v. Irizarry, 673 F.2d 554 (1st Cir. 1982) (hotel room registered to co-defendant in which defendant is merely present fails to establish privacy interest); Ray v. United States Dept. of Justice, 658 F.2d 608 (8th Cir. 1981) (plaintiff lacked privacy interest in third party hotel room; no expectation of privacy in letters sent by plaintiff and delivered to hotel room of third party); United States v. Vargas, 633 F.2d 891 (1st Cir. 1980) (defendant possesses no privacy interest in room registered to another); United States v. Hansen, 652 F.2d 1374 (10th Cir. 1981) (holding same).

available to him or her "legitimate presence" as a basis to contest the legality of the search. If it means a search of areas where the casual visitor was present legitimately, then the fourth amendment should be available. The issue needs to be stated forthrightly. The vitality of the fourth amendment is jeopardized when case law says an individual has no right to be secure from *unreasonable* government searches and seizures if he is *legitimately present* in another's private home for the first time.

In his *Rakas* dissent, Justice White criticized the majority's eviscera-tion of a long line of cases holding that the fourth amendment's bar against unreasonable searches is not limited to protection of property rights. White argued that the same logic that led the Court to conclude that "an individual in a business office, in a friend's apartment, in a taxicab, or in a telephone booth" may be protected by the fourth amendment also leads to the conclusion that "a person riding in an automobile next to his friend, the owner, . . . must have some protection as well."[39]

The rewriting of the fourth amendment standing doctrine only began with *Rakas*. In 1980, the Court completed the task in *United States v. Salvucci*[40] and *Rawlings v. Kentucky*.[41] Based on the rationale of *Rakas*, the Court dismantled the criteria of automatic standing in *Salvucci* and possessory interest in *Rawlings*.

In *Salvucci*, the defendants were charged with unlawful possession of stolen mail. The checks that formed the basis of the crime had been seized by police during a search of an apartment rented by one defendant's mother conducted pursuant to a warrant. Defendants moved to suppress the evidence on the grounds that the affidavit supporting the application for the search warrant was inadequate to show probable cause. After the

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[39] *Rakas*, 439 U.S. at 162-65 (White, J., dissenting). The *Rakas* reasonable expectation of privacy test has had effect on the Court's opinions concerning an individual privacy expectation when the property is related to a corporation or business, especially one highly regulated by the government. *See* United States v. Acklen, 690 F.2d 70 (6th Cir. 1982) (because pharmaceutical industry is highly regulated, pharmacist had a lesser expectation of privacy in prescription files); United States v. Katz, 705 F.2d 1237 (10th Cir. 1983) (bank customer possesses no expectation of privacy in bank's Currency Transaction Reports); and United States v. Payner, 447 U.S. 727 (1980) (no privacy interest in defendant's accounts illegally seized from bank official). *Compare* United States v. Allison, 619 F.2d 1254 (8th Cir. 1980) (union official possesses legitimate privacy expectation in records held in union office) *with* United States v. Rucinski, 658 F.2d 741 (10th Cir. 1981) (because millyard could be inspected at any time, a reasonable expectation of privacy could not be asserted), *cert. denied*, 455 U.S. 439 (1982) *and* United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980) (corporations possess many public attributes reducing their expectation of privacy) *and* United States v. Blue Diamond Coal, 667 F.2d 510 (6th Cir. 1981) (statute allows inspection of company books by regulatory agencies and "interested persons," therefore operators of mine had no reasonable expectation of privacy in books), *cert. denied*, 456 U.S. 1007 (1982).

[40] 448 U.S. 83 (1980).

[41] 448 U.S. 98 (1980).

district court granted the motion, the court of appeals affirmed, holding that since respondents were charged with crimes of possession, they were entitled to claim "automatic standing" as enunciated in *Jones*. The Supreme Court, however, decided that the time was ripe to overrule the automatic standing of *Jones*. Justice Rehnquist stated, in effect, that one who petitions to exclude illegally obtained evidence must show that his rights were violated. He could no longer rely on *Jones*, as *Jones* had "outlived its usefulness and served "only to afford a windfall to defendants whose fourth amendment rights had not been violated."[42] The court asserted that the "legal contradiction" in *Rakas* was that a prosecutor may simultaneously maintain that a criminal possessed the seized good, but that he was not subject to fourth amendment deprivation.[43] In addition, the court cited *Simmons v. U.S.*[44] and its holding that testimony given by the defendant in support of a motion to suppress cannot be admitted as evidence of guilt at trial, as providing the impetus to overrule *Jones*.[45]

After refocusing the inquiry in standing cases by declaring that none of the criteria of the past cases are to be controlling in the future, and by overruling the automatic standing of *Jones*, the *Salvucci* Court used the concept of "interest in the property seized" as a criterion for fourth amendment standing.

The court used the reasoning of *Salvucci* to deny standing to the petitioner in *Rawlings*. In *Rawlings*, six police officers armed with a warrant to arrest Lawrence Marquess arrived at Marquess' house. In the house at the time was one of Marquess' housemates, Dennis Sadler, and four visitors, Keith Northern, Linda Braden, Vanessa Cox and petitioner David Rawlings. While searching the house unsuccessfully for Marquess, several officers smelled marijuana smoke and saw marijuana seeds. Two of the officers left to obtain a search warrant. The other officers detained the occupants, allowing them to leave only if they consented to a body search. Northern and Braden did consent to such a search and were allowed to leave.

Approximately fourty-five minutes later, the officers returned with the search warrant, which was read to the remaining occupants along with the "Miranda" warnings. Cox, who was seated on a couch next to

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[42] *Salvucci*, 448 U.S. at 95.

[43] *Id.* at 88.

[44] 390 U.S. 370 (1968).

[45] Justice Marshall, however, raised issues in his dissent which questioned whether *Simmons* provided protection against self-incrimination since the majority left open the question of whether the testimony could be used for impeachment purposes. Justice Marshall also stated that the opportunity for the prosection to use information garnered at a suppression hearing during cross-examination should not be at the price of asserting a fourth amendment claim. *Salvucci*, 448 U.S. at 96-97 (Marshall, J., dissenting).

petitioner, was ordered to empty her purse, which was between her and petitioner. The contents of the purse included drugs which were controlled substances under Kentucky law. Upon pouring out the contents of her purse, Cox turned to petitioner and told him "to take what was his" and Rawlings immediately claimed ownership of the controlled substances. At that time an officer searched petitioner, found a knife and $4,500 in cash, and formally arrested him.

Rawlings had placed the drugs in Cox's purse on the morning of his arrest. Although there is dispute over the discussion that took place, petitioner testified that he "asked [Cox] if she would carry this for [him], and she said 'yes.'" Petitioner then left the room to use the bathroom, and when he returned he discovered that the police had arrived to arrest Marquess.

The State conceded that the search of Cox's purse was unreasonable and in violation of the fourth amendment. On these facts, and in light of *Salvucci*, the questions presented on the issue of standing were (1) whether petitioner had a reasonable expectation of privacy in the place searched—Cox's purse—and, (2) whether petitioner had a reasonable expectation of privacy in the items seized because of his ownership of these items.

In answering both these questions in the negative, the Court reasoned that Rawlings had neither previously sought access to the purse, nor had any right to exclude others from access, nor did he take normal precautions to maintain his privacy. Justice Rehnquist also cites *Rakas* as "emphatically rejecting the notion that 'arcane' concepts of property law ought to control the ability to claim the protection of the [f]ourth [a]mendment."[46]

The dissenting opinion of Justice Marshall, in which Justice Brennan joined, provides some comfort, for it illustrated that not all the Justices of the Court were intent on contributing to the illogic and inconsistency of the majority's opinion.

Justice Marshall contended that the *Rawlings* majority rejected the fundamental principle that an interest in either place or property invoked the Constitution's protections against unreasonable searches and seizures. He claimed that the Court substantially cut back the protections that had been expanded by earlier decisions such as *Jones* and

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[46] Rawlings v. Kentucky, 448 U.S. 98, 105-06 (1980). *See* United States v. Medina-Verdugo, 637 F.2d 649 (9th Cir. 1980); *see also* United States v. Dunn, 674 F.2d 1093 (5th Cir. 1982) (no legitimate expectation of privacy with neither a proprietary nor possessory interest demonstrated); United States v. Porter, 701 F.2d 1158 (6th Cir. 1983) (no possessory interest is dispositive of expectation of privacy); United States v. Merlo, 704 F.2d 331 (6th Cir. 1983) (holding same); United States v. Johnston, 685 F.2d 934 (5th Cir. 1982) (no standing to challenge search of car when defendant admitted he never possessed car).

Katz v. United States.[47] According to Justice Marshall, "an ungrudging application of the [f]ourth [a]mendment is indispensable to preserving the liberties of a democratic society."[48]

IV. CONCLUSION

The holdings of *Rakas*, *Salvucci*, and *Rawlings* demonstrate the Court's desire to limit the applicability of the exclusionary rule. These cases also demonstrate that the Court was impatient. The Court was not willing to allow other judicial and/or legislative efforts to address the issue of alternatives to the rule, alternatives brought about by means less destructive to fundamental rights founded in the fourth amendment. Even if one is convinced that the exclusionary rule is in need of reform, one can assuredly agree that there was a method of bringing about such reform which was less obtrusive than the evisceration of the fourth amendment of the Rehnquist Court.

The Court's approach brings to mind a story of a big two-hundred-year old cabin in the mountains of New Hampshire overlooking a lake. While a group of campers were using the log cabin, mosquitos got in and became a substantial nuisance. One group of campers proposed the distasteful and not totally effective approach of spraying the cabin with insecticide. The other group was outraged at this suggestion, stating that this approach merely coddles the mosquitos and many may escape the effects of the spray. This group insisted that tough, drastic action was required to eliminate these pests, that they had a right to quiet enjoyment of the cabin, and that the pests had no right whatsoever to be in the cabin. It would be necessary to burn the cabin. This, they proclaimed, would give them peace of mind knowing that the pests were eliminated. The other group, in an effort to recover from the shock of what they had just heard, consoled themselves with the thought that there may be some validity to the proposal and maybe they should have more deference for the wisdom of the second group and allow them to try the tough, drastic approach.

It seems that the way to save the cabin is to protect it so that the flames will never spread into a conflagration, resulting in total destruction of fourth amendment safeguards. Since the present Court cannot be relied upon to choose a more limited approach that preserves these provisions, Congress will need to act. In the spirit of the precedent articulated in *Jones*, Congress should enact legislation granting fourth amendment standing in the following situations: (1) where possession of the items seized is an element of the offense charged; (2) when a search is conducted in the immediate private or semiprivate area where a petitioner is

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[47] 389 U.S. 347 (1967).

[48] *Rawlings*, 448 U.S. at 114-21.

lawfully present; (3) when the petitioner has an interest in the place searched *or* property seized; and (4) in all situations where a person invoking the protection of the fourth amendment took precautions customarily taken by those seeking privacy. Such legislation is a first step toward the revitalization of our precious commitment to the principle that the people have a right to be secure from unreasonable governmental searches and seizures.