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Introduction

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INTRODUCTION

*THE HONORABLE KIM MCLANE WARDLAW**

“Constitutions should consist only of general provisions,” Alexander Hamilton once explained.¹ “The reason is, that they must necessarily be permanent, and that they cannot calculate for the possible change of things.”² As the Framers predicted, “things” certainly have changed. In 1791, when the Bill of Rights was ratified, much correspondence was sent by horseback, often taking days to reach its final destination. I personally recall the days when – as an attorney in private practice – I would carefully draft a letter to opposing counsel, drop it in the mail, and not expect a response for weeks. Today, with the advent of the Internet and the invention of text messaging, written communications are transmitted instantaneously over a truly worldwide network. How do the “general provisions” of the Fourth Amendment apply to modes of communication sent via technologies that were likely beyond the wildest imagination of the Founders? And how can we ensure that our answers to today’s legal questions provide principled guidance to future jurists called upon to address issues arising from tomorrow’s technological developments? We, after all, are no more capable of predicting the course of future technological change than were the Framers.

At the Ninth Circuit Court of Appeals, we often consider the application of the Constitution’s “general provisions” to new technologies. When we do, we not only resolve the question before us, but we necessarily contribute to the doctrinal framework within which future technologies will be considered. For instance,

* United States Circuit Judge, United States Court of Appeals for the Ninth Circuit. The views expressed in this introduction are my own and do not necessarily reflect the views of my colleagues or of the United States Court of Appeals for the Ninth Circuit.

¹ Alexander Hamilton, Third Speech at New York Ratifying Convention (June 28, 1788), in 5 Papers of Alexander Hamilton 114, 118 (Harold C. Syrett ed., 1962).

² *Id.*

294 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 40]

in *Quon v. Arch Wireless Operating Co., Inc.*,³ we had to decide whether a police department acted unconstitutionally when it searched personal text messages that its officers sent or received on two-way pagers. As we considered the question, we observed that “[t]he extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question,” and that the “recently minted standard of electronic communication via e-mails, text messages, and other means opens a new frontier in Fourth Amendment jurisprudence.”⁴ In exploring this “new frontier,” we were not without guidance, however. We began our constitutional analysis by citing the text of the Fourth Amendment, and we proceeded to apply the lessons of existing precedent to this relatively new form of communication.⁵ The Supreme Court granted certiorari to address this issue – not because there exists an inter-circuit split, as this question has been decided only by the Ninth Circuit – but most likely because of the importance of defining reasonable expectations of privacy in the information age. (The *Quon* opinion also was the first in the nation to decide whether a wireless service was an “electronic communication service” under the Stored Communications Act, an issue that the Supreme Court did not take up for decision.)

The past year has provided us many more opportunities to explore these new frontiers. In *United States v. Payton*,⁶ – the subject of an article in this edition of the Golden Gate University Law Review – and *United States v. Comprehensive Drug Testing, Inc.*,⁷ we examined the constitutionality of searches of information electronically stored on personal and proprietary computers. In each case, we revisited first principles established in the Constitution, examined case law interpreting the constitutional provisions at issue, and applied that body of doctrine to new facts.

Similarly, in *Bryan v. McPherson*,⁸ – the subject of another article in this edition – we considered the constitutional implications of a police officer’s use of the Taser X26, a stun gun that uses compressed nitrogen to propel electrically charged aluminum darts toward its target. To nobody’s surprise, the

³ *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892 (9th Cir. 2008).

⁴ *Id.* at 904.

⁵ *Id.* at 904–05.

⁶ *United States v. Payton*, 573 F.3d 859 (9th Cir. 2009).

⁷ *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (2009) (en banc).

⁸ *Bryan v. McPherson*, 590 F.3d 767 (9th Cir 2009).

Constitution lacks explicit instructions on the circumstances under which this state-of-the-art law enforcement tool lawfully may be deployed. But it does provide us with guiding principles, the foundation upon which case law has developed. Thus, in *Bryan*, we returned to the analytical framework of *Graham v. Connor*,⁹ and its progeny, which instructed us to consider the government's interest in the use of the Taser, which, in turn, depended on the severity of the crime at issue, the immediacy of any threat imposed by the suspect, and the suspect's resistance to arrest. The invention of the Taser was not license for the courts to remake the law – a task exclusively within the province of the people and their elected representatives – but was instead a reason to apply existing law to new law enforcement technology.

Technological innovations often present our court with interesting issues of local governance as well. Last year, in *Sprint v. Palos Verdes*,¹⁰ we were called upon to examine the extent of municipalities' authority to regulate the placement and aesthetics of cellular telephone towers in light of a federal statute enacted to facilitate the development of wireless services. In analyzing the federal, state, and local laws governing the issue, we took note of the longstanding "tension between technological advancement and community aesthetics."¹¹ Similarly, today, we are currently considering the extent to which a city may regulate state-of-the-art billboards, including "supergraphic signs" and displays featuring digital content.¹²

There is no doubt that, given its large population, geographic reach, and the diverse, creative and innovative people and industries within its jurisdiction, the Ninth Circuit Court of Appeals will continue to be among the first in the nation to address legal questions involving novel technologies. However, technological change does not come to the Ninth Circuit exclusively in the form of legal issues which we are called upon to resolve. I am proud to say that our court has embraced new technologies to improve the administration of justice in a myriad of ways. Litigants are now able to file documents electronically, saving time and resources. Web-based streaming media permit members of the public to observe oral arguments even when they are unable to attend

⁹ *Graham v. Connor*, 490 U.S. 386 (1989).

¹⁰ *Sprint v. Palos Verdes*, 583 F.3d 716 (9th Cir. 2009).

¹¹ *Id.* at 720.

¹² See *World Wide Rush v. City of Los Angeles*, No. 08-56454 (argued and submitted December 10, 2009).

proceedings in person. This is especially useful as our en banc proceedings, held typically in San Francisco or Pasadena, are streamed to public conference areas in each of our courthouses. Beginning the day after an oral argument is heard, a digitized audio recording is made available on our court's public web site. We have also begun to allow the media to use electronic devices for blogging, tweeting, and other realtime reporting from the courtroom. Our court library compiles and distributes a daily digest of media coverage and blog entries summarizing public discussions of our work. Overall, innovations in the employment of technology instituted under the strong leadership of Chief Judge Kozinski have ensured greater transparency and efficiency of our judicial proceedings. Behind the scenes, email and word processing systems – tools that, not long ago, were unavailable to judges – have facilitated dialogue and debate among members of our court. Most of our judges have themselves become technologically savvy and can be seen with an array of court-issued laptops, mobile devices, cellular telephones, and other means of staying in contact 24/7 as we “ride circuit.”

In a world of constantly changing technologies, it is important that we periodically take time to stop and reflect on the product of our vast and evolving dockets. I am grateful to the Golden Gate University Law Review for its annual examination of some of our most important decisions from each preceding year, which sit at the intersection of law and technology and elsewhere. I look forward to reading the 2010 edition and hope others will take the opportunity to learn about our court's most recent decisions.