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# The Effect U.S. Conflict has on Supreme Court Decisions Regarding Electronic Surveillance

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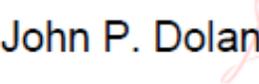
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THE EFFECT U.S. CONFLICT HAS ON SUPREME COURT DECISIONS REGARDING  
ELECTRONIC SURVEILLANCE

A Master Thesis

Submitted to the Faculty

of

American Military University

by

Dustin J. Taylor

In Partial Fulfillment of the

Requirements for the Degree

of

Master of Arts

May 2016

Charles Town, WV

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Abstract of Thesis

THE EFFECT U.S. CONFLICT HAS ON SUPREME COURT DECISIONS REGARDING  
ELECTRONIC SURVEILLANCE

by

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American Military University

May 15<sup>th</sup>, 2016

Charles Town, WV

Dr. Cynthia Nolan, Thesis Professor

## Abstract

The purpose of this thesis is to explore Supreme Court influences, more specifically the effect of US foreign conflict on electronic surveillance cases. Electronic surveillance is a primary contingent of the Congressional Authorization for the Use of Military Force (AUMF) and a hotly debated issue in the 21<sup>st</sup> century. However, the contentious use of electronic surveillance dates back to the Supreme Court case of *Olmstead v. United States* (1928). There have been various other electronic surveillance cases brought before the Supreme Court but the five selected in this case study are a mixture of peace and wartime cases that illustrate existential influences to include foreign conflict, political, and legislation. The remaining four selected cases were *Katz v. United States* (1967), *US v. US District Court of Eastern Michigan* (1972), *Kyllo v. United States* (2001), and *Jones v. United States* (2012).

Research of the aforementioned cases led to the following research question: to what extent does US foreign conflict influence Supreme Court rulings on the use of electronic surveillance? After delving into each case three variables were identified as influential: foreign conflict or lack thereof, significant political influence, and legislation that governed the use of electronic surveillance. Collectively, the variables and judicial Segal-Cover scores contributed to a complete analysis of the five selected Supreme Court cases and a conclusive answer. US foreign conflict does not influence Supreme Court decisions regarding electronic surveillance cases.

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## Chapter 1

### INTRODUCTION

Foreign conflict is singly one of the most influential factors a government can face as it sets a national agenda and the United States is no stranger to foreign conflict. From the Revolutionary War to the Global War on Terror it seems that nearly every decade has been consumed by foreign conflict either foreign or domestic. Therefore, historically, the national agenda has been dictated by foreign conflict but, does it influence every aspect of the government? The one sector of government that should not be susceptible to foreign conflict influence is the judicial branch, specifically the Supreme Court.

The Supreme Court of the United States was created by the Constitution in 1789 to protect civil rights and liberties. Article III Section 2 of the US Constitution states this, “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority...” (U.S. Constitution Article III, Section 2) In addition to the terms set forth by the Constitution, upon being confirmed by the Senate after a presidential nomination a Justice swears an oath to rule with impartiality.

The Supreme Court has ruled on many cases during times of foreign conflict, for example: *Katz v. United States*, *US v. US District Court of Eastern Michigan*, and *Jones v. United States*. These cases are not simply examples of foreign conflict era cases but also include the use of electronic surveillance by the government. Superficially, the Supreme Court appeared to be granting judicial latitude for electronic surveillance activities because the US was engaged

in foreign conflict. In a constitution based democracy national security exigency supersedes constitutionalism. The result is a temporary suspension of civil liberties in effort to restore peace through law and policy. (Rossiter, 1948 p. 5) With that in mind, the suspension of civil rights could be indefinite or delayed at least until law and policy restore peace as dictated by the government.

Under exigent circumstances such as foreign conflict, Congress or the president can circumnavigate standard procedure by ordering the Supreme Court to review legislation for constitutionality under a “Question Presented” headline. (Harvard Law Review, 2011 p. 2069) The “Question Presented” headline fall under “Rule 24: Briefs on the Merits: In General.” Rule 24 allows for questions not pertaining to a writ of certiorari but do not change perception of questions already asked. The Supreme Court can rule on “Questions Presented” headlines outside of writ of certiorari proceedings. (Legal Information Institute, “Rule 24: Briefs on the Merits: In General)

Ordering the Supreme Court to review legislation outside of standard procedure opens the door for potential for foreign conflict coercion and/or political influence. Conflict coercion is national security considerations as the result of military engagement in a foreign theater which influences constitutional law. Political influence works in the same way, “When the court deals with major issues of social policy, the law it shapes is the most inescapably political.” (Tamanaha, 2012 p. 759) Therefore, the question must be asked: To what extent does US foreign conflict influence Supreme Court rulings on the use of electronic surveillance?

## Chapter 2

### Methodology

#### **Strategy**

A combination of grounded theory and inductive methodology was applied to this research. The intent of an inductive methodology in this study is to use grounded theory which requires being immersed in historical data. The advantage of grounded theory in the exploration of this topic is that it allows for theory to develop into concrete analysis. Out of the historical data, social and political factors were extracted that lead to the generation of the hypotheses. The socio and geopolitical factors refers to the national agenda, time period foreign conflict, and domestic turmoil affecting the nation at the time of the individual case. Additionally, the surrounding socio and geopolitical factors were documented as variables to test the hypothesis.

Research was conducted through the American Military University online library and the Google™ search engines using key terms: “Electronic Surveillance,” “Supreme Court,” “U.S. foreign conflict,” “U.S. electronic surveillance legislation,” and “Supreme Court AND politics” which yielded more than five million hits. The parameters were limited using Boolean principles, “Boolean logic is a system of showing relationships between sets by using the words "AND," "OR," and "NOT." (University of Alaska, Fairbanks, 2014) By inserting “AND” in between the search terms in combination with restricting the results to scholarly and peer-reviewed the hits significantly decreased but increased in relevance. For example, “Electronic Surveillance AND Supreme Court” yielded over 2,900 results for scholarly and peer-reviewed journal hits. By adding “cases” into the search term the reduction in irrelevant material was exponentially significant.

The Google™ search engine was utilized in this context because it provided links to external academia. For example, the American Military University Library search of EzProxy, Proquest, and LexisNexus did not produce relevant resources from respected universities such as Harvard University Law or Cornell Law that were referenced. Google was instrumental in producing this scholarly literature. Google™ also provided links to governmental entity websites such as the Supreme Court of the United States' webpage that provided insight into the framework and proceedings of the court which aided in a foundational understanding. The next step in the research process utilized a nonprobability purposive modal sampling technique with the related literature. Approximately 3% of the research items were selected. The reason behind this strategy was to eliminate redundancy. The selected resources that contained pertinent contributions to the analysis of Supreme Court influences during foreign conflict were included.

Seven Supreme Court cases were located that cited electronic surveillance as the main point of contention. Five of the seven were selected because of the historical significance in electronic surveillance case law. Additionally, the five were selected because of their significance during foreign conflict or peacetime. The intent was to have an equal amount of cases during war and peace to measure the influence of foreign conflict on the US Supreme Court. It was determined that all five cases were relevant beyond foreign conflict because the preceding case rulings were cited in the decision making process of the latter. Additionally, the five selected cases proved to be interesting measurements of the socio and geopolitical factors during the time period. These cases are *Olmstead*, *Katz*, *U.S. District Court*, *Kyllo*, and *Jones* which discusses the use of electronic surveillance and was heard during foreign conflict or peace which directly contributed to the analysis of the effect foreign conflict has on Supreme Court rulings.

Next, a review of foreign conflicts or lack thereof during the five selected cases was conducted, by the researcher, which aided in identifying the associated political party affiliation of the presidential administrations that nominated the Supreme Court justices. Since Supreme Court justices can be selected based upon their ideological alignment with the national agenda and the seated administration the foreign conflict itself is an important variable to analyze. (Dorsen, 2006 p. 652) Additionally, the review of U.S. foreign conflict highlighted military foreign engagement during the five Supreme Court cases. Military engagement sparked the fear of foreign agents operating within the United States which in turn created the governmental demand for electronic surveillance.

Additionally, a review of electronic surveillance legislation was included. Electronic surveillance legislation is a key variable that is judicially reviewed by the Supreme Court. The judicial review of electronic surveillance legislation illustrates judicial ideological tendencies as well as the ideological correlation between Supreme Court justices and the presidential agenda. Furthermore, the Solicitor General cited electronic surveillance legislation during a case argument. Therefore, the significance of electronic surveillance legislation as an influential factor is that cited legislation has been congressionally and presidentially approved as well as judicially reviewed.

Contained within each case analysis will be a table displaying the individual justice's opinions that will be completed in the conclusion of each case analysis. Additionally, a Segal-Cover ideological score will be used for justices after 1935. Segal-Cover did not start the scoring system until the nomination of Justice Hugo Black therefore; Olmstead's case will not include a Segal-Cover ideological score but will be explained through the political influence of the time. (Segal et al 1989 p. 557-565) The Segal-Cover score ranges from 0, extremely conservative to

100, extremely liberal. (Segal et al 1989 p. 557-565) The database at Insidgov.com utilizes information from the Supreme Court Database which is maintained and operated by Lee Epstein (Distinguished University Professor), Thomas G. Walker, Nancy Staudt, Scott Hendrickson, and Jason Roberts at the Washington University in St. Louis and funded by the National Science Foundation Law and Social Science Program. (Epstein 2013, "Supreme Court Justice Database") To establish the database and an ideological score using the Segal-Cover method, Epstein and his team used 263 variables divided into five categories: identifiers, background characteristics and personal attributes, nomination and confirmation, service on the Court, and departures from the bench. (Epstein 2013, "Supreme Court Justice Database") Therefore, judicial political polarity will be explained through political ideologies of period Republicans and Democrats and the Segal-Cover score which illustrates influence susceptibility in the Supreme Court. "Thus, with the exception of the onset of critical or realigning periods, the president's appointment power should ensure a Court whose views represent those of the dominant political coalition." (American Political Science Review, 1994 p. 711)

Additionally, a table was constructed containing the five Supreme Court cases and the associated variables for tracking purposes. The use of a table allowed for enumerating the influence that each variable had upon Supreme Court rulings and comparison. Furthermore, the total score increased readability and understanding by associating a numerical value with each variable. The following table was developed and used during the analytical phase of this project. A completed case specific table is provided at the conclusion of the analysis of each case. A comparative table including all cases will be provided in the conclusion chapter of this research.

Table 1: Influence Effect

Variable==>	Conflict	Political	Legislation	Total
Olmstead v. United States				
Katz v. United States				
US v. US District Court				
Kyllo v. United States				
Jones v. United States				

**KEY:** INFLUENCE PRESENT: HIGH/ELEVATED = 1 INFLUENCE NOT PRESENT: NONE/LIMITED = 0

### Reliability and Validity

“The reliability of a research instrument concerns is determined by the extent to which the instrument yields the same results on repeated trials.” (Key 1997, “Reliability and Validity”)

The repeated review of Supreme Court cases contained within this research by academia increased reliability. Furthermore, Supreme Court cases are the most widely publicized and cited legal briefs to be used as a standard of measurement for the constitutionality of electronic surveillance throughout the legal system. As a standard of legal measurement within this study Supreme Court case briefs cannot be altered or deleted. Therefore, the replication of this research can be done and other researchers can reach their own conclusions.

“Validity can be defined as the degree to which a test measures what it is supposed to measure.” (Key 1997, “Reliability and Validity) Since the foundation of this research is the five selected Supreme Court cases and the cases are determined to be reliable the conclusions drawn with the use of the variables satiate basic validity concerns. Disregarding any of the Supreme Court cases or the extracted variables would be detrimental in providing a full and conclusive analysis. To remove ambiguity the term “electronic surveillance” is defined as any method used

to electronically monitor a subject. Moreover, “electronic surveillance” will be used throughout Supreme Court case briefs and legislation. The reliability of the data determines the validity of this study.

## Chapter 3

### Background

The intent of this section is to provide background knowledge on the five selected Supreme Court cases that involve electronic surveillance. The case briefs will include a summary of the case and the evidence provided along with how the evidence was obtained. A brief summary of socio and geopolitical events within the US during the particular time period is included for foundation and later variable measurement. Additionally, the corresponding Supreme Court Justices are identified and contained in a table. The table highlights the political party affiliation for each Justice which was also contained within the biography and Segal-Cover score of each justice. Furthermore, the nominating president is identified which sets the political tone for the Supreme Court panel, justice nominations as well as the controlling political majority. For the contextual purpose of this chapter and all subsequent chapters the definition of political will be political party affiliation, US foreign conflict will be a military engagement, and legislation will be congressionally enacted legislation.

#### ***Olmstead v. United States (1928)***

*Roy Olmstead*, a Seattle, Washington based bootlegger took his case before the Supreme Court February 21<sup>st</sup>, 1928. Olmstead was indicted and convicted in a lower court on conspiracy to violate the Prohibition Act which eventually became the 18<sup>th</sup> Amendment to the U.S. Constitution (Repealed). (history.com 2010, “18<sup>th</sup> and 21<sup>st</sup> Amendments”) Federal agents monitored *Olmstead's* conversation by tapping the phone lines between Olmstead's residence and his co-conspirators. The agents set the wiretaps in the basement of a public building. During

this time period Washington State still recognized common law which allowed evidence to be admitted into the court despite it being obtained illegally which led to the appeal in front of the Supreme Court. (*Olmstead v. United States*, 1928)

The 1920s were known as the roaring 20s because of the economic and industrial proliferation occurring throughout the United States. The rise in economic and industrial status was due in part to the conclusion of World War I in 1918 and the U.S. was not engaged in any major foreign conflicts. A majority of the United States' success during the 1920s was attributed to President Calvin Coolidge. Coolidge took office after President Harding died suddenly. Harding's presidency was "riddled with scandal." (History.com 2009, "Calvin Coolidge") President Coolidge, nicknamed "Silent Cal", was a no-nonsense conservative Republican who idealized as being frugal and a governmental minimalist.

Coolidge took corruption to heart so much so that he relieved Republican Attorney General Harry Daugherty of his position thus being succeeded by Republican Harlan Stone. (Sobel, 2012) The Harding issues were eventually cleaned up by President Coolidge and the luster was restored to the presidency. President Coolidge's notable policy contributions were large scale tax cuts and the implementation of trickle-down economics. (Miller Center of Public Affairs, 2016) During his time in office President Coolidge nominated more than 78 federal judges but only one Supreme Court justice, Justice Harlan Stone after his stint as the Attorney General. Coolidge also appointed SG William Mitchell (Republican). (fjc.gov, "Biographical Directory of Federal Judges)

Chief Justice William Taft convened the court and *Olmstead's* case was heard. Eventually, Chief Justice William Taft delivered the opinion of the court. The Supreme Court

ruled in favor of the government 5 to 3 with one separate opinion. (*Olmstead v. US*, 1928)

Table 2 identifies Taft's accompanying justices, the corresponding party affiliation and nominating president of the Supreme Court panel in *Olmstead's* case.

Table 2: Supreme Court Justices *Olmstead v. United States* (Supremecourt.gov "Justices from 1789 to Present", 2016)

<b>Justices</b>	<b>Party Affiliation</b>	<b>Nominated by President</b>
William Taft (Chief)	Republican	Harding (Republican)
Oliver Holmes	Republican	Roosevelt (Republican)
Willis Van Devanter	Republican	Taft & Roosevelt (Republicans)
James McReynolds	Democrat	Wilson (Democrat)
Louis Brandeis	Republican	Wilson (Democrat)
George Sutherland	Republican	Harding (Republican)
Pierce Butler	Democrat	Harding (Republican)
Edward Sanford	Republican	Roosevelt (Republican)
Harlan Stone	Republican	Coolidge (Republican)

### ***Katz v. United States (1967)***

Charles Katz was arrested and convicted in a lower court based upon evidence collected by electronic surveillance methods. *Katz* was charged with the transmission of wagering information across state lines which was intercepted by FBI agents. The Court of Appeals denied Katz's claim his Fourth Amendment rights were violated but the Supreme Court intervened and heard the case on October 16, 1967. Eventually, Justice Stewart delivered the court opinion of 7-1 in favor of *Katz*. The panel is identified in table 3.

Table 3: Supreme Court Justice Panel: *Katz v. United States* (Supremecourt.gov “Justices from

<b>Justices</b>	<b>Party Affiliation</b>	<b>Nominated By President</b>
Chief Justice Earl Warren	Republican	Eisenhower
Potter Stewart	Republican	Eisenhower
Hugo Black	Democrat	F. Roosevelt
William Douglas	Democrat	F. Roosevelt
William Brennan	Democrat	Eisenhower
Byron White	Democrat	J. Kennedy
Abe Fortas	Democrat	Johnson
Thurgood Marshall	Democrat	Johnson
John Harlan	Republican	Eisenhower

1789 to Present”, 2016)

Katz’s case took place during a very tumultuous time in U.S. history, 1967. There were nearly half a million troops deployed in the Vietnam War, race riots were breaking out across the United States, John Walker (US Navy) sold the first of many intelligence documents to the U.S.S.R, and Democratic President Lyndon B. Johnson was contending with accusations by the Russians of encouraging Israel to attack and seize land during the Cold War.

(nationalcoldwarexhibition.org 2013, “Timeline Year 1967”) Much like Cold War beginnings, Vietnam bolstered the use of electronic surveillance. The United States was experiencing domestic chaos with anti-war sentiment and race riots. President Johnson feared that anti-war sentiment was a direct result of foreign agent instigation and would lead to national destabilization.

In 1967, CIA director Richard Helms was presidentially directed to electronically surveil and infiltrate anti-war groups under codename CHAOS. (Hadley, 2013) The order of CHAOS came in the same year that the landmark case of *Katz v. United States* (1967) was heard in front of the Supreme Court. Despite Supreme Court precedence, such as *Cramp v. Board of Public*

*Education* (1961) which held that Cramp was wrongfully accused as a communist and deprived of liberty without due process of law, the fear of communist infiltration was prevalent. Some of history's most notable persons such as Dr. Martin Luther King Jr, Jane Fonda, and Joan Baez were the subjects of interest in the communist movement. Specifically, Dr. King eventually was the subject of eight wiretaps and 16 bugs by the FBI during the Johnson administration. (Hadley, 2013)

***U.S. v. United States District Court of Eastern Michigan (1972)***

The United States alleged and indicted three individuals for destroying and conspiring to destroy US government property. This case appeared before the Supreme Court in February of 1972, at the tail end of the Vietnam War, while the nation was still contending with civil unrest and national security issues. Justice Powell delivered a unanimous opinion of the court that the national security circumstances contained within this case do not alleviate the requirement for obtaining a search warrant. (*US v. US District Court (1974)*) The Supreme Court panel for this case are identified in Table 4.

Table 4: *US v. US District Court (1974)* Supreme Court Panel (Supremecourt.gov “Justices from 1789 to Present”, 2016)

<b>Justices</b>	<b>Party</b>	<b>Nominated by President</b>
Warren Burger (Chief)	Republican	Nixon
William Douglas	Democrat	F. Roosevelt
Potter Stewart	Republican	Eisenhower
Byron White	Democrat	J. Kennedy
Thurgood Marshall	Democrat	Johnson
William Rehnquist	Republican	Reagan
Harry Blackmun	Republican	Nixon and Eisenhower
Lewis Powell	Democrat	Nixon

The era surrounding this case proved to be just as foreign conflict ridden as the 1960s were. The Equal Rights Amendment was passed by the U.S. Senate, anti-war demonstrations were on the rise, and an assassination attempt was made on a seated governor. (history.com 2010, "1972") President Nixon, a Republican, inherited daunting tasks in the early stages of his presidency. He ran his campaign on a gradual military draw down in Vietnam which ultimately led to a peace agreement in 1973. (history.com 2009, "Richard Nixon") Additionally, President Nixon was able to ease tensions with the Soviet's during the Cold War. However, Nixon would be a party to illegal electronic surveillance activities which became known as the Watergate Scandal that eventually led to his resignation. (history.com 2009, "Watergate Scandal") The significance of illegal electronic surveillance activities in the 1970's was that the Title III of Omnibus Crime Control and Safe Streets Act. Title III was enacted in 1968 and set the standards and procedures for electronic surveillance activities. (justice.gov 2015, "Omnibus Crime Control and Safe Streets") Furthermore, the *Katz* ruling in 1967 determined the Supreme Court's stance and jurisprudence on government electronic surveillance.

### ***Kyllo v. United States (2001)***

Danny Kyllo was suspected by the government to be growing illegal controlled substances inside his residence. A thermal imaging device was used to detect heat signatures inside the residence. Marijuana grow operations emit a high amount of heat through the use of large lighting systems which aid in growing Marijuana plants. The lower courts determined that the thermal imaging device does not emit a light or beam and therefore does not constitute a search. Once the case was presented in February of 2001 the Supreme Court determined otherwise based on the fact that the thermal imaging device is not available for general public

use therefore it is a search. Justice Scalia and the Supreme Court panel, identified in Table 6, delivered a 5-4 opinion favoring *Kyllo*. (*Kyllo v. United States*, 2001)

Table 5: *Kyllo v. US (2001)* (Supremecourt.gov “Justices from 1789 to Present”, 2016)

<b>Justices</b>	<b>Party</b>	<b>Nominated by President</b>
William Rehnquist (Chief)	Republican	Nixon
John Stevens	Republican	Reagan
Antonin Scalia	Republican	Reagan and Ford
Anthony Kennedy	Republican	Reagan and Ford
David Souter	Republican	H.W. Bush
Clarence Thomas	Republican	H.W. Bush
Ruth Bader Ginsburg	Democrat	Clinton
Stephen Breyer	Democrat	Clinton
Sandra Day O’Connor	Republican	Reagan

Particular note should be taken to the year surrounding this case. It was inundated with geopolitical and sociopolitical factors that heavily weighed on the United States. President George W. Bush, a Republican, was sworn into office in 2001 and was immediately met with national security concerns of Iraq possessing nuclear weapons, a U.S. spy plane colliding with a Chinese fighter jet, and the CIA stating a terrorist attack was imminent. President Bush also contended with one of the largest terrorist attacks in U.S. history on September 11<sup>th</sup>, 2001. Although the 9/11 attacks and the subsequent Global War on Terrorism were not directly related to *Kyllo’s* case all subsequent cases would be, due to the legislation the government enacted.

The U.S.A. P.A.T.R.I.O.T. Act was signed in October of 2001. It included the Terrorist Surveillance Program which authorized broad sweeping electronic surveillance operations within the United States. Additionally, the USA Patriot Act nearly nullified the Foreign Intelligence

Surveillance Act which was enacted in 1978. Again the government used electronic surveillance to catch foreign operatives but this time legislation was used to bypass constitutional issues.

***Jones v. United States (2012)***

*Antoine Jones* was arrested on charges pertaining to drug trafficking that were leveraged by electronic surveillance methods. A global positioning system tracker was installed on Jones’ wife’s vehicle under the authority of a search warrant. The GPS tracker was installed one day after the expiration of the warrant. The GPS data was suppressed; however, there was no reasonable expectation of privacy when the vehicle was on a public street and that information was admitted which convicted *Jones* in a lower court. *Jones* took his case to the Supreme Court in June of 2011 where Justice Scalia delivered a unanimous opinion of the court in favor of *Jones* on January 22, 2012. Table 7 identifies the Supreme Court panel present for *Jones’* case.

Table 6: *Jones v. US (2012)* Supreme Court Panel (Supremecourt.gov “Justices from 1789 to Present”, 2016)

<b>Justices</b>	<b>Party</b>	<b>Nominated by President</b>
John Roberts (Chief)	Republican	G.W. Bush
Sonia Sotomayor	Democrat	Obama
Antonin Scalia	Republican	Reagan and Ford
Ruth Bader Ginsburg	Democrat	Clinton
Clarence Thomas	Republican	H.W. Bush
Samuel Alito	Republican	G.W. Bush
Elena Kagan	Democrat	Obama
Stephen Breyer	Democrat	Clinton
Anthony Kennedy	Republican	Reagan

In 2012 Democratic President Barack Obama won his second election and was contending with the rigors of war in Iraq and Afghanistan. The war with Islamic extremists was not nearly resolved which was made apparent by the attacks on the US consulate in Benghazi.

Even though the US was still engaged in foreign conflict Congress did not enact any major electronic surveillance legislation reform outside of renewing the USA Patriot Act in 2006.

## **Summary**

It has been illustrated that the rulings in all cases had identifiable social and political issues that existed at the time of the ruling which likely carried Supreme Court decision weight. C. Herman Pritchett stated that judges “are influenced by their own biases and philosophies, which to a large degree predetermine the position they will take on a given question. Private attitudes, in other words, become public law.” (Tamanaha, 2012 p. 759)

Previous research has briefly touched on the social and political issues surrounding Supreme Court decisions on electronic surveillance cases but none yet has thoroughly explored these influential factors. As privacy contentions become more prevalent the Supreme Court will play a larger role in scrutinizing electronic surveillance enacted legislation. Therefore, it is imperative that the historical ramifications of Supreme Court decisions constitutionally governing the use of electronic surveillance are understood. Furthermore, the knowledge of influential factors dictating Supreme Court decisions will lead to a better understanding about the role the Supreme Court plays in foreign conflict based electronic surveillance decisions. Thus, the research question was asked: to what extent does U.S. foreign conflict influence Supreme Court rulings on the use of electronic surveillance?

In order to answer the research question one hypothesis was formulated along with the identification of influential variables to test the hypothesis. The variables were extracted during

data immersion while constantly referring to the research question and the hypothesis. The hypothesis and corresponding variables are as follows:

Hypothesis 1: Judicial latitude is given for electronic surveillance application during times of foreign conflict.

Hypothesis 2: The Supreme Court is highly susceptible to influence in its decisions.

Variables: U.S. Foreign Conflict: Military engagement outside the borders of the United States.

Political: A collaborative influence of the controlling majority in the US government, the ideological alignment of the Supreme Court justices and the presidential administration.

Legislation: Electronic surveillance legislation that influences Supreme Court decisions and the actions of the government.

## Chapter 4

### Analysis

This chapter involves analyzing the five selected court cases individually. A full disclosure of the background of the individual case was previously presented to set the time period and the evidence contained within the brief. This will be paramount for understanding the judicial opinion and measuring the external influences. Next will be the inclusion of variables in the analytical equation which are organized in a descending manner based on a level of importance as determined by the researcher. The first variable application will be US foreign conflict followed by political party affiliation and finally legislation. This organization will be used throughout all five case analyses in order to maintain continuity and contribute to readability.

#### ***Olmstead v. United States, 277 U.S. 438 (1928)***

##### **Conflict**

The Olmstead case occurred during a gap in US foreign conflict. The United States was a decade removed from World War I and more than a decade away from World War II. As previously discussed this era was known as the roaring 20s because of the economic proliferation in the United States. The US was a captain of industry and had made exponential leaps in technology. For the most part the 1920s were a joyous time in the US which attests to the lack of foreign conflict and exigency for electronic surveillance application within the US.

## Political

President Coolidge's political agenda during this economically prolific time was to minimize the federal government, restore faith in the federal government, and apply conservative constitutional policies which the American public identified with after President Harding's scandal laden term. (history.com 2009, "Calvin Coolidge") The Republican Party of 1928 and President Coolidge favored utopian domestic policies such as liberal immigration reform, a reduction in taxes, civil rights advancements, and mutual profitability. (Peters et al 2016 "Republican Party Platform of 1928) President Coolidge and the Republican Party of this era also took a firm stance on pro-peace and anti-wiretapping which contributed to his 54 percent popular vote during his presidency. (Healy 2013, "Book Review: Coolidge;" whitehouse.gov, "Calvin Coolidge")

Justice Holmes, a Republican, exacted his party's sentiment regarding electronic surveillance calling it, "dirty business." (Hill, 1978 p. 177) Additionally, the Republican Party and President Coolidge publicly affirmed their strict adherence to the Constitution by citing Abraham Lincoln: "Our safety, our liberty, depends upon preserving the Constitution of the United States, as our forefathers made it inviolate." (Peters et al 2016, "Republican Party Platform of 1928) The actions by President Coolidge during his term showed party alignment which were affirmed by this Republican Party platform statement: "Never has the soundness of Republican policies been more amply demonstrated and the Republican genius for administration been better exemplified than during the last five years under the leadership of President Coolidge." (Peters et al, 2016 "Republican Party Platform of 1928")

The 1928 Democrats were vastly different from their counterparts. They favored strict immigration laws, increased federal wage and retirement benefits, farther reaching foreign policy, and governmental authority remaining with the states. (Peters et al, 2016 “Democratic Party Platform of 1928) Additionally, the Democrats were proponents for anti-trust laws but insisted they not apply to labor unions. Constitutional protection by the Democrats was limited to preserving state’s rights under the 10<sup>th</sup> Amendment but not as a national doctrine.

Republican and Democratic dissention was abundant in 1928 but the Republican’s held the White House and the Congressional majority. The Supreme Court was no different, consisting of seven Republican Justices all nominated by Republican presidents. Even more significant was that Justice Pierce Butler, a Democrat, was nominated by a Republican president. Although a Democrat, Justice Butler was considered a “pillar of conservatism” thus signifying an ideological selection by a conservative administration. (American Law 2008, “Pierce Butler”) The selection of a Supreme Court Justice by a president is part of an “important political institution” that adds to the presidential legacy. (Whittington, 2011 p. 631) The Republican influence in this case was significant and illustrates the existence of an ideological alignment with the White House.

## **Legislation**

Beyond ideological influence and foreign conflict no congressional electronic surveillance legislation existed that would have governed the use of electronic surveillance or guided the decision in this matter. Therefore, the government had no working surveillance rules to abide. SG Mitchell, during his argument, alluded to electronic surveillance not being forbidden by law or statute and the case should be dismissed based upon the fact there simply is

no legislation to govern the action. (Fisher, 1988) There was not legislation in place or in process that would limit the government's ability to conduct electronic surveillance activities as long as they were adhering to search and seizure laws.

## Opinion

The Supreme Court held, in this case, that the Fourth Amendment was not violated because no tangible evidence was seized. The following table breaks down the individual opinions in this matter.

Table 7: *Olmstead v. United States* (1928) Justice Opinions and Segal-Cover Score (Justice.gov, 2016; SupremeCourt.gov, 2016)

Justices	Opinion
Chief Justice William Taft (R)	Affirmed
Justice Oliver Holmes (R)	Separate
Justice Willis Van Devanter (R)	Affirmed
Justice James McReynolds (D)	Affirmed
Justice Louis Brandeis (R)	Dissented
Justice George Sutherland (R)	Affirmed
Justice Pierce Butler (D)	Dissented
Justice Edward Sanford (R)	Affirmed
Justice Harlan Stone (R)	Dissented

(R)-Republican, (D)-Democrat

## Conclusion

Four of the affirmations came from Republicans and one from a Democrat. However, two dissensions came from Republican Justices--one of whom was nominated by President Coolidge. Justice Harlan Stone's dissention was synonymous with President Coolidge's stance on anti-wiretapping. Chief Justice Taft stated this in regards to the opinion of the court: "The principle of liberal construction applied to the Amendment to effect its purpose in the interest of liberty will not justify enlarging it beyond the possible practical meaning of "persons, houses, papers, and

effects," or so applying "searches and seizures" as to forbid hearing or sight." (*Olmstead v. United States* 277 U.S. 438 1928) Chief Justice Taft followed the opinion of the court with an opinion of his own. "If wiretapping is deemed an objectionable government practice, it may be regulated or forbidden by statute, or avoided by officers of the law." (Fisher 1988, p. 265)

The Republican majority ultimately decided this case. Furthermore, the majority within the Supreme Court ideologically aligned with the Republican President and Party platform, outside of wiretapping, by adopting a verbatim interpretation of the Constitution and the 4<sup>th</sup> Amendment. This point was illustrated in the closing opinions offered by the court citing that the Constitution would not be expanded beyond the explicitly stated terms contained in the 4<sup>th</sup> Amendment. Additionally, the high approval rating that Coolidge had received affirmed the general political consensus of the time. The *Olmstead* case lacked foreign conflict and could not be cited as an influential decision factor in this matter. Furthermore, this case also lacked legislative influence on the judicial decision, as Chief Justice Taft implied; had there been legislation it would have been a factor. Therefore, it has been shown that political influence was the only measureable variable in this case which is enumerated in Table 8.

Table 8: Influence Effect on *Olmstead v. United States* (1928)

<b>Variable ==&gt;</b>	<b>Conflict</b>	<b>Political</b>	<b>Legislation</b>	<b>Total</b>
Olmstead v. United States	0	1	0	1

**KEY:** INFLUENCE PRESENT: HIGH/ELEVATED = 1 INFLUENCE NOT PRESENT: NONE/LIMITED = 0

***Katz v. United States, 389 U.S. 347 (1967)***  
**Conflict**

In 1967 the Vietnam War was raging and nearly 500,000 US active combat troops had been deployed. (americanwarlibrary.com 2008, "Vietnam War Allied Troop Levels 1960-73")

Social unrest and protests ensued, demanding an end to the foreign conflict. Skepticism of the national agenda grew when President Johnson declared an increase in taxes to fund the war effort. Additionally, the US was still contending with the Cold War and had been since 1947. (Hadley 2007, p.1) With the combination of two major foreign conflicts and concerns of communist espionage, President Johnson enacted warrantless electronic surveillance projects such as Minaret and Shamrock. (Hadley, 2013 p. 1) “Governmental agencies used electronic surveillance techniques including surreptitious entry on the domestic scene to initiate and carry out special programs directed against supposed subversives.” (Elder Jr 2016, “Electronic Surveillance”) During the years of these operations the CIA amassed an index of nearly 300,000 names of US citizens that were associated with the anti-war movement and communism which went generally unreported until years later. (Hadley, 2007 p. 1)

## **Political**

The Democratic Party platform and President Johnson vehemently supported a national healthcare system, the institution of welfare, a bolstered nuclear arsenal, and federally funded education programs. (University of Virginia, Miller Center, “Lyndon B. Johnson: Domestic Affairs”) These ticket items were the influential components of the Kennedy/Johnson campaign that got them elected in 1960. President Kennedy met his untimely death in 1963 and Johnson succeeded him with the intention to fulfill campaign promises. The most notable aspects of President Johnson’s presidency were his dedication to creative federalism and his unsupported entry into the Vietnam War by the Democratic left. This directly contributed to a drastic drop in approval rating from 70 percent to below 40 percent in 1967. The Democrats unabatedly

supported his creative federalist policies and surreptitious surveillance programs but lost a majority of the liberal leftist support with the Vietnam foreign conflict. This was illustrated by President Johnson enacting President Kennedy's national security agency memorandum which authorized counterinsurgency programs in Vietnam and the Democrats strongly supported a non-communist Vietnam but without extensive US military involvement. (University of Virginia, Miller Center, "Lyndon B. Johnson: Foreign Affairs")

Though traditionally political opposites, the Republican Party platform also favored a strong centralized government with the responsibility to ensure freedom but with limitations in power. The Republicans proposed a foreign policy that was evident but not overreaching and a reduction in the risk of war through nuclear disarmament. The platform declaration did not ask for an increase in the nuclear arsenal but was limited regarding education and healthcare reform. (Peters et al, 2016 "Republican Party Platform of 1964") Additionally, presidential candidate Barry Goldwater's campaign (1964) marked a severe decline in Republican Party affiliates by declaring the Civil Rights Act unconstitutional. (Bates 2014, "Why did Black Voters Flee the Republican Party in the 1960's") Thereafter, the Republicans lost political influence in nearly every aspect despite moderately conservative policies.

President Johnson nominated two Supreme Court justices that shared his Democratic Party ideologies, Justices Abe Fortas and Thurgood Marshall that contributed to the Democratic majority and promulgation of party ideologies within the Supreme Court. (Supremecourt.gov "Justices from 1789 to Present", 2016) The Democratic ideologies are illustrated in the Segal-Cover ideological score which pertains to individual case issues. This is clearly shown in Table 9 that Justices identify with a political party's ideologies and interject a conservative or liberal ideology into their decisions.

Table 9: Segal-Cover Ideological Score Individualized by Case Type (Insidegov.com 2016, “Supreme Court Justices: Ideology,” Segal et al, 1989 p. 557-565)

Justices	Civil Rights	Criminal	Economic	Federal Tax	Federalism	First Amendment	Union Cases
Warren (R)	82	74	81	78	74	82	72
Stewart (R)	50	45	45	66	59	64	58
Black (D)	*	*	*	*	*	*	*
Douglas (D)	*	*	*	*	*	*	*
Brennan (D)	83	76	71	70	67	84	66
White (D)	56	33	58	84	67	39	62
Fortas (D)	83	78	70	43	64	79	60
Marshall (D)	84	80	65	74	68	83	67
Harlan (R)	45	39	38	69	55	44	55

(R) = Republican; (D) = Democrat; (0) = Conservative; (100) = Liberal

\*Justices Douglas and Black were not documented in these individual case types by the Segal-Cover Scoring Model.

## Legislation

It was illustrated that Democrats were markedly more influential than the Republicans throughout politics including the proposal of various forms of legislation, except electronic surveillance. Since the 1934 enactment of the Federal Communications Act electronic surveillance legislation had not received any modification. The significance of discussing legislation in this case was that it was not an influence at all. The FCA was not cited in the opinion of the court in this matter despite Supreme Court opinions offered in the Olmstead’s case that stated that congressional legislation would have been influential by restricting the use of warrantless electronic surveillance.

## Opinion

Justice Potter Stewart delivered the opinion of 7-1 in favor of Katz. The individual opinions and Segal-Cover Score of the Justices in this case are displayed in the following table.

Table 10: Justice Opinions and Segal-Cover Score (Insidegov.com 2016, “Supreme Court Justices: Ideology;” Segal et al 1989 p. 557-565 )

<b>Justices</b>	<b>Opinion</b>	<b>Segal-Cover Overall Score</b>
Chief Justice Earl Warren (R)	Affirmed	73
Potter Stewart (R)	Affirmed	75
Hugo Black (D)	Dissent	87
William Douglas (D)	Affirmed	73
William Brennan (D)	Affirmed	100
Byron White (D)	Affirmed	50
Abe Fortas (D)	Affirmed	100
Thurgood Marshall (D)	Separate	100
John Harlan (R)	Affirmed	87

(R) = Republican; (D) = Democrat; (0) = Conservative; (100) = Liberal

Although the Supreme Court was intended to remain separated from politics, the Warren Court made its leftist ideologies known above and beyond the Segal-Cover score. The Warren Court ruled in favor of students wearing black armbands to support the anti-war movement during the Johnson presidency. (Schwartz, 1997 p. 58)

## Conclusion

Summarily, foreign conflict challenged the Johnson administration in 1967. The administration feared espionage and subversive communist groups during the Vietnam and Cold Wars. President Johnson cited these foreign conflicts as the primary source of national security exigency that deemed warrantless surveillance acceptable. It was President Johnson’s decision to

fully engage in the Vietnam foreign conflict that contributed to the downward spiral in his public approval rating.

President Johnson utilized non-traditional federalist politics to which the Democratic Party contributed unabated support. Democratic liberalism permeated American government on all levels during the Johnson administration. The Supreme Court and the Democratic majority identified with President Johnson's creative federalist domestic policies separate from the Vietnam foreign conflict. The Justice's liberalist tendencies were identified in their Segal-Cover case specific table and overall score. Additionally, Republican Justices also identified with the liberal leftist ideology that was dominant during the 1960's. This was illustrated by Justice Harlan who was Republican but easily identified as a liberal leftist in his ideologies and his subsequent affirmation with liberal Justices. Eight of the nine Justices were ideologically higher on the Segal-Cover score and the 7-1 decision was conclusively attributed to the leftist ideology of the time period. Table 10 illustrated and established credibility to that assertion.

Since there was not any electronic surveillance legislation in process and the FCA was of no legal consequence, legislation was a non-factor. Conflict was not cited as a primary motivating factor for legislation or the decision by the court in this matter. Additionally, the Supreme Court ruled in favor of a declared Communist in 1967 which lends credibility to judicial restriction despite foreign conflict. (*United States v. Robel 1967*) With that information in mind this case had one measureable influential factor, political, which is enumerated in Table 11.

Table 11: Influences *Katz v. United States*

Variables==>	Conflict	Political	Legislation	Total
Katz v. United States	0	1	0	1

**KEY:** INFLUENCE PRESENT: HIGH/ELEVATED = 1 INFLUENCE NOT PRESENT: NONE/LIMITED = 0

*U.S. v. United States District Court of Eastern Michigan (1972)*

**Conflict**

In 1972 the US was still dealing with Vietnam but in a diminished capacity. The vast majority of the deployed combat units were air cavalry units. (Starry, 1975 p. 199) The North Vietnamese made advancement late in 1972 but US forces slowed the North Vietnamese attack. (Starry, 1975 p. 201) Although a majority of the focus was on Vietnam tensions were still high with the Soviets. 54 percent of the nation called the Vietnam the most important problem facing the nation. (Newport et al, 2005 “Iraq versus Vietnam: A Public Opinion Poll”) President Nixon made a monumental step in negotiations with the Soviets by attending the Moscow Summit where both parties signed the Anti-Ballistic Missile Treaty and the Strategic Arms Limitation Treaty which eased tensions in May of 1972. (US Department of State 2009, “United States Relations with Russia: The Cold War”) Nixon’s foreign policies resonated with the American public which contributed to his 68 percent approval rating. (Gao et al, 2016 “Presidential job approval ratings from Ike to Obama”) Despite eased foreign conflict tension the fear of subversive groups and communist activity was still prevalent.

Projects Shamrock and Minaret continued to be operational and unreported during the 1970’s. (Elder Jr. 2016, “Electronic Surveillance”) The Cold War at this juncture was the only foreign conflict that the government saw as an imminent threat to national security that mandated

electronic surveillance operations. (nsaarchives.gwu.edu 2008, “National Security Agency Releases History of Cold War Intelligence Activities”)

## **Political**

The 1970's saw a drastic shift in political influence. The 1960's saw the widespread influence of the leftist Democratic Party and creative federalism that President Nixon had to overcome. President Nixon could not be identified with a specific version of either party but he adapted to the political climate that he had entered when he was elected. He sought political favor from both parties by increasing wages, supporting minority outreach programs, and federal spending on work related training. (Eddins, 2016; Fisher, 2012) Additionally, Nixon had to contend with the domestic and foreign policy failures of President Johnson by developing a Vietnam exit strategy and outreach programs that resonated with the voting public. (University of Virginia, Miller Center, “Richard Nixon: Impact and Legacy”) Republican influence regained the majority in many facets of government, notably Congress. (history.house.gov 1970, “92<sup>nd</sup> Congress 1971-1973”) What the electing majority did not know about President Nixon was his pro-wiretapping stance.

Beyond Nixon's position on wiretapping, Republican ideological influence can be seen in the nominations and appointment of Republican Supreme Court Justices Burger, Blackmun, and Powell. A Democratic majority held Senate appointed Justice Burger with a 74-0 vote, Justice Blackmun with a 94-0 vote, and Justice Powell with an 89-1 vote. (Supreme-court-justices.insidegov.com 2016 “SCOTUS Justices”) All Justices were extremely conservative which was synonymous with Hamiltonian Federalism. This version of federalism is very similar to the British form of government and favors a strong central government. (Palomar College,

“Jefferson/Hamilton Viewpoints”) “Richard Nixon governed essentially as a Hamiltonian president, on foreign policy as well as domestic issues.” (Dueck, “Jacksonian Republicans”) Additionally, the follies of the Johnson administration during the Vietnam foreign conflict contributed to the Republican cause by pushing a majority of Democrats to the moderate right. The new age of conservative Hamiltonian Republicanism influenced the Supreme Court and Democrats alike.

Table 12 displays the ideological identification with cases that occurred during their tenure which is attributed to their political tendencies and overall Segal-Cover score.

Table 12: Segal-Cover Ideological Score Individualized by Case Type (Insidegov.com 2016, “Supreme Court Justices: Ideology;” Segal et al, 1989 p. 557-565)

Justices	Civil Rights	Criminal	Economic	Federal Tax	Federalism	First Amendment	Union Cases
Burger (Chief) (R)	38	19	42	72	66	30	42
Douglas (D)	*	*	*	*	*	*	*
Stewart (R)	50	45	45	66	59	64	58
White (D)	56	33	58	84	67	39	62
Marshall (D)	84	80	65	74	68	83	67
Rehnquist (R)	25	14	40	62	31	18	48
Blackmun (R)	62	42	54	74	67	56	60
Powell (D)	40	29	44	56	60	45	50

\*Justice Douglas was not documented in these individual case types by the Segal-Cover Scoring Model.

## Legislation

Prior to *US v. US District Court of Eastern Michigan* a major piece of electronic surveillance legislation was enacted. The Title III Omnibus Crime Control and Safe Streets Act of 1968 states the following: (US Department of Justice 2013, “Title III Omnibus Crime Control and Safe Streets Act of 1968”)

- Prohibits the unauthorized, nonconsensual interception of "wire, oral, or electronic communications" by government agencies as well as private parties,
- Establishes procedures for obtaining warrants to authorize wiretapping by government officials, and
- Regulates the disclosure and use of authorized intercepted communications by investigative and law enforcement officers.

Title III significantly impacted the use of electronic surveillance by the government in all aspects with the exception of an executive order. There was not any other documented interim legislation that affected this case. For the first time in US history electronic surveillance had strict policy that played a significant role in a decision by the US Supreme Court.

## **Opinion**

Justice Powell returned a unanimous decision in favor of the US District Court. The Title III Omnibus Crime Control and Safe Streets Act were cited as a method of measurement in this case. Pursuant to a criminal investigation a search warrant should have been obtained to conduct electronic surveillance. The government argued in this case however, that national security exigency existed and under Presidential Powers a search warrant was not necessary. The Supreme Court saw validity in Title III and upheld its terms. The following table identifies the individual Justices opinions as well as their Segal-Cover score identifying their political ideologies.

Table 13: Supreme Court Justice Opinions *US v. US District Court of Eastern Michigan* and Segal-Cover Score (Insidegov.com 2016, “Supreme Court Justices: Ideology;” Segal et al 1989 p. 557-565)

<b>Justices</b>	<b>Opinion</b>	<b>Segal-Cover Overall Score</b>
Warren Burger (Chief) (R)	Affirmed	11
William Douglas (D)	Affirmed	73
Potter Stewart (R)	Affirmed	75
Byron White (D)	Affirmed	50
Thurgood Marshall (D)	Affirmed	100
William Rehnquist (R)	Separate	4
Harry Blackmun (R)	Affirmed	11
Lewis Powell (D)	Affirmed	16

(R) = Republican; (D) = Democrat; (0) =Conservative; (100) =Liberal

## **Conclusion**

It was illustrated that Vietnam was winding down and had little impact on electronic surveillance exigency. However, the Cold War was still a cause for concern amongst the nation’s leaders. Additionally, President Nixon had made an effort to diminish Soviet potency in the Cold War within the United States by attending the Moscow Summit. All efforts and programs aside, massive electronic surveillance operations continued within the United States disregarding Title III and the Federal Communications Act.

A shift in the political paradigm was illustrated in this case. The Republicans held the White House and were able to shift the Democratic pragmatism in the Senate to the moderate right. The same can be said for the Supreme Court panel. The Segal-Cover score illustrated a conservative ideology across a majority of the justices which was synonymous with the Republican ideologies of the time period. Furthermore, the nominations of conservative Justices brought more of a political balance to the Supreme Court that was not seen in the previous cases.

President Nixon’s pro-wiretapping stance had no influence on the judicial panel in this case. This was made apparent with a poignant constitutional statement by the Supreme Court,

“The ‘inherent vagueness of the domestic security concept’ and the potential for abusing it to quell political dissent made the Fourth Amendment protections especially important when the government engaged in spying on its own citizens.” (Chicago-Kent College of Law at Illinois Tech, “*United States v. United States District Court of Eastern Michigan*”)

This case addressed a matter of national security and the Supreme Court held that electronic surveillance required a warrant pursuant to legislation. The adaptation of the 4<sup>th</sup> Amendment in this case shows judicial restriction on electronic surveillance activities despite foreign conflict. Therefore, the assertion can be made that foreign conflict had no measureable influence in this case whereas political ideology and legislation were influences. Table 14 enumerates the influential variable data.

Table 14: Influences in *US v. US District Court of Eastern Michigan*

<b>Variables ==&gt;</b>	<b>Conflict</b>	<b>Political</b>	<b>Legislation</b>	<b>Total</b>
US v. US District Court of Eastern Michigan	0	1	1	2

**KEY:** INFLUENCE PRESENT: HIGH/ELEVATED = 1 INFLUENCE NOT PRESENT: NONE/LIMITED = 0

***Kyllo v. United States (2001)***

**Conflict**

Kyllo’s case was heard in a definitive gap in US foreign conflict which is reminiscent of the Olmstead case. The end of the Gulf War was a decade ago and a foreign relation with Iraq was the closest issue resembling foreign conflict. The Iraq Liberation Act was signed in 1998 but

had no military implications. (Battle, 2010 “NSA Briefing Archive No. 326”) Predominately the intention behind the act was to change the mindset of the Iraqi people and convince them to liberate themselves from tyranny. Additionally, this case was determined prior to September 11<sup>th</sup> 2001 therefore, foreign conflict will not be of measurable influence in this case.

## **Political**

President G.W. Bush was elected in late 2000 after a Supreme Court decision that was ideologically split. (encyclopedia.com 2003, “Republican Party”) The Republicans had narrowly won the Congressional majority in the 107<sup>th</sup> Congress. (history.house.gov 2001, “Congress Profiles: 107<sup>th</sup> Congress 2001-2003”) President Bush and the Republicans sought to reestablish presidential power asserting it was “unduly constrained” and the office had been weakened since the Ford administration due to scandal and foreign conflict. (Piffner, 2015 p. 727) Bush’s administration was determined to return the constitutional luster of the presidential office through executive authority and neo-conservative politics.

The Bush administration’s first undertakings were to remove the federal government from a majority of the social programs. President Bush felt that faith based charities and local non-profits could aid people in need better than the federal government. (University of Virginia, Miller Center, “George W. Bush: Domestic Affairs”) Additionally, Bush enacted massive tax cuts, no child left behind education reform, and healthcare reform. (University of Virginia, Miller Center, “George W. Bush: Domestic Affairs”) President Bush’s domestic policy intended to stimulate economic growth by cutting taxes and increasing political support through government funded education and healthcare programs. This contributed to an overall approval

rating of 86 percent amongst the American public in 2001. (Gao et al, 2016 “Presidential job approval ratings from Ike to Obama”)

However, neo-conservative politics were not as persuasive in 2001 as President Bush had intended. Bush met strong opposition to his community aid initiatives and the lack of a balanced budget after massive tax cuts. This caused Democrats and Republicans to be split on a vast majority of Bush’s domestic policies. For example, bipartisan support was given to aggressive anti-terrorism policies and sacrificing civil liberties which also had a bipartisan opposition. (Balz et al 2006, “Differing Views on Terrorism”) A split in political influence throughout a majority of the government did not stop President Bush from obtaining strong majorities in other areas. He selected the politically conservative likeminded Justices Souter and Thomas. With these two appointments the Republicans obtained a majority and a moderately conservative ideology in the Supreme Court.

Table 15 identifies the individual Justices and their political stance relationally to the president’s national agenda issues presented to the Supreme Court during their tenure.

Table 15: Segal-Cover Ideological Scores (Segal et al, 1989 p. 557-565)

<b>Justices</b>	<b>Civil Rights</b>	<b>Criminal</b>	<b>Economic</b>	<b>Federal Tax</b>	<b>Federalism</b>	<b>First Amendment</b>	<b>Union Cases</b>
William Rehnquist (Chief) (R)	25	14	40	62	31	18	48
John Stevens (R)	64	66	58	59	56	67	63
Antonin Scalia (R)	30	27	41	69	51	29	33
Anthony Kennedy (R)	42	32	43	79	53	44	39
David Souter (R)	69	56	52	70	64	70	57
Clarence Thomas (R)	23	21	40	57	44	29	32
Ruth Bader Ginsburg (D)	69	61	56	78	59	69	75
Stephen Breyer (D)	69	56	51	76	65	50	81
Sandra Day O'Connor (R)	45	26	43	58	48	41	41

(R) = Republican; (D) = Democrat; (0) =Conservative; (100) =Liberal

## **Legislation**

In decades prior to Kyllo's case electronic surveillance legislation was heavily reformed. Over and above Title III and the Federal Communications Act, the Foreign Intelligence Surveillance Act of 1978 was established. FISA was the result of investigation into federal surveillance practices which also subsequently established the Foreign Intelligence Surveillance Court. However, all of these restrictive legislation components did not cover the use of a thermal imaging device because it does not intercept oral communications; therefore no previous legislation could be introduced for foundation in this case.

## Opinion

Justice Scalia delivered a 5-4 opinion in favor of *Kyllo*. The decision factors were limited to the application of thermal devices and the 4<sup>th</sup> Amendment. *Katz*'s case was cited for measurement but determined to be irrelevant based on the lack of intercepted communications. Therefore, the entirety of this case rested upon the application of the 4<sup>th</sup> Amendment to the use of a thermal imaging device that was not readily available to the public. Table 13 identifies the individual Justice's opinions and their respective Segal-Cover score for enumeration later in this section.

Table 16: Supreme Court Justice Opinions and Segal-Cover Score (Insidegov.com 2016, "Supreme Court Justices: Ideology;" Segal et al 1989 p. 557-565)

Justices	Opinion	Segal-Cover Overall Score
William Rehnquist (Chief) (R)	Dissented	4
John Stevens (R)	Dissented	25
Antonin Scalia (R)	Affirmed	0
Anthony Kennedy (R)	Dissented	36
David Souter (R)	Affirmed	32
Clarence Thomas (R)	Affirmed	16
Ruth Bader Ginsburg (D)	Affirmed	68
Stephen Breyer (D)	Affirmed	47
Sandra Day O'Connor (R)	Dissented	41

(R) = Republican; (D) = Democrat; (0) =Conservative; (100) =Liberal

## Conclusions

This case lacked foreign conflict as an influential factor. Additionally, the political influence was split throughout the government. The ideological split decision by the Supreme Court predicated the government wide political split that was manifested in the elections in 2000. Therefore, the influence of one political party over the other could not be identified in this case.

The Supreme Court panel is considered to be moderately conservative in this case. The Democratic Justices did not exemplify the liberal extreme but were illustrated to be liberal moderates. Justices Rehnquist and Scalia on the other hand exuded extreme conservatism in their overall score but based upon individual case types they were considered to be moderate conservatives. The remaining Republican Justices were moderate conservatives with some liberal tendencies. This is significant in this case because of the political stalemate that had occurred throughout the rest of the government. Therefore, in this case the conclusion can be made that the Supreme Court mirrored the political climate of the rest of the government and illustrated a political influence.

The legislative influence would have been present had the legislation covered the method of electronic surveillance used in this case. The Supreme Court was left to 4<sup>th</sup> Amendment interpretations and the opinions of the individual Justices. This conclusively demonstrates the significance of political influence in the Supreme Court when other variables are absent. Table 14 enumerates the influential variables in this case.

Table 17: *Influences in Kyllo v. United States (2001)*

<b>Variables ==&gt;</b>	<b>Conflict</b>	<b>Political</b>	<b>Legislation</b>	<b>Total</b>
Kyllo v. United States	0	1	0	1

**KEY:** INFLUENCE PRESENT: HIGH/ELEVATED = 1 INFLUENCE **NOT** PRESENT: NONE/LIMITED = 0

### **Jones v. United States (2012)**

#### **Conflict**

The United States had been engaged in the Global War on Terror since 2001 due to a large scale terrorist attack on September 11<sup>th</sup> 2001. Hundreds of al Qaeda operatives were killed;

including the 9/11 mastermind Sheikh Mohammed, during the occupation of Iraq and Afghanistan. (whitehouse.gov, "Fact Sheet: Global War on Terror") The Global War on Terror was asymmetrical and multi-axis because the combatants were non-uniformed and irregular. Therefore, more than 90 nations were linked together in an information sharing network to combat terrorism. (whitehouse.gov, "Fact Sheet: Global War on Terror") Out of that information sharing network multiple terrorist plots were thwarted and mitigated the attack probability. A vast majority of the information gathered regarding terrorism was collected by large scale electronic surveillance initiatives that were the direct result of the Global War on Terror.

The use of electronic surveillance during foreign conflict was reviewed and supported by the Supreme Court under the Authorization to Use Military Force (AUMF) passed by Congress,

"In its Hamdi decision, the Supreme Court ruled that the AUMF also authorizes the 'fundamental incident[s] of waging war.' The history of warfare makes clear that electronic surveillance of the enemy is a fundamental incident to the use of military force." (Justice Department 2006, "The NSA Program to Detect and Prevent Terrorist Attacks")

Constitutional authority is granted to Congress and the president to use all necessary military force which includes the use of electronic surveillance on enemy combatants contained within the United States. For all intents and purposes the Supreme Court judicially read the use of military force to include electronic surveillance during this time of foreign conflict and approved it, citing the war powers of Congress and the president as being consistent with the Constitution. (Justice Department 2006, "The NSA Program to Detect and Prevent Terrorist Attacks")

## **Political**

In 2008 President Barack Obama was elected for his first term and reelected in 2012 for a second term. In the early years of his Presidency Obama met backlash from the Democratic Party for retaining oppositional Republican cabinet members. (University of Virginia, Miller Center, “Barack Obama: Domestic Affairs”) In the latter half of 2010 President Obama surrounded himself with an overtly Democratic and liberal staff thus completing the Democratic take over in the White House.

President Obama’s first order of business after regaining Democratic support in 2008 was to address the wars in Iraq and Afghanistan. President Obama looked for an exit strategy from both nations without losing. For the most part Obama looked to exit the Middle East but still accomplish the mission that President Bush had set out to do. The majority of Democrats identified with the exit strategy in order to reduce the national deficit. The American public identified with Obama’s domestic and foreign policies which resulted in a 49 percent approval rating that was similar to President Reagan’s during his time in office. (Gao et al, 2016 “Presidential job approval ratings from Ike to Obama”)

The Democratic permeation of government continued with two significant Supreme Court appointments. Justices Souter and Stevens, two of the most identifiably conservative justices on the panel, retired in 2009 and 2010 which left two vacancies for President Obama to fill. He selected two liberal justices to replace them, Justices Sonia Sotomayor and Elena Kagan. (University of Virginia, Miller Center, “Barack Obama: Domestic Affairs”) Despite all of the political movements by President Obama the Congress and Senate remained split, the

Republicans controlled the House and the Democrats held the Senate majority. (University of Virginia, Miller Center, “Barack Obama: Domestic Affairs”)

President Obama’s domestic affairs policies met opposition from the House in the early months of his Presidency. He signed into effect, in 2009, the Troubled Asset Relief Program (TARP), originally President Bush’s initiative, which bailed out multiple large corporations and banks. (University of Virginia, Miller Center, “Barack Obama: Domestic Affairs”) This was not popular amongst Democrats or the American public initially. President Obama’s approval rating in the early portion of 2012 was 43 percent. (Rasmussen Reports, 2016 “Daily Presidential Tracking Poll”) Eventually, the assistance program proved to be a critical move in keeping the economy afloat by providing 600 billion dollars in bailout money to banks and major automotive manufacturers. It eventually regained Democratic confidence. President Obama continued to reform domestic policy through a national healthcare initiative, national deficit reduction, and education reform that often left him in the middle of a House and Senate debate. (University of Virginia, Miller Center, “Barack Obama: Domestic Affairs”) The Republicans strongly opposed most domestic policies whereas the Democrats vehemently supported most of what President Obama presented.

The domestic policies and political climate during the Obama administration are critical in understanding the Segal-Cover Ideological scores in Table 18. This identifies the ideological orientation of the Justices which is reflected in their decision tendencies.

Table 18: Table: Segal-Cover Ideological Score Individualized by Case Type (Insidegov.com 2016, “Supreme Court Justices: Ideology;” Segal et al, 1989 p. 557-565)

Justices	Civil Rights	Criminal	Economic	Federal Tax	Federalism	First Amendment	Union Cases
Roberts (Chief) (R)	40	28	38	85	68	33	50
Sotomayor (D)	63	62	51	100	53	76	66
Scalia (R)	30	27	41	69	51	29	33
Bader Ginsburg (D)	69	61	56	78	59	69	75
Thomas (R)	23	21	40	57	44	29	32
Alito (R)	37	19	37	85	61	21	44
Kagan (D)	61	71	48	50	71	62	100
Breyer (D)	69	56	51	76	65	50	81
Kennedy (R)	42	32	43	79	53	44	39

(R) = Republican; (D) = Democrat; (0) =Conservative; (100) =Liberal

## Legislation

President Obama took a moderate and logical approach to electronic surveillance during his Presidency by stating, “...you can't have 100% security and also then have 100% privacy and zero inconvenience. We're going to have to make some choices as a society.” (Hammond, 2013 p. 1) This statement was followed by identifying the Foreign Intelligence Act as the primary source of oversight for electronic surveillance program. Additionally, Congress was made privy to all of the information collected by electronic surveillance programs. Obama’s stance on electronic surveillance was clear: it’s a necessary evil.

The majority of the debate regarding electronic surveillance under Obama’s administration was the result of the USA Patriot Act. The USA Patriot Act was renewed in 2011 and still had implications in 2012. (Hattern 2015, “Obama Signs NSA Bill, Renewing Patriot Act

Powers”) There was nothing revolutionary in the renewal of the act beyond the implementation of appropriate electronic surveillance activity oversight. Despite Congressional oversight modifications the USA Patriot Act had no implications in the Jones case which are reflected in the opinions of the Supreme Court Justices in this matter.

## **Opinion**

The Supreme Court delivered a unanimous decision favoring Jones in this matter. Justice Scalia delivered the majority opinion of the court which held that the installation of the GPS device on Jones’ vehicle constituted a search and seizure that required a search warrant, subsequently violating the 4<sup>th</sup> Amendment. (*Jones v. United States 2012*) Justice Sotomayor offered her opinion following the decision, “... a Fourth Amendment search occurs whenever the government violates a subjective expectation of privacy that society recognizes as reasonable, which is particularly important in an era where physical intrusion is unnecessary to many forms of surveillance.” (*Jones v. United States 2012*) Justice Alito concurred with Justice Sotomayor and added that in this case the *Katz* analysis is a standard of measurement that is applicable. Table 17 identifies the individual Justice’s opinions and Segal-Cover Score regarding this matter.

Table 19: Supreme Court Justice Opinions and Segal-Cover Score (Insidegov.com 2016, “Supreme Court Justices: Ideology,” Segal et al 1989 p. 557-565)

<b>Justices</b>	<b>Opinion</b>	<b>Segal-Cover Score Overall</b>
Roberts (Chief) (R)	Affirm	12
Sotomayor (D)	Affirm	78
Scalia (R)	Affirm	0
Bader Ginsburg (D)	Affirm	68
Thomas (R)	Affirm	16
Alito (R)	Affirm	10
Kagan (D)	Affirm	73
Breyer (D)	Affirm	47
Kennedy	Affirm	36

(R) = Republican; (D) = Democrat; (0) =Conservative; (100) =Liberal

## **Conclusion**

It was illustrated that foreign conflict was a socio and geopolitical factor in the United States at the time of this case. The Global War on Terror was still a concern more than a decade later which resulted in the continuation of broad sweeping electronic surveillance activities within the United States. Despite the presence of foreign conflict at the time, the Justices did not cite it as a decision factor. Additionally, the Supreme Court took up this matter-- despite foreign conflict-- because it required a constitutional analysis.

Secondly, President Obama sought political dominance in multiple areas of the government. He appointed a liberal Democratic cabinet and had a supportive Democratic Senate which aided in passing his domestic affairs policies. Concurrently, President Obama nominated two liberal Justices to replace two identifiably conservative Justices in the Supreme Court. This reestablished more of a political balance within the judicial panel. Furthermore, Table 17 illustrates the Justice’s ideological tendencies on certain types of cases. The Federal Tax cases produced a liberal average amongst the Justices which lends credibility to the ideological alignment with the presidential politics and policies.

Lastly, it was illustrated that a broad sweeping legislative component existed during a foreign conflict. However, the USA Patriot Act was not cited as a critical component in the decision making process. What was significant was that the *Katz* standard was applied to this case along with the 4<sup>th</sup> Amendment but the decision was absent legislative influence.

Summarily, foreign conflict had no influence on this case nor did legislation. However, it has been demonstrated that the political influence existed based upon the ideological alignment of the Justices and the Obama Administration. Furthermore, the Democratic Senate leveraged support for presidential initiatives that resonated with Justices which is demonstrated in their more liberal opinions reflected in Table 17. Therefore, the scoring of this case is reflected in Table 18.

Table 20: Influences in *Jones v. United States (2012)*

<b>Variables==&gt;</b>	<b>Conflict</b>	<b>Political</b>	<b>Legislation</b>	<b>Total</b>
Jones v. United States	0	1	0	1

**KEY:** INFLUENCE PRESENT: HIGH/ELEVATED = 1 INFLUENCE NOT PRESENT: NONE/LIMITED = 0

## Chapter 5

### LITERATURE REVIEW

#### **Introduction**

Each Supreme Court justice has a particular political point of view that inherently shapes their view of the law and the subsequent cases they hear. Presumably the individual justice's views on geopolitical and sociopolitical occurrences within their Supreme Court career affect their judicial decisions. Many studies have been conducted on the Supreme Court and influence. However, to the researcher's knowledge US foreign conflict has not been studied as an influential factor in electronic surveillance cases.

Therefore, the purpose of this literature review is to provide scholarly assimilated information that addresses the individual variables which contributed to the overall analysis of the cases and an assigned influence score. The variables and the organizational structure of this literature review will be in the following order: foreign conflict, political, and finally, legislation.

#### **Foreign Conflict**

The operational definition of foreign conflict within this study has been military engagement. Invariably the public can oppose and support foreign conflict all within the same time period. Supreme Court justices are a part of the public just as any other person is and have opinions and feelings directed towards foreign conflict. Inherently opinions and views of justices make it into the court room to some extent. As of yet there has not been an ideological score that measures a Supreme Court justices views and tendencies during periods of foreign conflict.

Gordon Silverstein et al (2010) assert that the effect of foreign conflict influence could be measured by addressing certain variables. Silverstein continues by stating this: "...at what stage

in a crisis was the decision made, what was the president's own popularity at that point in the war, what was the public's perception of the credibility of the threat or emergency, and what was the public's attitude about the policies the president was urging or enacting?" (Silverstein et al 2010, p. 1453) This attests to the analysis conducted in this research by presenting the political views and popularity of the president during the time of the foreign conflict. Furthermore, the public attitude towards foreign conflict was highlighted to understand the culture of the era and public perception.

However, Silverstein et al (2010) suggested that the influence of foreign conflict is difficult to measure even with the ideal conditions during times of peace and foreign conflict because the Supreme Court has been known to rule against presidents despite their foreign conflict agenda. For example, "...

the court ruled against President Nixon during the Vietnam foreign conflict on his executive privilege." (Silverstein et al 2010, p. 1453) These components affirm the assessment contained within this research that foreign conflict either had limited or no measurable influence in the Court's decisions. Additionally, it attests to the impartiality by Supreme Court justices despite public or personal opinion regarding US foreign conflict.

Summarily, US foreign conflict influence is difficult to measure according to Silverstein et al (2010) but in Silverstein's assessment it can be done by measuring political and public influence on the justice's human element. This supports the political variable and Segal-Cover scores used in this research that contributed to the overall assessment of the Supreme Court cases which included a conclusive answer to the research question.

## **Political**

Famous political analyst Alexis de Tocqueville wrote, “[T]here is hardly a political question that in the United States which does not sooner or later turn into a judicial one.” Simply, politics and judicial decisions have a symbiotic relationship. What is significant about the political influence and political decisions becoming judicial ones is that Supreme Court justices often do not receive any sort of specialized training that prepares for separating politics from the law. (Sherry, 2012 p. 10) Therefore, Supreme Court justices are highly susceptible to the influences of politics that are hotly debated by the public and politicians alike.

There is not a more hotly contested political topic than the national agenda which is set by the president. Presidents use two types of agendas: political and partisan which address the president’s own objectives and the party’s goals. (Donner, 2012 p. 435) The reason this was notable and significant in addressing Supreme Court decisions is because the president nominated justices during their administration which is often the primary way of leaving an ideological legacy. With that in mind, presidents selected ideologically likeminded justices who employed those political tendencies in their decisions. Donner (2012) referenced Moraski and Shipan’s study of twentieth century Supreme Court justices which revealed that presidents made strategic judicial nominations. (Donner, 2012 p. 427; Moraski & Shipan, 1999 p. 1069-1095) Overall, this systematically contributed to consistency in ideological decisions of the five Supreme Court cases. Additionally, the Segal-Cover scores enumerated and provided empirical evidence to support conclusively the existence of political influence in the Supreme Court.

Impartiality has been studied thoroughly by the academic community but only in recent times due to less than publically acceptable rulings. Additionally, only recently publicized judge

hunting by presidents has come to light. Moreover, historically Supreme Court justices were held in high regard and thought to be impervious to influence but as the attitudinal studies illustrate, political influence is rampant in judicial selection, Supreme Court saliency, and ultimately judicial rulings. In Segal's studies, "90.8 % of the votes conform to justices' revealed preferences. (Segal et al 1996, p. 983) That is only 9.2% of the time did a justice switch to the position established in the landmark precedent." (Segal et al 1996, p. 983) Empirical evidence promulgated by the attitudinal model affirms the existence of sociopolitical and geopolitical influences in Supreme Court decisions.

In summation, the national agenda that is set by the president, which includes political and partisan agendas, heavily influences the Supreme Court nominations. Furthermore, Supreme Court justice confirmations come with a political "price tag." Meaning, the justice is expected to be ideologically aligned with the president who nominated them. At some level it can be assumed that the justice has a feeling of indebtedness to the political party and the president that nominated them, therefore, "...cohesive voting among a president's appointees will generally support the president's ideological and political goals." (Donner, 2012 p. 427)

## **Legislation**

The Congressional body is an extremely influential body within American government that wields its power in the form of legislation. Legislation is drafted and enacted as a direct reflection of the people just as the framers of the Constitution had intended but also contained within the Constitution was a system of checks and balances. This system keeps the balance of power between the three branches of government. The Supreme Court represents its position in government by embodying "the rule of law" while having to capitulate tension created by

popular sovereignty that is embodied by the legislature. (Nelson et al, 2013 p. 358) This exemplifies influence in the government but also illustrates the purpose behind the Supreme Court which is to keep the government “constitutional.”

The Supreme Court plays an integral role in the Congressional legislative process. The Supreme Court can review legislation that is already approved for constitutional issues or in the more traditional form; the Supreme Court cites legislation in the court’s decision and opinion. *US v. US District Court of Eastern Michigan* exemplified this assertion by using the Title III Omnibus Crime Control and Safe Streets Act as reasoning for requiring a search warrant to conduct electronic surveillance on the parties in this case. (*US v. US District Court of Eastern Michigan 1972*) The reason this was so significant in the analysis of Supreme Court cases was that Congress more often than not uses legislation as a mechanism to bend the Supreme Court decisions in their favor which is the definition of legislative influence. (Segal et al, 2011 p. 91)

Although legislative influence was only significant in one case it lends credibility to the assertion that the Supreme Court is susceptible to influence and directly contributed to a complete analysis during this research project which has been shown to be supported by scholarship of trusted resources in the legal research community.

## **Conclusion**

This review has shown the susceptibility the Supreme Court has from multiple influences to include: foreign conflict, political, and legislation. These socio and geopolitical factors that surround Supreme Court cases have an influential role in the selection of justices because of their political tendencies. As Supreme Court cases are presented that pose constitutional violative issues with electronic surveillance methods the government seeks legislation to counter Supreme

Court rulings. The legislation following the Katz ruling was evidence of governmental reaction to the Supreme Court's interpretations. It appears that after the Katz ruling the political orientation of the justices was more readily documented suggesting the government was taking a more active approach in political orientation of the Supreme Court. The influence of the Supreme Court is bi-directional, politics influences the selection of the Supreme Court justices and the Supreme Court has influence over politics in the form of legislation.

In summation, the scholarship community has lent credibility to the variables that were used in this case study individually and collectively. Additionally, the primary source information contained within the literature review increases validity to the study no matter the outcome. Therefore, the researcher has accomplished what was intended at the beginning of this project which was to answer the question to what extent does US foreign conflict influence Supreme Court rulings on the use of electronic surveillance. Undoubtedly, the variables used and discussed in this literature review contributed to the complete case analysis and resulted in a conclusive answer to the research question. Furthermore, the scholarship that was located during the research phase was integral in the culmination of this project.

## Chapter 6

### Conclusion

The intent behind this research project was to determine the extent that US foreign conflict influenced Supreme Court decisions on the use of electronic surveillance. This was done by measuring the three variables against five selected Supreme Court cases that involved the use of electronic surveillance. It should be noted that the researcher has yet to find specific research that attempted to identify the relationship between US foreign conflict and Supreme Court decisions on the use of electronic surveillance. However, it was the lack of research that motivated the researcher to embark on this project. It was suspected that judicial latitude for the use of electronic surveillance was granted during times of foreign conflict and the researcher wanted to measure that in a systematic way.

The research findings suggested that US foreign conflict had no influence on Supreme Court decisions which was contrary to the hypothesis. However, what did emerge from the data is that the Supreme Court is susceptible to influence aside from US foreign conflict. The primary influential variable discovered in this study was political which is illustrated in Table 21.

Table 21: Completed Influential Variables

<b>Variable ==&gt;</b>	<b>Conflict</b>	<b>Political</b>	<b>Legislation</b>	<b>Total</b>
<i>Olmstead v. United States</i>	0	1	0	1
<i>Katz v. United States</i>	0	1	0	1
<i>US v. US District Court of Eastern Michigan</i>	0	1	1	2
<i>Kyllo v. United States</i>	0	1	0	1
<i>Jones v. United States</i>	0	1	0	1

**KEY:** INFLUENCE PRESENT: HIGH/ELEVATED = 1 INFLUENCE **NOT** PRESENT: NONE/LIMITED = 0

The president’s national agenda was used to illustrate the political climate of the time period and lay foundation for the Supreme Court justices Segal-Cover scores. The Segal-Cover scores were used in the political analysis of the case to determine the ideological alignment prior to assessing the opinions of the justices. The reason behind that was to remove bias from the analysis of the case during the conclusions phase which it did, but what it truly highlighted was the ideological alignment with the political figureheads of the time. This assessment has determined that judicial tendencies in the Supreme Court gravitate towards the nominating president and the influential political party which should be of concern for the American public.

The highest tribunal in the nation is influenced by politics and a national agenda set by a politician. This means that the Constitution is tested by a political agenda set by a politician and carried out through the Supreme Court which develops case law for all lower courts to apply. The ramifications of the Supreme Court’s decisions and role in American politics should be understood and continually researched to mitigate influence.

## Reference List.

- "About the Office." About the Office. October 27, 2014. Accessed February 13, 2016. <http://www.justice.gov/osg/about-office-1>.
- "ADVISORY OPINIONS AND THE INFLUENCE OF THE SUPREME COURT OVER AMERICAN POLICYMAKING." *Harvard Law Review* 124, no. 8 (June 21, 2011): 2064-82. Accessed February 13, 2016. <http://harvardlawreview.org/2011/06/advisory-opinions-and-the-influence-of-the-supreme-court-over-american-policymaking/>.
- Anonymous. 2011. advisory opinions and the influence of the supreme court over American policymaking. *Harvard Law Review* 124 (8): 2064-82.
- "ACLU v. NSA - Challenge to Warrantless Wiretapping." American Civil Liberties Union. September 10, 2014. Accessed January 31, 2016. <https://www.aclu.org/cases/aclu-v-nsa-challenge-warrantless-wiretapping>.
- Anderson, Austin. "The Terrorist Surveillance Program: Assessing the Legality of the Unknown." *IS: A Journal of Law and Policy for the Information Society* 3, no. 3 (2007): 387-410. Accessed January 31, 2016. <http://moritzlaw.osu.edu/students/groups/is/files/2012/02/Anderson.pdf>.
- "Annotation 5 - Fourth Amendment - FindLaw." Findlaw. Accessed January 31, 2016. <http://constitution.findlaw.com/amendment4/annotation05.html>.
- Bailey, Michael A., Brian Kamoie, and Forrest Maltzman. "Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making." *Am J Political Science American Journal of Political Science* 49, no. 1 (January 2005): 72-85. Accessed February 15, 2016. Jstor.
- Ball, Terence. "Neoconservatism." Encyclopedia Britannica Online. Accessed March 07, 2016. <http://www.britannica.com/topic/neoconservatism>.
- Balz, Dan, and Claudia Deane. "Differing Views on Terrorism; Americans Divided on Eavesdropping Program, Poll Finds." *The Washington Post*, January 11, 2006. Accessed March 7, 2016. [http://www.highbeam.com/doc/1P2-99910.html?refid=easy\\_hf](http://www.highbeam.com/doc/1P2-99910.html?refid=easy_hf).
- Bates, Karen Grigsby. "Why Did Black Voters Flee The Republican Party In The 1960s?" NPR. July 4, 2014. Accessed March 04, 2016. <http://www.npr.org/sections/codeswitch/2014/07/14/331298996/why-did-black-voters-flee-the-republican-party-in-the-1960s>.
- Battle, Joyce. "THE IRAQ WAR -- PART I: The U.S. Prepares for Conflict, 2001." THE IRAQ WAR -- PART I: The U.S. Prepares for Conflict, 2001. September 22, 2010. Accessed March 07, 2016. <http://nsarchive.gwu.edu/NSAEBB/NSAEBB326/print.htm>.

- Beniger, James. "The Case Against Wiretapping: Some of LBJ's Own Doubt It | News | The Harvard Crimson." The Case Against Wiretapping: Some of LBJ's Own Doubt It | News | The Harvard Crimson. May 8, 1967. Accessed March 04, 2016.  
<http://www.thecrimson.com/article/1967/5/8/the-case-against-wiretapping-some-of/?page=2>.
- Black, Ryan C., and Ryan J. Owens. "Solicitor General Influence and Agenda Setting on the U.S. Supreme Court." *Political Research Quarterly* 64, no. 4 (December 2011): 765-78. Accessed February 15, 2016.  
[http://www.jstor.org.ezproxy1.apus.edu/stable/23056345?pq-origsite=summon&seq=8#page\\_scan\\_tab\\_contents](http://www.jstor.org.ezproxy1.apus.edu/stable/23056345?pq-origsite=summon&seq=8#page_scan_tab_contents).
- Boyd, Eugen. "American Federalism, 1776 to 1997: Significant Events." American Federalism, 1776 to 1997: Significant Events. January 6, 1997. Accessed March 04, 2016.  
<http://usa.usembassy.de/etexts/gov/federal.htm>.
- "Brief Timeline of American Literature and Events:1920s." Brief Timeline of American Literature and Events:1920s. July 4, 2013. Accessed January 31, 2016.  
<http://public.wsu.edu/~campbelld/amlit/1920.htm>.
- Carpenter, Ted Galen. *Smart Power: Toward a Prudent Foreign Policy for America*. Washington, D.C.: Cato Institute, 2008. Accessed January 31, 2016.  
<https://books.google.com/books?id=wWiQAAAAQBAJ&pg=PA239&lpg=PA239&dq=electronic+surveillance+during+world+war+1+woodrow+wilson&source=bl&ots=mAod5fBuze&sig=owzuZybhZ4Vv1pGCnIRCYkik38A&hl=en&sa=X&ved=0ahUKEwi08fy31dTKAhVS9mMKHYhRAeUQ6AEIPzAF#v=onepage&q=woodrow+wilson&f=false>.
- "Compare Supreme Court Justices." U.S. Supreme Court Justices. 2016. Accessed February 13, 2016. <http://supreme-court-justices.insidegov.com/>.
- "Congress Profiles | US House of Representatives: History, Art & Archives." Congressional Profiles. Accessed March 07, 2016. <http://history.house.gov/Congressional-Overview/Profiles/107th/>.
- Cooperstein, Theodore. "The Emerging Interplay Between Law Enforcement and Intelligence Gathering." *International & National Security Law Practice Group*, Fall, 1, no. 3 (December 1, 1997). Accessed January 31, 2016.
- Cordray, Margret Marywether, and Richard Cordray. "THE SOLICITOR GENERAL'S CHANGING ROLE IN SUPREME COURT LITIGATION." *Boston College Law Review* 51 (2010): 1323-382.  
[https://www.bc.edu/content/dam/files/schools/law/bclawreview/pdf/51\\_5/01\\_cordray.pdf](https://www.bc.edu/content/dam/files/schools/law/bclawreview/pdf/51_5/01_cordray.pdf).
- "Daily Presidential Tracking Poll." - Rasmussen Reports™. April 8, 2016. Accessed April 08, 2016.

[http://www.rasmussenreports.com/public\\_content/politics/obama\\_administration/daily\\_presidential\\_tracking\\_poll](http://www.rasmussenreports.com/public_content/politics/obama_administration/daily_presidential_tracking_poll)

Dallek, Matthew. "The Conservative 1960s From the Perspective of the 1990s, It's the Big Political Story of the Era." *The Atlantic*. December 1995. Accessed March 04, 2016. <http://www.theatlantic.com/magazine/archive/1995/12/the-conservative-1960s/376506/>.

"Democratic Party Platforms: Democratic Party Platform of 2004." *Democratic Party Platforms: Democratic Party Platform of 2004*. July 26, 2004. Accessed February 14, 2016. <http://www.presidency.ucsb.edu/ws/?pid=29613>.

DiPaolo, Amanda. *Zones of Twilight: Wartime Presidential Powers and Federal Court Decision Making*. Lanham, MD: Lexington Books, 2010.

Donner, Christopher M. 2013. "Presidential Influence on Police Practices: The U.S. President's Indirect Impact on Fourth Amendment Case Outcome Through Supreme Court Appointments." *American Journal of Criminal Justice : AJCJ* 38, no. 3: 422-438, <http://search.proquest.com/docview/1412905739?accountid=8289>.

Dorsen, N. "The Selection of U.S. Supreme Court Justices." *International Journal of Constitutional Law* 4, no. 4 (2006): 652-63.

Dueck, Colin. "Cover Story - American Review - Global Perspectives on America." *Cover Story - American Review - Global Perspectives on America*. Accessed April 07, 2016. <http://americanreviewmag.com/stories/Jacksonian-Republicans>

Eddins, Geri. "Choosing Sides: The Rise of Party Politics." *Choosing Sides: The Rise of Party Politics*. 2016. Accessed March 05, 2016. <http://www.ourwhitehouse.org/choosingsides.html>.

Elder, Willie, Jr. "83.04.07: Electronic Surveillance: Unlawful Invasion of Privacy or Justifiable Law Enforcement." *83.04.07: Electronic Surveillance: Unlawful Invasion of Privacy or Justifiable Law Enforcement*. 2016. Accessed March 05, 2016. <http://www.yale.edu/ynhti/curriculum/units/1983/4/83.04.07.x.html>.

"Electronic Surveillance." LII / Legal Information Institute. Accessed February 29, 2016. [https://www.law.cornell.edu/wex/electronic\\_surveillance](https://www.law.cornell.edu/wex/electronic_surveillance).

"Elmer E. Rasmuson Library." *Boolean Searching*. November 9, 2014. Accessed February 20, 2016. <http://library.uaf.edu/ls101-boolean>.

*Encyclopædia Britannica Online*, s. v. "neoconservatism", accessed March 05, 2016, <http://www.britannica.com/topic/neoconservatism>.

- "Factbox: History of Mass Surveillance in the United States." Reuters. June 07, 2013. Accessed February 15, 2016. <http://www.reuters.com/article/us-usa-security-records-factbox-idUSBRE95617O20130607>.
- "Federal Judicial Center." Federal Judicial Center. Accessed February 29, 2016. <http://www.fjc.gov/>.
- Fisher, Louis. *Constitutional Dialogues: Interpretation as Political Process*. Princeton, NJ: Princeton University Press, 1988.
- Fisher, Marc. "GOP Platform through the Years Shows Party's Shift from Moderate to Conservative." *Washington Post*, August 28, 2012. Accessed March 5, 2016. [https://www.washingtonpost.com/politics/gop-platform-through-the-years-shows-partys-shift-from-moderate-to-conservative/2012/08/28/09094512-ed70-11e1-b09d-07d971dee30a\\_story.html](https://www.washingtonpost.com/politics/gop-platform-through-the-years-shows-partys-shift-from-moderate-to-conservative/2012/08/28/09094512-ed70-11e1-b09d-07d971dee30a_story.html).
- "The Foreign Intelligence Surveillance Act of 1978." The Foreign Intelligence Surveillance Act of 1978. September 19, 2013. Accessed March 07, 2016. <https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1286>.
- Gilson, Dave, Alex Park, and AJ Vicens. "The Domestic Surveillance Boom, From Bush to Obama." *Mother Jones*. June 7, 2013. Accessed January 31, 2016. <http://www.motherjones.com/politics/2013/06/timeline-nsa-domestic-surveillance-bush-obama>.
- Goldman, Sheldon. 2005. Judicial confirmation wars: Ideology and the battle for the federal courts. *University of Richmond Law Review* 39 (3): 871.
- Goldsmith, Michael. "The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance." *The Journal of Criminal Law and Criminology (1973-)* 74, no. 1 (1983): 1. Accessed January 31, 2016.
- Greenberg, David. "Lincoln's Suspension of Habeas Corpus." *Slate*. November 30, 2001. Accessed February 14, 2016. [http://www.slate.com/articles/news\\_and\\_politics/history\\_lesson/2001/11/lincolns\\_crackdown.html](http://www.slate.com/articles/news_and_politics/history_lesson/2001/11/lincolns_crackdown.html).
- Hadley, David P. "America's 'Big Brother': A Century of U.S. Domestic Surveillance." *Origins: Current Events in Historical Perspective* 7, no. 3 (December 2013): 1-2. Accessed February 13, 2016. <http://origins.osu.edu/article/americas-big-brother-century-us-domestic-surveillance/page/0/1>.
- Hastedt, Glenn P. 2011. *Spies, Wiretaps, and Secret Operations : An Encyclopedia of American Espionage*. Santa Barbara, Calif: ABC-CLIO, 2011. *eBook Collection (EBSCOhost)*, EBSCOhost (accessed February 14, 2016).
- Hastedt, Glenn. 2011. *Shamrock, project*.

- Hamm, Richard F. *Olmstead v. United States : The Constitutional Challenges of Prohibition Enforcement*. PhD diss., University at Albany, SUNY, 2010. Washington D.C.: Federal Judicial Center, 2010.
- Hammond, Brian. 2013. obama defends surveillance programs, seeks discussion on privacy trade-offs. *Cybersecurity Policy Report*: N\_A.
- Hattern, Julian. "Obama Signs NSA Bill, Renewing Patriot Act Powers." TheHill. June 02, 2015. Accessed March 07, 2016. <http://thehill.com/policy/national-security/243850-obama-signs-nsa-bill-renewing-patriot-act-powers>.
- Healy, Gene. "Book Review: Coolidge." Cato Institute. 2013. Accessed March 04, 2016. <http://www.cato.org/publications/commentary/book-review-coolidge>.
- Hill, Christopher. "Reviewed Work: The Political Philosophy of Hobbes by Howard Warrender." *Science & Society* 22, no. 2 (Spring 1958): 177-82. Accessed March 4, 2016. [http://www.jstor.org/stable/pdf/40400568.pdf?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/pdf/40400568.pdf?seq=1#page_scan_tab_contents).
- History.com Staff. "18th and 21st Amendments." History.com. 2010. Accessed February 29, 2016. <http://www.history.com/topics/18th-and-21st-amendments>.
- History.com Staff. "Calvin Coolidge." History.com. 2009. Accessed February 22, 2016. <http://www.history.com/topics/us-presidents/calvin-coolidge>.
- History.com Staff. "Lyndon B. Johnson." History.com. 2009. Accessed February 29, 2016. <http://www.history.com/topics/us-presidents/lyndon-b-johnson>.
- History.com Staff. "Richard M. Nixon." History.com. 2009. Accessed February 29, 2016. <http://www.history.com/topics/us-presidents/richard-m-nixon>.
- History.com Staff. "Search Results." History.com. 2009. Accessed March 04, 2016. <http://www.history.com/search?q=1972>.
- History.com Staff. "Red Scare." History.com. 2010. Accessed March 05, 2016. <http://www.history.com/topics/cold-war/red-scare>.
- History.com Staff. "Watergate Scandal." History.com. 2009. Accessed March 04, 2016. <http://www.history.com/topics/watergate>.
- Henderson, Nathan C. "The Patriot Act's Impact on the Government's Ability to Conduct Electronic Surveillance of Ongoing Domestic Communications." *Duke Law Journal* 52, no. 1 (2002): 179. Accessed January 31, 2016.
- "Hepting v. AT&T." Electronic Frontier Foundation. 2011. Accessed January 31, 2016. <https://www.eff.org/cases/hepting>.

- Horowitz, Bernie. "Wiretapping and J. Edgar Hoover." UNREDACTED. December 20, 2010. Accessed March 05, 2016. <https://nsarchive.wordpress.com/2010/12/20/wiretapping-and-j-edgar-hoover/>.
- Hughes, Sunny Skye. 2012. US domestic surveillance after 9/11: An analysis of the chilling effect on first amendment rights in cases filed against the terrorist surveillance program. *Canadian Journal of Law and Society* 27 (3): 399-425.
- "JEFFERSON/HAMILTON VIEWPOINTS." Palomar.edu. Accessed April 7, 2016. <http://www.palomar.edu/ehp/history/sgrenz/Study Guides/JEFFERSON-HAMILTON VIEWPOINTS.pdf>.
- Jones v. United States* (January 23, 2012). (Cornell University Law School, Legal Information Institute, Dist. file).
- "Justices 1789 to Present." Justices 1789 to Present. February 2, 2016. Accessed February 22, 2016. <http://www.supremecourt.gov/about/members.aspx>.
- Kaplan, Howard, Joseph Matteo, Richard Sillett, and Arkin Kaplan Rice. "The Lessons of the Raj Rajaratnam Trial: Be Careful Who's Listening." In *Americanbar.org*. Proceedings of ABA Section of Litigation 2012 Section Annual Conference, New York City. April 18, 2012. Accessed January 31, 2016. [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac\\_2012/29-1\\_history\\_and\\_law\\_of\\_wiretapping.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/29-1_history_and_law_of_wiretapping.authcheckdam.pdf).
- Katz v. United States* (December 18, 1967). (Cornell University Law School, Legal Information Institute, Dist. file).
- Kyllo v. United States*, 533 U.S. 27 (2001) (Cornell University Law School, Legal Information Institute, Dist. file).
- Key, James P. "Reliability and Validity." Reliability. 1997. Accessed February 20, 2016. <http://www.okstate.edu/ag/agedcm4h/academic/aged5980a/5980/newpage18.htm>.
- Lardner, Lynford A. "Constitutional Dictatorship by Clinton Rossiter." Review of *Constitutional Dictatorship*. *Louisiana Law Review* 9, no. 1 (November 1948): 143-46.
- "Lee Epstein : Research." Lee Epstein : Research. Accessed March 07, 2016. <http://epstein.wustl.edu/research/justicesdata.html>.
- "Lyndon Johnson's "Great Society"" Ushistory.org. 2014. Accessed March 04, 2016. <http://www.ushistory.org/us/56e.asp>.
- Mindich, David T.Z. "Lincoln's Surveillance State." *The New York Times*. July 05, 2013. Accessed February 13, 2016. <http://www.nytimes.com/2013/07/06/opinion/lincolns-surveillance-state.html>.

- Miller Center of Public Affairs, University of Virginia. "Barack Obama: Domestic Affairs." Accessed March 7, 2016. <http://millercenter.org/president/biography/obama-domestic-affairs>.
- Miller Center of Public Affairs, University of Virginia. "Calvin Coolidge: Domestic Affairs." Accessed February 22, 2016. <http://millercenter.org/president/biography/coolidge-domestic-affairs>.
- Miller Center of Public Affairs, University of Virginia. "Calvin Coolidge: Foreign Affairs." Accessed March 12, 2016. <http://millercenter.org/president/biography/coolidge-foreign-affairs>.
- Miller Center of Public Affairs, University of Virginia. "George W. Bush: Domestic Affairs." Accessed March 6, 2016. <http://millercenter.org/president/biography/gwbush-domestic-affairs>.
- Miller Center of Public Affairs, University of Virginia. "Lyndon B. Johnson: Domestic Affairs." Accessed March 3, 2016. <http://millercenter.org/president/biography/lbjohnson-domestic-affairs>.
- Miller Center of Public Affairs, University of Virginia. "Richard Nixon: Impact and Legacy." Accessed March 6, 2016. <http://millercenter.org/president/biography/nixon-impact-and-legacy>.
- Modarressy-Tehrani, Caroline. "Why Does the U.S. Keep Getting Involved in Conflict?" The Huffington Post. October 10, 2014. Accessed February 14, 2016. [http://www.huffingtonpost.com/caroline-tehrani/why-does-the-us-keep-getting-involved\\_b\\_5666898.html](http://www.huffingtonpost.com/caroline-tehrani/why-does-the-us-keep-getting-involved_b_5666898.html).
- Moraski, B. J., & Shipan, C. R. (1999). The politics of Supreme Court nominations: A theory of institutional constraints and choices. *American Journal of Political Science*, 43(4), 1069–1095.
- Morley, Mark. "The Supreme Court and Electronic Surveillance." *The Supreme Court and Electronic Surveillance*. December 21, 1993. Accessed January 31, 2016. <http://www.tscm.com/SupremeCourt9.html>.
- "National Security Act." National Security Act. Accessed January 31, 2016. <https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1280>.
- Newport, Frank, and Joseph Carroll. "Iraq Versus Vietnam: A Comparison of Public Opinion." Gallup.com. August 24, 2005. Accessed April 07, 2016. <http://www.gallup.com/poll/18097/iraq-versus-vietnam-comparison-public-opinion.aspx>.
- Olmstead v. United States* (June 4, 1928) (Cornell University Law School, Legal Information Institute, Dist. file).
- "Omnibus Crime Control And Safe Streets Act Of 1968 42 U.S.C. Â§ 3789d." Omnibus Crime Control And Safe Streets Act Of 1968 42 U.S.C. Â§ 3789d. August 6, 2015. Accessed

- February 29, 2016. <https://www.justice.gov/crt/omnibus-crime-control-and-safe-streets-act-1968-42-usc-3789d>.
- Pernot, Catherine Renz. "The NSA and the Telecoms." PBS. May 15, 2007. Accessed February 15, 2016. <http://www.pbs.org/wgbh/pages/frontline/homefront/preemption/telecoms.html>.
- Peters, Gerhard, and John T. Woolley. "Democratic Party Platforms: Democratic Party Platform of 1928." Democratic Party Platforms: Democratic Party Platform of 1928. 2016. Accessed February 29, 2016. <http://www.presidency.ucsb.edu/ws/?pid=29594>.
- Peters, Gerhard, and John T. Woolley. "Republican Party Platforms: Republican Party Platform of 1928." Republican Party Platforms: Republican Party Platform of 1928. 2016. Accessed February 29, 2016. <http://www.presidency.ucsb.edu/ws/?pid=29637>.
- Peters, Gerhard, and John Woolley. "Democratic Party Platforms: Democratic Party Platform of 1964." Democratic Party Platforms: Democratic Party Platform of 1964. 2016. Accessed March 04, 2016. <http://www.presidency.ucsb.edu/ws/?pid=29603>.
- Peters, Gerhard, and John Woolley. "Republican Party Platforms: Republican Party Platform of 1964." Republican Party Platforms: Republican Party Platform of 1964. 2016. Accessed March 04, 2016. <http://www.presidency.ucsb.edu/ws/?pid=25840>.
- Peters, Gerhard, and John Woolley. "Republican Party Platforms: Republican Party Platform of 2000." Republican Party Platforms: Republican Party Platform of 2000. 2016. Accessed March 07, 2016. <http://www.presidency.ucsb.edu/ws/?pid=25849>.
- Pfiffner, James P. 2015. The constitutional legacy of George W. Bush. *Presidential Studies Quarterly* 45 (4): 727-41.
- "Popular Influence on Supreme Court Decisions". 1994. "Popular Influence on Supreme Court Decisions". *The American Political Science Review* 88 (3). [American Political Science Association, Cambridge University Press]: 711-24. doi:10.2307/2944805.
- "Republican Party." Encyclopedia.com. 2003. Accessed March 07, 2016. [http://www.encyclopedia.com/topic/Republican\\_party.aspx](http://www.encyclopedia.com/topic/Republican_party.aspx).
- Rivkin, Daniel. *Distilling Judicial Ideology*. Master's thesis, University of Georgia, 2011. Athens: University of Georgia, 2011.
- Rossiter, Clinton. *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. Princeton: Princeton University Press, 1948.
- Rudenstine, David. "Roman Roots for an Imperial Presidency: Revisiting Clinton Rossiter's 1948 Constitutional Dictatorship: Crisis Government in the Modern Democracies." *Cardozo*

- Law Review* 34, no. 1063 (2013): 1063-078. Accessed February 13, 2016.  
<http://www.cardozolawreview.com/content/34-3/RUDENSTINE.34.3.pdf>.
- "Rule 24. Briefs on the Merits: In General." LII / Legal Information Institute. Accessed April 06, 2016. [https://www.law.cornell.edu/rules/supct/rule\\_24](https://www.law.cornell.edu/rules/supct/rule_24).
- Schwartz, Bernard. *Decision: How the Supreme Court Decides Cases*. New York: Oxford University Press, 1996.
- Segal, Jeffrey A., and Albert D. Cover. "Ideological Values and the Votes of U.S. Supreme Court Justices." *The American Political Science Review* 83, no. 2 (1989): 557-65. Accessed March 7, 2016. JSTOR.
- Sherry, Suzanne. *Influence and Independence: Role of Politics in Court Decisions*. Washington D.C.: U.S. Department of State, 2012. EBook.
- Silverstein, Gordon, and John Hanley. 2010. The supreme court and public opinion in times of war and crisis. *Hastings Law Journal* 61 (6): 1453.
- Sobel, Robert. *Coolidge: An American Enigma*. Washington, D.C.: Regnery Pub., 1998.
- Sulmasy, Glenn, and John Yoo. "Katz and the War on Terrorism." *University of California, Davis Law Review*, 19th ser., 41, no. 12 (2008): 1219-258. Accessed February 13, 2016. [http://lawreview.law.ucdavis.edu/issues/41/3/intl-crime-terrorism/41-3\\_Sulmasy-Yoo.pdf](http://lawreview.law.ucdavis.edu/issues/41/3/intl-crime-terrorism/41-3_Sulmasy-Yoo.pdf).
- Tamanaha, Brian Z. "The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influence" Is Not "Partisanship"." *Emory Law Journal* 61, no. 4 (2012): 759-78. Accessed April 6, 2016. [http://law.emory.edu/elj/\\_documents/volumes/61/4/contents/tamanaha.pdf](http://law.emory.edu/elj/_documents/volumes/61/4/contents/tamanaha.pdf).
- "THE BUSH RECORD - FACT SHEET: The Seventh Anniversary of 9/11." THE BUSH RECORD - FACT SHEET: The Seventh Anniversary of 9/11. Accessed March 07, 2016. <http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/factsheets/9-11.html>.
- "The Court and Electronic Surveillance: To Bug or Not to Bug--What Is the Exception?" *St. John's Law Review*, 1st ser., 47, no. 1 (August 2012): 76-106. Accessed February 13, 2016. <http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=2892&context=lawreview>.
- "The Evolution of the U.S. Intelligence Community-An Historical Overview." The Evolution of the U.S. Intelligence Community-An Historical Overview. February 23, 1996. Accessed February 13, 2016. <http://fas.org/irp/offdocs/int022.html>.
- "Timeline | National Cold War Exhibition." Timeline | National Cold War Exhibition. 2013. Accessed February 29, 2016. <http://www.nationalcoldwarexhibition.org/timeline/>.

- "Timeline of NSA Domestic Spying." Electronic Frontier Foundation. 2012. Accessed January 31, 2016. <https://www.eff.org/nsa-spying/timeline>.
- "Title III of The Omnibus Crime Control and Safe Streets Act of 1968." Title III of The Omnibus Crime Control and Safe Streets Act of 1968. September 19, 2013. Accessed February 15, 2016. <https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1284>.
- Unah, Isaac, and Ange-Marie Hancock. 2006. "U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model." *Law & Policy* 28, no. 3: 295-320. *Criminal Justice Abstracts with Full Text*, EBSCOhost (accessed February 14, 2016).
- United States of America. United States Army. Department of the Army. *Mounted Combat in Vietnam*. By Donn A. Starry. Washington: Dept. of the Army, 1978.
- United States. Department of Justice. Office of the Attorney General. *United States Attorneys' Manual*. Falls Church, VA (2917 Meadow View Rd): Niche Publishers, 1996.
- United States of America. Department of Justice. Office of Public Affairs. *THE NSA PROGRAM TO DETECT AND PREVENT TERRORIST ATTACKS MYTH V. REALITY*. Washington D.C.: U.S. Department of Justice, 2006.
- United States of America. United States House of Representatives. Office of the Historian. *Congress Profiles: 92nd Congress (1971–1973)*. Washington D.C.: Office of Art and Archives, 1970.
- United States of America. National Security Agency. *National Security Agency Releases History of Cold War Intelligence Activities Soviet Strategic Forces Went on Alert Three times during September-October 1962 Because of Apprehension over Cuban Situation, Top Secret Codeword History of National Security Agency Shows*. By Matthew M. Aid and Thomas R. Johnson. Washington, D.C.: National Security Archive, 2008.
- United States of America. State Department. Office of the Historian. *United States Relations with Russia: The Cold War*. Washington D.C.: State Department, 2009.
- United States v. United States District Court for the Eastern District of Michigan (1972).
- "USA Patriot Act." USA Patriot Act. Accessed February 15, 2016. <http://www.justice.gov/archive/ll/highlights.htm>.
- "Vietnam War Allied Troop Levels 1960-73." Vietnam War Allied Troop Levels 1960-73. December 6, 2008. Accessed March 04, 2016. <http://www.americanwarlibrary.com/vietnam/vwatl.htm>.
- Whittington, Keith E. "The Supreme Court Politics." *Reviews in American History* 39 (2011): 631-36. Accessed March 7, 2016. [https://scholar.princeton.edu/sites/default/files/Powe\\_RAH\\_0.pdf](https://scholar.princeton.edu/sites/default/files/Powe_RAH_0.pdf).

Woolf, Christopher. "The History of Electronic Surveillance, from Abraham Lincoln's Wiretaps to Operation Shamrock." Public Radio International. November 7, 2013. Accessed January 31, 2016. <http://www.pri.org/stories/2013-11-07/history-electronic-surveillance-abraham-lincolns-wiretaps-operation-shamrock>.

Wermeil, Stephen. "SCOTUS for Law Students: What Does the Solicitor General Do? (sponsored by Bloomberg Law)." *SCOTUS Blog* (blog), May 2, 2012. Accessed February 15, 2016. <http://www.scotusblog.com/2012/05/scotus-for-law-students-what-does-the-solicitor-general-do-sponsored-by-bloomberg-law/#more-144154>.

*West's Encyclopedia of American Law, edition 2*. S.v. "Pierce Butler." Retrieved March 5 2016 from <http://legal-dictionary.thefreedictionary.com/Pierce+Butler>