AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice/Search and Seizure

**Byrd v. United States, \_\_\_ U.S. \_\_\_** (2018)

*Terrence Byrd was stopped by Pennsylvania state troopers when driving a car rented by Latasha Reed. The officers did not believe they needed Byrd’s consent to search the car because his name was not on the rental agreement as an authorized driver. That search uncovered almost 50 bricks of heroin and body armor, which the officers turned over to federal authorities.. Byrd was subsequently charged with distribution and possession of heroin as well as unlawful possession of body armor. Byrd’s lawyer moved to suppress the fruits of the search on the ground that the search violated the Fourth Amendment. The trial court disagreed and that decision was affirmed by the Court of Appeals for the Third Circuit. Both courts ruled that a driver not listed on a rental agreement had no standing to object to a search of the vehicle. Byrd appealed to the Supreme Court of the United States.*

 *The Supreme Court by a unanimous vote reversed and remanded for further proceedings. Justice Kennedy’s majority opinion held that police officers could not engage in a search without consent merely because the driver or a rented car was not listed on the rental agreement. Why does Kennedy maintain that drivers may have a reasonable expectation of privacy even when they are not authorized to drive a rental car? Under what conditions must officers obtain consent after* Byrd*? Kennedy admits that probable cause may have existed for the search and that no need for consent would exist if fraud was involved in the rental agreement? Based on his opinion and the concurrences, what is the likelihood that at the end fo the day federal prosecutors will be able to present the evidence obtained during the search.*

JUSTICE [KENNEDY](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I94f2fcf9575c11e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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One who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it. More difficult to define and delineate are the legitimate expectations of privacy of others.

On the one hand, as noted above, it is by now well established that a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it. On the other hand, it is also clear that legitimate presence on the premises of the place searched, standing alone, is not enough to accord a reasonable expectation of privacy, because it “creates too broad a gauge for measurement of Fourth Amendment rights.”

 Although the Court has not set forth a single metric or exhaustive list of considerations to resolve the circumstances in which a person can be said to have a reasonable expectation of privacy, it has explained that “[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.”  The two concepts in cases like this one are often linked. “One of the main rights attaching to property is the right to exclude others,” and, in the main, “one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude.”

Here, the Government contends that drivers who are not listed on rental agreements always lack an expectation of privacy in the automobile based on the rental company's lack of authorization alone. This *per se* rule rests on too restrictive a view of the Fourth Amendment's protections. Byrd, by contrast, contends that the sole occupant of a rental car always has an expectation of privacy in it based on mere possession and control. There is more to recommend Byrd's proposed rule than the Government's; but, without qualification, it would include within its ambit thieves and others who, not least because of their lack of any property-based justification, would not have a reasonable expectation of privacy.

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The Court sees no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it, much as it did not seem to matter whether the friend of the defendant in *Jones* owned or leased the apartment he permitted the defendant to use in his absence. Both would have the expectation of privacy that comes with the right to exclude. Indeed, the Government conceded at oral argument that an unauthorized driver in sole possession of a rental car would be permitted to exclude third parties from it, such as a carjacker.

The Government further stresses that Byrd's driving the rental car violated the rental agreement that Reed signed, and it contends this violation meant Byrd could not have had any basis for claiming an expectation of privacy in the rental car at the time of the search. As anyone who has rented a car knows, car-rental agreements are filled with long lists of restrictions. Examples include prohibitions on driving the car on unpaved roads or driving while using a handheld cellphone. Few would contend that violating provisions like these has anything to do with a driver's reasonable expectation of privacy in the rental car—as even the Government agrees.

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. . . [T]here may be countless innocuous reasons why an unauthorized driver might get behind the wheel of a rental car and drive it—perhaps the renter is drowsy or inebriated and the two think it safer for the friend to drive them to their destination. True, this constitutes a breach of the rental agreement, and perhaps a serious one, but the Government fails to explain what bearing this breach of contract, standing alone, has on expectations of privacy in the car. Stated in different terms, for Fourth Amendment purposes there is no meaningful difference between the authorized-driver provision and the other provisions the Government agrees do not eliminate an expectation of privacy, all of which concern risk allocation between private parties—violators might pay additional fees, lose insurance coverage, or assume liability for damage resulting from the breach. But that risk allocation has little to do with whether one would have a reasonable expectation of privacy in the rental car if, for example, he or she otherwise has lawful possession of and control over the car.

The central inquiry at this point turns on the concept of lawful possession, and this is where an important qualification of Byrd's proposed rule comes into play. *Rakas v. Illinois* (1978) makes clear that “‘wrongful’ presence at the scene of a search would not enable a defendant to object to the legality of the search.” . . . No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car.

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The Government did not raise this argument in the District Court or the Court of Appeals, however. It relied instead on the sole fact that Byrd lacked authorization to drive the car. And it is unclear from the record whether the Government's inferences paint an accurate picture of what occurred. Because it was not addressed in the District Court or Court of Appeals, the Court declines to reach this question. The proper course is to remand for the argument and potentially further factual development to be considered in the first instance by the Court of Appeals or by the District Court.

The Government argued in its brief in opposition to certiorari that, even if Byrd had a Fourth Amendment interest in the rental car, the troopers had probable cause to believe it contained evidence of a crime when they initiated their search. If that were true, the troopers may have been permitted to conduct a warrantless search of the car in line with the Court's cases concerning the automobile exception to the warrant requirement. The Court of Appeals did not reach this question because it concluded, as an initial matter, that Byrd lacked a reasonable expectation of privacy in the rental car.

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Though new, the fact pattern here continues a well-traveled path in this Court's Fourth Amendment jurisprudence. Those cases support the proposition, and the Court now holds, that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. The Court leaves for remand two of the Government's arguments: that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief; and that probable cause justified the search in any event. The Court of Appeals has discretion as to the order in which these questions are best addressed.

JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I94f2fcf9575c11e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I94f2fcf9575c11e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, concurring.

Although I have serious doubts about the “reasonable expectation of privacy” test from *Katz v. United States* (1967) (Harlan, J., concurring), I join the Court's opinion because it correctly navigates our precedents, which no party has asked us to reconsider. . . .

The Fourth Amendment guarantees the people's right to be secure from unreasonable searches of “their persons, houses, papers, and effects.” With this language, the Fourth Amendment gives “*each*person ... the right to be secure against unreasonable searches and seizures in *his own*person, house, papers, and effects.”  The issue, then, is whether Byrd can prove that the rental car was *his*effect.

That issue seems to turn on at least three threshold questions. First, what kind of property interest do individuals need before something can be considered “their ... effec[t]” under the original meaning of the Fourth Amendment? Second, what body of law determines whether that property interest is present—modern state law, the common law of 1791, or something else? Third, is the unauthorized use of a rental car illegal or otherwise wrongful under the relevant law, and, if so, does that illegality or wrongfulness affect the Fourth Amendment analysis?

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JUSTICE [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I94f2fcf9575c11e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), concurring.

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