The Burger Court Opinion Writing Database

Rakas v. Illinois

439 U.S. 128 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 7, 1978

Memorandum to the Conference:

Re: 77-5781 Rakas v. Illinois

My vote is to affirm.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 19, 1978

Re: 77-5781 - Rakas v. Illinois

Dear Bill:

I will await your draft with interest. In the analysis, I wonder where one would come out if the occupant of a stolen car claims standing on the basis of an expectation of privacy.

Regards,

WEB

this is meaningless in the light of Wolf's letter.

Mr. Justice Rehnquist

cc: Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

one copy only

CHAMBERS OF
THE CHIEF JUSTICE

November 16, 1978

Re: 77-5781 - Rakas v. Illinois

Dear Bill:

You obviously have put a lot of thought and work into your Rakas opinion, and most of it is well conceived and wrought. Indeed, despite some initial skepticism on my part, you have persuaded me there is little to be gained by continuing to treat the "standing" question in total isolation from the merits of the case. You also have convinced me that we need to abandon wooden application of the "legitimately on the premises" rule. I suspect, however, that you may be too far out in front of the Court by abandoning the rule altogether.

I am not yet prepared to say that mere lawful presence in someone's home is insufficient in itself to generate a legitimate expectation of privacy in certain circumstances. I believe my guests have a right to expect privacy in my home. It is a place of private repose and respite from public scrutiny, and those present at my invitation have a reasonable expectation of privacy. It is an expectation that they are entitled to assert in their own right.

It is a truism now that the Fourth Amendment protects people, not places. But, as Justice Harlan observed in his concurrence in Katz, the question of what protection the Fourth Amenement affords people generally requires reference to a "place." 389 U.S. at 361. In certain places, people expect privacy by virtue of the "private" character of those places. A home is one such place. A confessional may be another. And, in an enclosed telephone booth, we have said that one may reasonably expect privacy of conversation at least. With reference to such "private places," legitimate expectations arise by virtue of one's presence there. Indeed, this is in the thrust of the dissent's analysis, and it has underpinnings that we cannot ignore.

Where I part company with the dissent is in its assumption that a car is a "private place" to be equated with a home. It is no such thing. Indeed, it is not a "place" at all, but rather a non-place because of its mobility. Its occupants and much of its contents are constantly exposed to public scrutiny, and it moves about public thoroughfares continuously subject to the intrusion of other traffic. One has no more right to expect privacy when travelling on a public highway than when walking down a public street or across an open field. I could be persuaded to hold that mere presence in a car, in itself, does not suffice to generate any reasonable expectation of privacy.

Moreover, I believe that such a rationale will provide a more straightforward way of distinguishing Jones. The "ability to exclude others" rationale does not strike me as particularly persuasive for the reason noted in Byron's dissent at note 15; and the emphasis on the lack of a privacy expectation in the particular areas of the car from which the evidence was seized seems to ignore that the passenger areas of the car were searched as well. In Jones itself the evidence was seized from a bird's nest in an awning outside the apartment, an area in which Jones had less expectation of privacy than the birds and no more than these petitioners had in the glove compartment of the car as passengers.

Should you not meet the dissent head-on and take the position that a car is simply not a "private place" whose character as such vests reasonable expectations of privacy in the passengers? The germ of this approach is already present in your discussion of Mancusi in footnote 10: it's not enough that one be present on the premises searched to have a reasonable expectation of privacy; rather, the premises themselves must be the type of place or area in which one may legitimately expect privacy in ordinary human experience. A car is simply not such a "private premises," as was the dwelling involved in Jones.

I think you might get a Court for this approach, and incorporation of this rationale would not require wholesale revision of your opinion. Parts of Section II C might have to go, such as your references to the "casual visitor" hypotheticals at page 14, but that is dictum in any event. Only Section II D would need to be substantially reworked. I can live with your attack on overbroad and simplistic applications of the legitimately-on-the-premises rule, but I am not sure we need abandon it in advance of a real necessity to do so. Here you can say it simply does not apply when the "premises" involved is a car rather than a dwelling. And, when those "casual visitor" cases you hypothesize arise, you may yet convince me of the need to abandon the rule even in the context of a dwelling place, wherein it

initially arose. At least with this case behind us, you'll have a much firmer precedential base on which to do so than you do now.

While I'm on the subject of Rakas, I'd like to toss out some other "thoughts while shaving." Why can't we say that petitioners had no legitimate expectations of privacy while riding in the car because they were still in flight from the scene of the crime? I recognize that "hot pursuit" has usually been thought of as justifying failure to obtain a warrant, but might it not also bear on the issue of petitioners' legitimate expectation of privacy? I cannot accept the notion that bank robbers in flight, in whatever vehicle, have any legitimate expectation of privacy. Surely no one would suggest that petitioners had any legitimate expectation of privacy while fleeing the scene of the crime in the stolen getaway car. Why should the fact that they switched cars alter the analysis?

For my part, from more bank robbery cases than I can count, I can judicially notice the modus operandi of these culprits. A stolen car is often the means of getaway. Very soon, as here, the first car is abandoned and the culprits transfer to another as part of their previously arranged plan. Why should the car switch generate any expectation of privacy that did not exist in the stolen car? Is the new car any less an instrumentality of the crime and escape than the first one? Any less so simply because the registered owner-driver is not, on this record, linked to the scene of the crime itself? How would our "expectation of privacy" analysis change if the culprits had commandeered a taxi for either the first or second tier of flight? For me at least, traditional "hot pursuit" analysis would permit curbing and searching any getaway car, as robbers in flight have no expectation of privacy in their getaway cars.

I believe the record supports the view that our petitioners were still in flight. Their brief pit stop at a local lounge does not change my thinking. That was simply evasive action taken to shake the policeman on their tail. It succeeded, temporarily. But the "pursuit" continued. We are no longer dealing with a posse in pursuit over the open plains, but the posse's pursuit does not terminate simply because they lose the culprits' tracks for a while. The same is true here, and the concept of "hot pursuit" in today's world must include pursuit by every police vehicle in radio contact receiving intelligence about the crime and the criminals. And, when the chasing police cars lost sight of the fleeing criminals in our overcrowded streets, it makes no sense to say the pursuit is over, or that new cars picking up the chase a short time and distance away are not part of that pursuit. Here, we may not have a classic case of

traditional "hot pursuit," but we do have a modern electronic version that is the practical equivalent. True, the pursuit may have "cooled" while petitioners were in the lounge, but the police never really abandoned the chase. And, even if petitioners' legitimate expectations of privacy may be thought to enlarge as their flight removes them in time and distance from the scene of the crime, an hour or so and a few miles does not provide sufficient insulation -- so far as I am concerned.

I would like to explore these "thoughts while shaving" more fully than can be done in this hasty note. But, I must be off to the secret precincts of Harvard where I'm told I am to be honored with organized demonstrations. I like them. They are good for the circulation -- mine and theirs! Ponder my musings, and let's discuss them when I get back.

Regards,

WED

Mr. Justice Rehnquist

cc: Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Powell

Dave - these seem innocuous. What do you think

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

PERSONAL

November 21, 1978

Re: 77-5781 - Rakas v. Illinois

Dear Lewis:

I am joining Bill's opinion and I will join yours if you are willing to focus on some small factors I consider crucial.

(a) In line 7, first paragraph, page 1, underscore "legitimate" which is the crux of the debate.

(b) Line 3, second full paragraph, page 2, insert "all" before "surrounding".

(c) In Line 8, second full paragraph, page 2, insert after "Amendment" "concepts of reasonableness". WO

(d) Page 6, insert after first sentence, WP The very concept "reasonableness" precludes bright lines or per se rules.

Regards,

WEB

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 31, 1979

Re: 77-1844 - City of Mobile v. Bolden

MEMORANDUM TO THE CONFERENCE:

The vote is 4/4 and I will vote to reargue if Lewis wishes to hear the case argued rather than vote on the briefs and recorded arguments.

Regards,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 28, 1978

RE: 77-5781 - Rakas v. Illinois

Dear Bill:

I join.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 11, 1978

RE: No. 77-5781 Rakas v. Illinois

Dear Byron:

This confirms my understanding that you will undertake the dissent in the above.

Sincerely,

Mr. Justice White

cc: Mr. Justice Marshall
Mr. Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 8, 1978

RE: No. 77-5781 Rakas v. Illinois

Dear Byron:

Please join me in your dissent in the above.

Sincerely,

Bill

Mr.Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

October 18, 1978

Re: No. 77-5781, Rakas v. Illinois

Dear Bill,

The approach outlined in your memorandum of October 17 seems sound to me, as of now. It is possible, of course, that I may have specific problems with the proposed opinion you ultimately produce.

Sincerely yours,

P.S.
I.

Mr. Justice Rehnquist

Copy to The Chief Justice
Mr. Justice Blackmun
Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 6, 1978

Re: No. 77-5781, Rakas v. Illinois

Dear Bill,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 13, 1978

Re: No. 77-5781, Rakas v. Illinois

Dear Bill,

Your amended opinion, as recirculated November 11, seems fine to me.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 29, 1978

Re: No. 77-5781, Rakas v. Illinois

Dear Bill,

I have no serious objection to the changes in your Court opinion described in your Memorandum of today.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to The Chief Justice
Mr. Justice Blackmun
Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 4, 1978

Re: 77-5781 - Rakas v. Illinois

Dear Bill,

I shall shortly circulate a dissent in this case.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 7 NOV 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-5781

Frank L. Rakas and Lonnie L. King, Petitioners, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, Third District.

[November —, 1978]

MR. JUSTICE WHITE, dissenting.

The Court today holds that the Fourth Amendment protects property, not people, and specifically that a legitimate occupant of an automobile may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it.[1] Though professing to acknowledge that the primary purpose of the Fourth Amendment's prohibition of unreasonable searches is the protection of privacy—not property—the Court nonetheless effectively ties the application of the Fourth Amendment and the exclusionary rule in this situation to property law concepts. Because the majority's conclusion has no support in the Court's controlling decisions, in the logic of the Fourth Amendment, or in common sense, I must respectfully dissent. If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what is perceived as the correct results in specific cases. Cf. *Stone* v. *Powell,* 428 U. S. 465, 536 (WHITE, J., dissenting).

I

Two intersecting doctrines long established in this Court's

[1] I agree with the Court's rejection, which was implicit in *Alderman* v. *United States,* 394 U. S. 165 (1969), of petitioners' secondary theory of target standing.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

From: Mr. Justice White

Circulated: _____

Recirculated: 9 NOV

2nd DRAFT

9 NOV 1978

SUPREME COURT OF THE UNITED STATES

No. 77-5781

Frank L. Rakas and Lonnie L. King, Petitioners, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, Third District.

[November —, 1978]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, dissenting.

The Court today holds that the Fourth Amendment protects property, not people, and specifically that a legitimate occupant of an automobile may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it.[1] Though professing to acknowledge that the primary purpose of the Fourth Amendment's prohibition of unreasonable searches is the protection of privacy—not property—the Court nonetheless effectively ties the application of the Fourth Amendment and the exclusionary rule in this situation to property law concepts. Because the majority's conclusion has no support in the Court's controlling decisions, in the logic of the Fourth Amendment, or in common sense, I must respectfully dissent. If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what is perceived as the correct results in specific cases. Cf. *Stone* v. *Powell,* 428 U. S. 465, 536 (WHITE, J., dissenting).

[1] For the most part, I agree with the Court's rejection, which was implicit in *Alderman* v. *United States,* 394 U. S. 165 (1969), of petitioners' secondary theory of target standing.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 14 NOV 1978

pp 1, 9-10

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-5781

Frank L. Rakas and Lonnie L. King, Petitioners, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, Third District.

[November —, 1978]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

The Court today holds that the Fourth Amendment protects property, not people, and specifically that a legitimate occupant of an automobile may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it.[1] Though professing to acknowledge that the primary purpose of the Fourth Amendment's prohibition of unreasonable searches is the protection of privacy—not property—the Court nonetheless effectively ties the application of the Fourth Amendment and the exclusionary rule in this situation to property law concepts. Insofar as passengers are concerned, the Court's opinion today declares an "open season" on automobiles. However unlawful the search of a car may be, absent a possessory or ownership interest, no "mere" passenger may object to it, regardless of his relationship to the owner. Because the majority's conclusion has no support in the Court's controlling decisions, in the logic of the Fourth Amendment, or in common sense, I must respectfully dissent. If the Court is troubled by the practical impact of the

[1] For the most part, I agree with the Court's rejection, which was implicit in *Alderman* v. *United States*, 394 U. S. 165 (1969), of petitioners' secondary theory of target standing.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

pp 1, 9, 10, 13

From: Mr. Justice White

Circulated: _____

Recirculated: 30 NOV 1978

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-5781

Frank L. Rakas and Lonnie L. King, Petitioners, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, Third District.

[November —, 1978]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

The Court today holds that the Fourth Amendment protects property, not people, and specifically that a legitimate occupant of an automobile may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it.[1] Though professing to acknowledge that the primary purpose of the Fourth Amendment's prohibition of unreasonable searches is the protection of privacy—not property—the Court nonetheless effectively ties the application of the Fourth Amendment and the exclusionary rule in this situation to property law concepts. Insofar as passengers are concerned, the Court's opinion today declares an "open season" on automobiles. However unlawful stopping and searching a car may be, absent a possessory or ownership interest, no "mere" passenger may object, regardless of his relationship to the owner. Because the majority's conclusion has no support in the Court's controlling decisions, in the logic of the Fourth Amendment, or in common sense, I must respectfully dissent. If the Court is troubled by the practical impact of the exclusionary rule, it should face the

[1] For the most part, I agree with the Court's rejection, which was implicit in *Alderman* v. *United States*, 394 U. S. 165 (1969), of petitioners' secondary theory of target standing.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 30 NOV 1978

Recirculated: _____

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-5781

Frank L. Rakas and Lonnie L. King, Petitioners, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, Third District.

[December —, 1978]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

The Court today holds that the Fourth Amendment protects property, not people, and specifically that a legitimate occupant of an automobile may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it.[1] Though professing to acknowledge that the primary purpose of the Fourth Amendment's prohibition of unreasonable searches is the protection of privacy—not property—the Court nonetheless effectively ties the application of the Fourth Amendment and the exclusionary rule in this situation to property law concepts. Insofar as passengers are concerned, the Court's opinion today declares an "open season" on automobiles. However unlawful stopping and searching a car may be, absent a possessory or ownership interest, no "mere" passenger may object, regardless of his relationship to the owner. Because the majority's conclusion has no support in the Court's controlling decisions, in the logic of the Fourth Amendment, or in common sense, I must respectfully dissent. If the Court is troubled by the practical impact of the exclusionary rule, it should face the

[1] For the most part, I agree with the Court's rejection, which was implicit in *Alderman* v. *United States*, 394 U. S. 165 (1969), of petitioners' secondary theory of target standing.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 6, 1978

Re: No. 77-5781 - Rakas v. Illinois

Dear Bill:

I await the dissent.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 9, 1978

Re: No. 77-5781 - Rakas v. State of Illinois

Dear Byron:

Please join me.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 18, 1978

Re: No. 77-5781 - Rakas v. Illinois

Dear Bill:

This is in response to your letter of October 17. I do not feel "irrevocably committed."

Sincerely,

H. A. B.

Mr. Justice Rehnquist

cc: The Chief Justice
Mr. Justice Stewart
Mr. Justice Powell ✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 21, 1978

Re: No. 77-5781 - Rakas v. Illinois

Dear Lewis:

I am pleased that you have written separately in this case for I think your writing brings particular focus on the issue and well serves to answer the position taken by the dissent. I am joining Bill Rehnquist today. I trust you will understand why I do not join your opinion: it gives great emphasis to Chadwick, and I was in dissent there.

Sincerely,

Harry

Mr. Justice Powell

P. S. Am I presumptuous in suggesting that in the several references to the dissenting opinion (on your pages 1, 2, 3, and 6) the "ante" should be "post"?

done 11/22/78 H.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 21, 1978

Re: No. 77-5781 - Rakas v. Illinois

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 29, 1978

Re: No. 77-5781 - Rakas v. Illinois

Dear Bill:

I, too, have no particular objection to the changes proposed in your note of today.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Chief Justice
Mr. Justice Stewart
Mr. Justice Powell

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 20 NOV 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–5781

Frank L. Rakas and Lonnie L. King, Petitioners, v. State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, Third District.

[November —, 1978]

MR. JUSTICE POWELL, concurring.

I concur in the opinion of the Court, and add these thoughts. I do not believe my dissenting Brethren correctly characterize the rationale of the Court's opinion when they assert that it ties "the application of the Fourth Amendment . . . to property law concepts." *Ante*, at —. On the contrary, I read the Court's opinion as focusing on whether there was a legitimate expectation of privacy protected by the Fourth Amendment.

The petitioners do not challenge the constitutionality of the police action in stopping the automobile in which they were riding; nor do they complain of being made to get out of the vehicle. Rather, petitioners assert that their constitutionally protected interest in privacy was violated when the police, after stopping the automobile and making them get out, searched the vehicle's interior, where they discovered a sawed-off rifle under the front seat and rifle shells in the locked glove compartment. The question before the Court, therefore, is a narrow one: Did the search of their friend's automobile after they had left it violate any Fourth Amendment right of the petitioners?

The dissenting opinion urges the Court to answer this question by considering only the talisman of legitimate presence on the premises. To be sure, one of the two alternative reasons given by the Court for its ruling in *Jones* v. *United*

November 27, 1978

No. 77-5781 Rakas v. Illinois

Dear Chief:

Thank you for your note indicating general approval of my concurring opinion.

I am happy to incorporate your first two suggestions. The other two do not quite fit, as I did not reach the question whether the search was "reasonable". As I conclude that there was no reasonable expectation of privacy, there simply was no Fourth Amendment interest at stake. Thus, it was unnecessary to consider whether the search itself was reasonable.

As I believe we are in accord, I will add your name to my concurring opinion unless you advise to the contrary.

Sincerely,

The Chief Justice

lfp/ss

November 30, 1978

No. 77-5781 Rakas v. Illinois

Dear Bill:

The Chief's suggested changes are fine with me.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Chief Justice
Mr. Justice Stewart
Mr. Justice Blackmun

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 30 NOV 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-5781

Frank L. Rakas and Lonnie L. King, Petitioners, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, Third District.

[November —, 1978]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring.

I concur in the opinion of the Court, and add these thoughts. I do not believe my dissenting Brethren correctly characterize the rationale of the Court's opinion when they assert that it ties "the application of the Fourth Amendment . . . to property law concepts." *Ante,* at —. On the contrary, I read the Court's opinion as focusing on whether there was a *legitimate* expectation of privacy protected by the Fourth Amendment.

The petitioners do not challenge the constitutionality of the police action in stopping the automobile in which they were riding; nor do they complain of being made to get out of the vehicle. Rather, petitioners assert that their constitutionally protected interest in privacy was violated when the police, after stopping the automobile and making them get out, searched the vehicle's interior, where they discovered a sawed-off rifle under the front seat and rifle shells in the locked glove compartment. The question before the Court, therefore, is a narrow one: Did the search of their friend's automobile after they had left it violate any Fourth Amendment right of the petitioners?

The dissenting opinion urges the Court to answer this question by considering only the talisman of legitimate presence on the premises. To be sure, one of the two alternative reasons given by the Court for its ruling in *Jones* v. *United*

Supreme Court of the United States
Washington, D. C. 20543

Bruce
Lewis
Eric
Paul

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 17, 1978

MEMORANDUM TO: The Chief Justice
Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Powell

Re: No. 77-5781 Rakas v. Illinois

My work on the drafting of the Court's opinion in this case leaves me as firm as ever in the view that the judgment of the Supreme Court of Illinois should be affirmed. But the work has brought me in contact with a number of lower court cases with which I was not familiar at the time of the Conference discussion, and has also caused me to re-read most of our principal cases in the area of "standing" to move to suppress evidence. My net conclusion at this stage is that the term "standing" means nothing more in an analytical sense than does the statement found in several of our cases that rights secured by the Fourth Amendment are personal, and A will not be heard to assert that evidence was obtained in violation of the constitutional rights of B. It also seems to me that the concept

of "standing", far from narrowing the applicability of the Fourth Amendment, has produced a tendency in many of the lower courts to quite superficially analyze the "standing" question in terms of highly subjective expectations of privacy, and then jump immediately to the question of whether a search or seizure was reasonable under the Fourth Amendment.

All of this leads to the following point: I would like to try drafting this opinion so as to subsume "standing" under the principle that one may only move to suppress when his own Fourth Amendment rights have been violated, and make the analysis focus on the extent of the particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate but in practice invariably intertwined concept of "standing". The "seminal" case on "standing" in this Court, Jones v. United States, in the opinion not once but three times places quotation marks around the word "standing". See 362 U.S., at 263, 265, 267. I think it fair to infer from this that Felix Frankfurter, when he was writing this opinion for the Court, himself had a good deal of doubt as to whether the issue of "standing" ought to be separated from the merits of the Fourth

Amendment claim, but that at that time the lower courts, the government, and the defendants all tended to speak in that way. Part of this may have been because of the fact that Jones was by its terms an interpretation of Rule 41(e) of the Federal Rules of Criminal Procedure, which contains the language "A person aggrieved by an unlawful search and seizure may move the district court . . . "

Obviously, I cannot expect you to "join" this approach at this time, or to even give it your general approval until you have had a chance to see how it writes. But since we have only a five-man Court for this result, I would simply abandon even the trial effort to write it this way now if any one of the four of you felt irrevocably committed to the proposition that the notion of "standing" in Fourth Amendment cases should be retained exactly as it is, regardless of how well or how poorly a draft opinion might demonstrate that it is not a useful analytical tool for purposes of determining when the Fourth Amendment rights of a particular individual have been violated. In sum, if any one of you feels that irrevocably committed, will you let me know? If I don't hear from you, I will not feel that I have been given any sort of advance tacit approval for the

proposition discussed in this letter, but only that none of you would foreclose consideration of it if it proves to write in a way consistent with our previous holdings.

Sincerely,

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr Justice Powell
Mr Justice Stevens

From: Mr Justice Rehnquist

Circulated: NOV

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-5781

Frank L. Rakas and Lonnie L. King, Petitioners, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, Third District.

[November —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners were convicted of armed robbery in the Circuit Court of Kankakee County, Ill., and their convictions were affirmed on appeal. At their trial, the prosecution offered into evidence a sawed-off rifle and rifle shells that had been seized by police during a search of an automobile in which petitioners had been passengers. Neither petitioner is the owner of the automobile and neither has ever asserted that he owned the rifle or shells seized. The Illinois Appellate Court held that petitioners lacked standing to object to the allegedly unlawful search and seizure. We granted certiorari in light of the obvious importance of the issues raised to the administration of criminal justice, 435 U. S. 922 (1978), and now affirm.

I

Because we are not here concerned with the issue of probable cause, a brief description of the events leading to the search of the automobile will suffice. A police officer on a routine patrol received a radio call notifying him of a robbery of a clothing store in Bourbonnais, Ill., and describing the getaway car. Shortly thereafter, the officer spotted an automobile which he thought might be the getaway car. After following the car for some time and after the arrival of assistance, he and several other officers stopped the suspected

see pp 1, 5, 16-22

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: Nov 97

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-5781

Frank L. Rakas and Lonnie L. King, Petitioners, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, Third District.

[November —, 1978]

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice
Mr. Justice

FP 6421

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-5781

Frank L. Rakas and Lonnie L. King, Petitioners, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, Third District.

[November —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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Kennedy

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 17, 1978

Re: No. 77-5781 - Rakas v. Illinois

Dear Chief:

I wanted to have my reply to your letter of November 16th waiting for you when you returned from the "secret precincts of Harvard", so as to hasten your transition from the academic back to the judicial world. Your letter is very thought provoking, and perhaps for that very reason difficult to answer; I will try to answer first the criticisms of the opinion as presently drafted, and then give you my necessarily tentative reactions to your "thoughts while shaving" beginning at the top of page 3 of your letter.

You are right: I have put a lot of thought and work into the Rakas opinion, and in the course of that work, and of discussing proposed changes with Potter and Lewis, am convinced that the opinion is analytically sound. As you well know, that does not mean it is "right", but only that it is a principled and analytically defensible exposition of the judgment of af-

firmance for which five of us voted at Conference. For the very reason that I have put so much effort into it, you perhaps ought to take my defense of it as being that of an advocate, rather than that of a neutral arbiter.

The product I have come up with is necessarily a composite, which does not reflect my precise views nor, I suspect, the views of any of the other four of us who voted to affirm at Conference. I do think you are mistaken, though, in your suggestion that we have abandoned altogether the "legitimately on the premises" rule. We have simply said that it is not a "buzz word" which automatically entitles a person to the protection of the Fourth Amendment where the property seized is not his and the premises searched are not his; I would think from the present draft of the opinion that lawful presence remains a factor that courts certainly could consider, and I would be willing to put in a statement to that effect if you so desire.

You say on page 1 that a home generally is a "private" place. I agree with you in the colloquial sense, but under a

Katz analysis I think we must distinguish between an owner and a casual guest. A home is an irreducible unit from the point of view of its owner or lessor; he has a legitimate expectation of privacy in every part of it. But normally a guest in that home, in my view, does not stand on the same footing as the owner. As suggested in the opinion, he has expectations of privacy in the parts of the house which he has been permitted to use, but not in a basement that he has never even seen. I think the opinion makes this quite clear, and to the extent that the dissent disagrees with it, we do not ignore the latter but take it on straightforwardly. Indeed, our opinion presents a reasoned defense of this position, while I think the dissent merely assumes the contrary without giving any explanation for their assumption.

As you will note, I have expressly reserved the question of whether the same rule would govern a dwelling place as would govern a car in circumstances analogous to this case. My impression is that Potter feels it probably would, you obviously feel that it would not, and some of both Harry's and Lewis' comments at Conference indicate that they might well agree with you. On the other hand, the four dissenters clearly do not agree with you, so there simply is not a

majority to affirm on the basis that a car is different in kind than a dwelling place for purposes of this case.

Harry's plurality opinion in Cardwell v. Lewis, and your opinion for the Court in Chadwick, both of which I cite in the present draft in the sentence reserving the question, suggest that cars may be treated differently for Fourth Amendment purposes than dwelling places. I agree with this proposition (having joined Harry in Cardwell), but I am not sure that it would decide this case.

In the first place, the search of the passenger areas of the car to which you refer on page 2 is perfectly consistent with the opinion; the search of these areas disclosed no incriminating evidence, and there was no seizure of anything as a result of the search. The only parts of the car searched which turned up incriminating evidence were discrete areas such as the glove compartment, in which these passengers claim no legitimate expectation of privacy. Jones in his case was in effect the surrogate tenant for the entire apartment, and so could assert an interest in the entire apartment, including the awning attached to the apartment,

in a way that a mere passenger in a car owned and driven by someone else could not.

While it is relatively easy for purposes of framing hypothetical questions to distinguish between "cars" and "houses", I am not sure that the end result of a "bright line" distinction which you want to draw here would be as analytically defensible as you think it is. One need not revert to a mobile home, but only to a VW van in which a couple of people stow all of their possessions and start a trip across the country for an indefinite period of time, to see that legitimate expectations of privacy may not be confined to real property. While I have not had a chance to give your proposition that we flatly sever "cars" from "houses" the consideration which it undoubtedly deserves, I think you are going to run into gray areas which can be avoided only by going back to medieval legal distinctions between realty and personalty. I am sure you wish that no more than I.

As to your "hot pursuit" theory, I had until now thought that "hot pursuit" was regarded as an "exigent circumstance" which excused the need for a warrant but did not dispense with the need for probable cause in order to make a search.

Had there been a finding of probable cause in Illinois courts, I am not at all sure that I would not be prepared to join in your analysis, though I would want to think the matter over before doing so; it was neither argued nor briefed here. But the Illinois courts never confronted this question, because they went off on "standing". Thus, it seems to me impossible to switch now to an "exigent circumstance" which provides an exception to the warrant requirement but not to the probable cause requirement of the Fourth Amendment.

In addition, as you recognize, this certainly is not a classic case of "hot pursuit." There is no indication in the record of this case that petitioners were fleeing from the police at the time the car was stopped. To the contrary, the record shows that they were stopped while returning from a bar more than one hour after the robbery had occurred. And while it may be that the "pit stop" in the bar was taken for evasive action, as you suggest, that fact is not at all apparent from the record. It also is not clear that petitioners switched from the stolen getaway car directly into the car that ultimately was searched pursuant to a previously arranged plan. There are no facts in the record from which one can determine how or when petitioners came to be passengers in the car that was searched.

While all of this material regarding probable cause and hot pursuit could be flushed out on a remand, it could be done only at the cost of completely sacrificing everything the opinion now accomplishes, as noted below. For once we instruct the Illinois courts to determine the presence or absence of probable cause, we concede that these passengers' Fourth Amendment rights were infringed by a search of the glove compartment and the area under the front seat.

Even assuming that I am wrong on these points, and five members of the Court were willing to go on this basis, I think we would be giving up three very sound analytical principles contained in the present opinion: (a) "standing" as used in some of our previous Fourth Amendment cases is subsumed under substantive Fourth Amendment analysis; (b) the "directed at" or "target" principle of extended standing is explicitly rejected; (c) the doctrine that one "legitimately on the premises" has protected Fourth Amendment rights is refined so as to be consistent with Katz. I think the combination of these three principles will dispel a good deal of confusion in lower court analysis, and be important analytical tools in

aiding the thousands of judges who must decide these kinds of questions every day on motions to suppress. While I will do everything I can to accommodate your views in the first two pages of your letter into my opinion, I am extremely loath to sacrifice what I conceive to be these advantages in favor of a yet untried approach to the case which may or may not command the necessary votes for a Court and which was neither briefed nor argued to us.

Sincerely,

WEB

The Chief Justice

Copies to Mr. Justice Stewart,

Mr. Justice Blackmun, and

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 29, 1978

MEMORANDUM TO: The Chief Justice
Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Powell

Re: No. 77-5781 Rakas v. Illinois

Though the Chief's "join" letter was on its face unconditional, he requested, and I am willing to make, the following changes in the opinion if they are unobjectionable to those who have already joined.

Insert at page 19, at the end of the paragraph before subsection D, the following sentence:

"We would not wish to be understood as saying that legitimate presence

on the premises is irrelevant to one's expectation of privacy, but it cannot be deemed controlling."

Insert at page 20, a new footnote 15 (renumbering the remaining footnotes) which will read as follows: "As we noted in Martinez-Fuerte, '[o]ne's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence.' 428 U.S., at 561."

Sincerely,

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

PP 194-20

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-5781

Frank L. Rakas and Lonnie L. King, Petitioners, *v.* State of Illinois. | On Writ of Certiorari to the Appellate Court of Illinois, Third District.

[November —, 1978]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 9, 1979

Re: No. 77-5781 Rakas v. Illinois

Dear John:

This being Tuesday morning, and the customary oral argument week feeling of the one-armed paperhanger hanging heavily over me, I have had only a chance to glance at the petition for rehearing in this case in response to your letter of yesterday. On the basis of this glance, I am inclined -- albeit tentatively -- to disagree with your suggestion.

In the petition for rehearing, petitioners "request this Court to change its final order in this case from an affirmance to a remand". Pet. 2. This blithe request is made without suggesting what form the remand should take, and it seems to me without any appreciation of our limited jurisdiction over the judgments of state courts. I think it was either Justice Brandeis or Justice Cardozo who strongly insisted that all this Court could say, even when it reversed the judgment of a state court, was that the case be remanded for "proceedings not inconsistent with this opinion". Here petitioners were convicted in the Illinois courts, and their motion to suppress evidence was denied by those courts on the ground that they lacked standing to challenge the search in question. This Court affirmed the judgment of the Supreme Court of Illinois on precisely that ground, although in so doing, we modified the test of standing set forth in Jones v.

United States, 362 U.S. 257. I have grave doubt as to what form the "remand" would take, since I, for one, would not favor vacating the judgment of conviction.

Your analogy to Givhan certainly has some force, but that case came up through the federal courts, and I think this Court has always felt that it had a good deal more latitude in framing a remand to a federal Court of Appeals or a District Court than it did to the highest court of a state. The same is true with Mt. Healthy, which came up through the Court of Appeals for the Sixth Circuit. But even in Stone v. Powell, which came up through the federal court system, we refused a similar (although concededly distinguishable) request made by respondent prior to the handing down of the opinion. See 428 U.S. 465, 495, fn. 38.

Because of the highly speculative nature of petitioner's assertions here -- for example, that evidence was found "possibly indicating that petitioners and their female companions were overnight travelers or vacationers . . .", pet. 3, the claim of any unfairness or difference in result which would result from a remand does not strike me as very strong.

The combination of these factors can best be summarized in the language of our children's generation: The petition does not "light my fire".

Sincerely,

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 9, 1979

MEMORANDUM TO THE CONFERENCE

Re: Case held for Rakas v. Illinois, No. 77-5781

Only one case, No. 77-7004, Kerpen v. United States, was held for Rakas. The facts are set forth with both detail and clarity in Judge Blumenfeld's opinion for the United States District Court for the District of Connecticut, pet., A-1 through A-13, and his opinion denying the motion to suppress evidence for want of standing was affirmed from the bench by the Court of Appeals for the Second Circuit (Mansfield, Timbers, and Walter Hoffman, D.J.).

Petitioner pleaded guilty to bank robbery but reserved the right to appeal the suppression motion in question. The District Court denied the motion on the ground that petitioner lacked standing to question any illegality in the conduct of the government because no Fourth Amendment right of his was infringed. The evidence in question was obtained as the result of a search of the trunk of an automobile which belonged not to petitioner but to one Joan Arico. It consisted of several handguns, marked money stolen from the bank, and face masks.

The District Court found that (1) petitioner had no possessory interest in the automobile, since, although it had

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 9, 1978

Re: 77-5781 - Rakas v. State of Illinois

Dear Byron:

Please join me in your excellent dissenting opinion.

Respectfully,

/s/ h

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 8, 1979

Re: 77-5781 - Rakas v. Illinois

Dear Bill:

Although I do not have standing to move for rehearing, I hope it is not out of line for me to suggest that there really is an inconsistency between the remand in Givhan and the straight affirmance in this case.

Respectfully,

JPS

Mr. Justice Rehnquist

Copies to the Conference