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*Civil and Criminal Trial Lawyers Practicing in all State and Federal Courts*

The Law Office of Spinella & Associates is located on One Lewis Street, an historic Hartford address on Bushnell Park in downtown Hartford.

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# Do the Police Have the Right to Conduct Continuous Video Surveillance of Your Home Without a Warrant?

## *The case of Borg v. Town of Westport*

Geo-tracking smartphones. Cameras everywhere. Social media surveillance.

Whether it's the government intercepting a terrorist for your protection, or google tracking your searches, technology and the national security state it supports is at war with your privacy- and the civil liberties that protect it.

Some say, if there's nothing to hide, then let the government surveil away! Then why not save time and just remove your curtains, the lock on your bathroom, your smartphone password, or what you say to your doctor behind closed doors? Because permitting the government to record and archive your conduct, legal or not, gives it cart blanche to broadcast your private life anytime, anywhere, and to any end it desires- even years down the road. It turns out that ordinary citizens value their privacy. That's why we still have curtains, locks, passwords, and confidentiality agreements.

Consider the Borgs, husband and wife psychologists who operated a private practice out of their Westport, Connecticut home. The Borgs were caught in an ugly legal battle with their neighbors over a property easement. After noticing cameras pointed at their home from two neighboring homes, and being periodically adjusted by police officers, they filed a Freedom of Information request. They learned that the Westport Police Department was indeed conducting continuous surveillance of their home, hoping to catch criminal conduct and use it against them.

All of this was done without a warrant.

We brought suit against Westport and its police department in the U.S. District Court in Hartford under the Federal Civil Rights Acts, claiming that such invasive surveillance required a search warrant pursuant to the Fourth Amendment of the United States Constitution's Bill of Rights. The 54 words which make up the Fourth Amendment are the heart of the Bill of Rights and its protections against government overreaching:

> ***"The right of the people** to be secure in their persons, house, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*

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# The case of Borg v. Town of Westport

Westport promptly filed a Motion to Dismiss, arguing the Fourth Amendment was not applicable since the camera itself was not trespassing, and the surveillance was done from a physically non-invasive location (a second floor window). Using a handful of old Supreme Court cases, they argued the government has the right to surveil citizens in public areas or locations where there is no property interest. They cited the "open field" doctrine, first established in the 1924 case **Hester v. United States**, which found that a plane can fly over a home and surveil curtilage without invoking a Fourth Amendment "search." They also used **Goldman v. United States**, a1942 case where the Court found no "search" when police officers used a Dictaphone pressed against an adjoining wall to listen to a conversation.

Our rebuttal drew on two landmark privacy cases: **Katz v. United States**, 1966; and United **States v. Jones**, 2012. Katz was convicted of transmitting wagering information by phone, a federal offense. But after it was discovered that his phone conversations were being secretly recorded with an external device, the Supreme Court agreed to hear the matter. In this case, the Court's decision famously expanded the scope of the Fourth Amendment to "protect people, not places."

**From the Court: "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected ."**

In **United States v. Jones**, the Court found that the warrantless attachment of a GPS device to a car violated Fourth Amendment privacy and property protections, since it was prolonged, continuous, and electronic. From Supreme Court Justice Sotomayor's opinion:

*"Awareness that the Government may be watching chills... freedoms. And the Government's power to assemble data that reveal private aspects of identity is susceptible to abuse... Being watched can destroy a person's peace of mind, increase her self-consciousness and uneasiness to a debilitating degree and can inhibit her daily activities... An important dimension of privacy is informational control, which does not readily translate into spatial terms."*

I presented arguments to Hartford Connecticut Federal Judge Alvin Thompson. Since **Katz** and **Jones,** nearly every federal trial court has ruled that covert, continuous, electronic surveillance of a home violates the Fourth Amendment and requires a warrant. Despite this, the Court ruled against us, resting its opinion on the same line of old Supreme Courts cases, failing to consider the core issue of privacy invoked by continual, covert, electronic surveillance.

We immediately took our case to the Second Circuit Court of Appeals in New York City, the most highly-regarded federal appellate circuit court in the country, known for shaping constitutional law second only to the Supreme Court.

Argument day dawned dark and rainy; a disquieting omen of what ensued. Today, the case rested on a three-judge panel. My heart sank when I saw the senior member of the three-judge panel, a jurist with a well-known record of prioritizing security over privacy who also sat on the FISA Court (federal Intelligence Surveillance Act), a secret panel of conservative judges that hears rare appeals of surveillance court proceedings.

Suddenly, everything hinged on the judges that flanked him.

The first judge proceeded with a stream of openly dismissive "questions" as to why a warrant would even be required since there was no trespass, and the Borg's home interior could be viewed from outside their property line anyway. He even went on to state that should a police officer position himself on the neighbors building for 13 weeks in place of the camera there would be no search. I referred to the district courts across the country, all finding that continuous, electronic, home surveillance constituted even more invasive surveillance than say, a stake-out since the information could be stored, manipulated, and disseminated to millions with a single click. He responded that district court decisions were not worthy of consideration. I pointed out that the only other federal appellate court to rule on continuous, electronic, home surveillance found it prohibited under the Fourth Amendment absent a warrant. But it made no difference.

In stark contrast, the second judge proceeded with a series of leading questions that essentially argued my case for Fourth Amendment protections; even making multiple references to Justice Sotomayor's *Jones* case opinion. Before I knew it, I was a bystander watching two opposing justices debate privacy. The senior judge said more with his eye-rolling than his tongue, throwing just one question to the defense about why he had not raised sovereign immunity (a technical defense that shields government from liability when the legal rule is not known).

When the defense rightfully replied that sovereign immunity had no place here, the senior judge nonetheless suggested that he consider raising it in future cases.

The panel was both confusing and confused; I left nonplussed.

Three weeks later, the Court denied our appeal in a terse, two-page decision that relied exclusively on the so-called "open-fields" doctrine. No mention was made of violating the Borg's privacy inside their home, a place expressly protected by the Fourth Amendment. Nor was any reference made to the stunning 13 weeks of surveillance, by far the longest in any federal court decision. Equally distressing, the Court relied on **United States v. Davis**, where a police officer, inside a home legally, took pictures of the defendant with a body cam — completely contrary to our case.

We filed a petition for a hearing "en banc", requesting review by all sitting appellate judges. I was confident that outlier judges would offer a non-biased view. I was wrong and our petition was denied.

"Big brother is watching you." With cameras installed everywhere from stoplights to checkouts, George Orwell's prophetic words are now our daily reality. And though we no longer expect anonymity in public, government surveillance is about more than collecting information you are willing to share, like crossing a street or buying milk. The danger lies in collecting and storing the information that you do not know you are sharing, like talking with a spouse in your kitchen or texting with your family. When the Government has the power to observe anyone at anytime, we become a society of fearful, repressed citizens, afraid to deviate from the party line, to make a mistake, and to just be ourselves.

In their brilliance, the founding fathers understood this and formulated the Fourth Amendment to protect against "unreasonable searches and seizures." They never dreamed of digital video surveillance. That's why they crafted the Constitution with the purposely ambiguous language "unreasonable;" allowing — even requiring — that each generation interpret it in a way suitable to their times.

Privacy is an essential human right. It is the bedrock of freedom. Without privacy, our creativity, our exploration, and our very development as individuals is denied. Supreme Court Justice William O. Douglas said it best: "The right to be left alone is the beginning of all freedom." That's why we have appealed our case to the United States Supreme Court.

*And we will press on.*

*A. Paul Spinella is a Hartford based civil rights and criminal defense attorney. He is the author of Connecticut Criminal Procedure.*

# Defending Mr. Jesus

## Remembering a great criminal defense attorney: Edward Bennett Williams

For over three decades until the time of his death in 1988, Hartford native Edward Bennett Williams was the most famous lawyer in America. Although greatly celebrated, he does not belong on a legal pedestal; he was no cause lawyer, and would often quip, he would defend "anyone who'd pay his fee." William's remains important, however, for at least two reasons.

First, he was an effective advocate for civil liberties in the course of protecting the rights of the criminally accused. William's was instrumental in exposing the misuse of police power in the 1950's and 1960's, most notably by a corrupt FBI engaged in wiretaps, break-ins, illegal surveillance and multiple other unlawful activities.

Secondly, and equally important, was Williams' elevation of the criminal defense bar at a time when criminal lawyers were held in contempt. As a founder of the National Association of Criminal Defense Lawyers, and by the enormous skill and dedication he displayed in defense of citizens in big trouble, he made being a criminal defense lawyer what it is supposed to be: a profession dedicated, as he put it, to the "defense of liberty" on behalf of the "unpopular."

No one practiced the trial lawyer's art with greater skill and deep understanding of what works with a jury. His cross-examinations of key witnesses in marquee cases are still quoted from and copied by young lawyers today. William's 1960 defense of the famously unapologetic civil rights activist, Baptist preacher, and United States Congressman, Adam Clayton Powell, shows a cross-examination so compelling that even his own guilty client was persuaded of his innocence. The trial is recounted in Evan Thomas' preeminent biography of Williams, entitled *The Man to See*. From the book:

*They called him "Mr. Jesus." The congregation would weep and shout "Amen" through the sermons of Adam Clayton Powell, Jr., the charismatic pastor of Harlem's Abyssinian Baptist Church. Powell had inherited Abyssinian's pulpit from his father, who had suffered a nervous breakdown in 1936. The elder reverend Powell dealt in real estate as well as religion, and Adam's mother had been an illegitimate heiress of the Schaefer Brewing Company. The Powells vacationed in Bar Harbor, Maine, a summer oasis of the rich. When Adam heard his call to the ministry, his mother sent him on a chauffeur-driven tour of the Holy Land . . .*

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# Defending Mr. Jesus

*Elected to congress from Harlem in 1944 , he was a persistent advocate for civil rights. "I am an irritant," he said. "I see myself that way. Just to keep turning the screw, turning the screw. Dip, drip, drip makes a hole in the marble." On every housing, school, or labor bill, Powell would try to attach a desegregation rider. He almost always failed, but he was admired by many for his persistence.*

*He was, however, not admired for his absentee rate, usually the highest in Congress. And his swanky life-style- he liked to drive a silver Jaguar with the top down- was a source of envy and suspicion. He owned two homes and three luxury cars and had two servants, but he paid only $1,700 in federal taxes on an income of $160,000 in 1951 and 1952. In 1956, the government convened a grand jury to look more closely into his taxes . . .*

*Powell called Williams the day he was indited, complaining that he had been set up. Williams didn't believe Powell at first, but he took the case anyway, and quickly became Powell's drinking pal as well as his lawyer.*

*...as the trial approached, Williams became formal with Powell, no longer his fellow rake but rather his mentor and disciplinarian. As he had in the Hoffa case, Williams planned to put Powell on the stand. That meant transforming the preacher congressman from charming roué to sober, credible witness. As the two men worked late into the night at William's apartment on 55th Street, Powell received a much tougher grilling from Williams than any cross-examination he was likely to get in court . . .*

*Williams was just as hard on himself. Powell recounted in his memoir that Williams collapsed, ashen from exhaustion, one night but refused to let Powell put him to bed. The tax evasion case against Powell was technical, based on numbers and intricate calculations. Williams marinated himself in the details. Assigned to the case by Williams, Vince Fuller recalls working out the accounts to within $100. Williams would take over the accounting sheets and work them down to the cent. For hours, he sat in the apartment massaging the facts and numbers and shaping them in to a compelling story. Williams had a photographic memory, and he would store in his mind whole pages of deposition transcript, right down to the page number.*

*The line to get into Judge Bryan's courtroom snaked out of the federal courthouse in Foley Square when* United States v. Powell *went to trial on March 7, 1960. Toots Shor was there, and so was Sugar Ray Robinson...*

*Williams had been leading Emanuel through a series of numbers, writing each down on a blackboard before the jury. Although Powell had paid low taxes in 1951 and 1952, his wife, pianist Hazel Scott, had run up heavy travel expenses that were deductible. Williams methodically led Emanuel through an accounting of each. When he had finished, he drew a line underneath and appeared to add up the figures. With a look of totally feigned surprise, he wrote down the answer. His questions had forced Emanuel to concede that Powell had failed to claim legal deductions worth over $7,000 — more than wiping out his $6,700 deficiency. As the jury watched, Williams had just proved that Powell had in fact overpaid his taxes.*

**On cross-examination, Williams set about demolishing Robson's main witness, IRS agent Morris Emanuel. The government's case against Powell had been sloppily prepared, and Williams used the transcript of the grand jury proceedings to catch Emanuel in a series of contradictions. Emanuel had given the wrong figure on Powell's earnings to the grand jury.**

*"You don't stand by its accuracy, Mr. Emanuel, do you?" Williams asked in a soft voice as he paced back and forth before the witness.*

*"At that time, yes, at this time, no," answered Emanuel.*

*So, said Williams, "what you told the grand jury was inaccurate?"*

*"As of today, not as of 1958," said Emanuel, shifting in his chair.*

*"Do you mean the facts themselves were different in 1958 that they are now, or that your were mistaken about the facts then?" Williams inquired, allowing a slight edge to creep into his voice . . ."*

*"No, I mean and you know the facts were the same . . ."*

*Williams cut in: "Then the grand jury did not have the benefit of a complete and accurate investigation by you. Is that right?"*

*Squirming, Emanuel replied, "You make that sound a little difficult, Mr. Williams."*

*Judge Bryan glared at Emanuel and snapped, "All right, that is a question and it deserves an answer, Mr. Emanuel. Did it or did it not?"*

*Emanuel wiped his forehead. "I received whatever information our investigation had developed up to that point."*

*Williams closed in: "And you know now, do you not, Mr. Emanuel, on April Fool's day 1960, that was not accurate information?"*

*"That is correct," admitted the witness.*

*Williams finished him off, " You were wrong, weren't you?"*

*Thoroughly defeated, Emanuel answered, "I was wrong in a lot of things at that time."*

*A murmur swept through the courtroom; Bryan had to gavel for order.*

*At the counsel's table, Powell turned to look at columnist Murray Kempton, who was sitting in the row behind him. Powell had a look of "utter amazement" on his face, Kempton recalled, "He was shocked to find he was innocent."*

*Out of the corner of his eye, Williams had been watching the clock. He knew Bryan wanted to adjourn for the weekend at noon. As the clock struck twelve, Williams ran his hand through his wavy hair and turned to walk to his seat. "I have no further questions," he declared, not even trying to conceal the triumph in his voice. As he left the courtroom, Powell joked, "They better adjourn this case. I'm making more money every day."*

*From* The Man to See*, by Evan Thomas, Published by Simon and Schuster.*

Adam Clayton Powel Surrounded by Demonstrators in Washington D.C.