

# THIRD PARTY BOOZ(E)

In Volokh Conspiracy's new digs at the WaPo, former DHS Assistant Secretary Stewart Baker pushes back on Georgetown Professor Randy Barnett's call to end the Third Party doctrine in truly remarkable terms.

Randy's solution to *that* problem is to overrule a line of Supreme Court cases (*Smith v. Maryland*) holding that no one has a reasonable expectation of privacy in information they've disclosed to a third party. With *Smith v. Maryland* set aside, the government would need a search warrant to see the metadata.

Overruling Supreme Court precedent is a law professor's prerogative, but the rest of us don't have to go along. And in fact the *Smith v. Maryland* doctrine makes sense, especially compared to Randy's solution. We all learned no later than the third grade that secrets shared with another are not really secrets. They can be revealed at times and in ways we never expected. It hurts, but it's a fact of life.

Randy's solution is a fiction; he wants the courts to deny the facts of life and pretend that we still control information we willingly gave away. [my emphasis]

"We all learned no later than the third grade," this Snowden critic says, "that secrets shared with another are not really secrets."

Such secrets "can be revealed at times and in ways we never expected," Baker warns.

"The facts of life," prove that we do not "still control information we willingly gave away."

Baker argues that the Third Party doctrine arises not as a matter of law, but as a matter of fact, the facts of life, that no entity that

shares information with another entity can claim that information is secret.

The NSA, of course, willingly gives away information all the time. Huge chunks of that data go to Booz Allen Hamilton, the contractor Snowden worked for. Equally large chunks go to GCHQ. Chunks of that data go to Lockheed and SAIC and a slew of other contractors.

According to Stewart Baker's facts of life, the NSA has no business expecting this data to remain secret. None. Believing such data is secret defies common third grade logic and the facts of life.

Now that a big defender of the NSA has made the case that the NSA, too, is subject to the Third Party doctrine, perhaps we can move forward on giving the Third Grade treatment to all of their secret programs so we can debate them like adults?