A Man's House is His Castle

A Discussion on the Fourth Amendment and National Security

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Abstract: The Fourth Amendment is designed to protect the people of the United States "against unreasonable searches and seizures."(1) However, the degree of that protection is a careful balance of the people's right and the Government's protection, especially when national security is involved.

The Fourth Amendment is designed to protect the people of the United States "against unreasonable searches and seizures." (1) However, the degree of that protection is a careful balance of the people's right and the Government's protection.

Recent global developments, specifically the terrorist attacks of September 11, 2001, and the ensuing "global war on terrorism," have caused the Government to exercise power over the Fourth Amendment. However, doing so may be unconstitutional. This poses the question: Should the right of unreasonable searches and seizures be limited to protect national security?

The author will show that despite the Court's varied interpretations over the years, national security is not a compelling enough interest to overturn the people's right granted to them in the Fourth Amendment.

Also, note that this paper will deliberately *not* deal with the exclusionary rule or the concept surrounding "fruit of the poisonous tree." This paper is strictly limited to warrants and the Fourth Amendment. Any instances of illegally performed searches and seizures fall outside the purview of this paper.

Historic Development

After the United States Constitution was ratified in 1788, a series of amendments were proposed and passed. The fourth of these amendments reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, 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 (1).

The Framers wrote the Fourth Amendment in response to both "English and American experiences of virtually unrestrained and judicially unsupervised searches" (2 p. 774) carried out by the British government. Indeed, the British government had not always had such a liberal display of search and seizure. The movement toward expanded powers began with the Tudor dynasty.

During the Tudor dynasty, which lasted from 1485 until 1603 (3), the state licensed the production of printed matter to control the "seditious and nonconformist publications [that] had become a matter of

intense state concern." (2 p. 774) In order to suppress the undesirable publications, the Worshipful Company of Stationers and Newspaper Makers (more commonly called the Stationers' Company) (4) was "instructed 'to make search wherever it shall please them in any place…within our kingdom of England…and to seize, take hold, burn…those books and things which are or shall be printed contrary to the form of any statute, act, or proclamation…'." (2 p. 774) In exchange for performing this duty, the Stationers' Company was granted a monopoly over the production of all printed material. However, the British government's search and seizure power was not done expanding.

During the reign of James II, the Townshend Acts of 1767 were passed which "placed a tax on common products imported into the American Colonies, such as lead, paper, paint, glass, and tea." (5) It was not the tax that was most problematic, but rather the fact that the Act legalized writs of assistance - generally issued and open-ended search warrants that required all parties to help in its execution (6). The writs of assistance, which only expired six months after the death of the issuing king, were issued to government officials and allowed them to search anyone or anywhere they pleased. Ergo, the desire and need for limits on search and seizures was born.

On October 26, 1774 "the Continental Congress petitioned the King…for a redress of grievances, and among those listed was the abuse of the search power: 'The officers of the customs are empowered to break open and enter houses, without the authority of any civil magistrate, founded on legal information.'" (2 p. 778) This grievance is similarly alluded to in the Declaration of Independence, "He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance." (2 p. 778) (7)

Around the same time that the Declaration of Independence was adopted, Virginia was already moving to ensure that unencumbered search and seizure powers would never be brought forth again. Article X of Virginia's Declaration of Rights:

> That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted (8).

Virginia's Article was the first "provision in any American constitution" that sought to limit the power of searches and seizures (9 p. 162). However, unscrupulous officials could easily take advantage of several

gaping holes in Virginia's Article, primarily, the clause that states warrants "ought not to be granted" but does not outright prohibit them (9 p. 161). In short, Virginia's search and seizure Article is merely a suggestion.

Virginia diligently campaigned for inclusion of a similar article in the United States Constitution; however, Virginia eventually ratified the United States Constitution without such an article and instead pushed to have an even broader provision included in the Bill of Rights (2 p. 778).

Interpretation of the Fourth Amendment

The Fourth Amendment has been in place for over 200 years. In that time, America and the world have changed drastically. Nations have literally come and gone within that time, and yet the United States Constitution and Bill of Rights have remained steadfast. There does, however, remain a question of how one should interpret the text of Fourth Amendment.

With the advent of electricity, telegraphs, telephones, radio communication, and the Internet, the question of what the Framers of the Fourth Amendment intended is more important now than it ever has been before.

Broken into sections, the Fourth Amendment seems straightforward in its meaning: People within America have the right not to be unreasonably searched themselves or in their place of residence. People within America also have the right not to have papers and other items seized unreasonably. These rights shall not be violated unless someone under oath (or affirmation) declares that there is probable cause that describes the places to be searched and/or the persons or items to be seized. Only then shall a warrant be issued for only the above-mentioned places described to be searched and/or the persons or items to be seized.

However, there remains much to interpret. Thomas Davis, an Associate Professor at the University of Tennessee College of Law, explains that "evidence indicates that the Framers understood 'unreasonable searches and seizures' simply as a pejorative label for the inherent illegality of any searches or seizures that might be made under general warrant…thus, they never anticipated that 'unreasonable' might be read as a standard for warrantless intrusions." (10 p. 551)

The idea that the Framers never considered there might be 'reasonable' searches and seizures is shown by the fact that the "ex officio authority of the peace officer [was] still meager in 1789. Warrant

authority was the potent source of arrest and search authority. As a result, the Framers expected that warrants would be used. Thus they believed that the only threat to the right to be secure came from the possibility that too-loose warrants might be used."(10 p. 552)

Based on Davis' research, it then becomes entirely reasonable to assume that the Framers intended warrants to be used significantly more liberally than warrants are used currently. Thus, the only reason warrants are not used as liberally would be due to the expansion of the ex officio authority of peace officers to search and arrest, which is exactly what happened during the 19th century (10 p. 552).

Throughout the 20th century, the Supreme Court often had to clarify ambiguous parts of the Fourth Amendment. In *Olmstead* v. *United States*, 27 U.S. 438 (1928), the defendant argued "that the wiretapping of 'private telephone conversations between the defendant and others…amounted to a violation of the Fourth Amendment.'"(2 p. 781) In a five-to-four ruling, the Court held that the defendants Fourth Amendment rights were not violated because the Court could not "justify the enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."(11) Moreover, the majority wrote that "[t]he reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that *the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment.*"(11)(Emphasis added)

The Court interpreted the Fourth Amendment literally and since the telephone was not listed in the Amendment, it was not covered. The dissent countered that a "sealed letter entrusted to the mail is protected by the Amendments. The mail is a public service furnished by the Government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message."(11)

While the *Olmstead* decision was a blow to the right to be secure, *Katz* v. *United States*, 389 U.S. 347 (1967), overturned *Olmstead* and established a wider scope of protection given by the Fourth Amendment. The Court wrote, "For 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."(12) The Court also took time to correct the thinking in the *Olmstead* case, writing, "[the] Amendment was thought to limit only searches and seizures of tangible property. But

'[t]he premise that property interests control the right of the Government to search and seizure has been discredited.'" (12)

The major development from *Katz* was the implementation of the "*Katz* test – whether the individual has an expectation of privacy that society is prepared to recognize as reasonable." (13)

Kyllo v. *United States*, 533 U.S. 27 (2001), furthered the protection offered by the Fourth Amendment and affirmed the decision set forth by the *Katz* decision. However, *Kyllo* is not as straight forward as *Katz*. In *Kyllo*, an Agent of the United States Department of the Interior performed a thermal imaging scan of the petitioner's home from the passenger seat of the Agent's car and from the street behind the petitioner's home. Performing the scan allowed the agent to "[conclude that the] petitioner was using halide lights to grow marijuana in his house." (13)

The Court had already ruled that "[visual] surveillance [is] unquestionably lawful because "'the eye cannot by the laws of England be guilty of trespass.'" *Boyd* v. *United States,* 116 U.S. 616, 628 (1886) (quoting *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765))." (13) Thus, one might think there is little thought required to assume that the passive surveillance conducted by the Department of the Interior Agent is "unquestionably lawful." The Agent simply shifted the frequencies of the emitted energy rays into ones that could be perceived by humans. However, the Court took a more philosophical approach.

Referring back to the *Katz* decision, the Court writes, "We held that the Fourth Amendment nonetheless protected *Katz* from the warrantless eavesdropping because he 'justifiably relied' upon the privacy of the phone booth. *Id.,* at 353. As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the Government violates a subjective expectation of privacy that society recognizes as reasonable." (13)

When the *Katz* test is applied, is becomes apparent that *Kyllo*'s right to privacy as provided by the Fourth Amendment was, in fact, violated.

The Court concluded in its opinion:

> While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take

> the long view, from the original meaning of the Fourth Amendment forward.
>
> "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll* v. *United States,* 267 U.S. 132, 149 (1925).
>
> Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant (13).

Statement of Question

Thus, the stage is set. In light of recent global developments, specifically the terrorist attacks of September 11, 2001, and the ensuing "global war on terrorism," should the right of unreasonable searches and seizures be limited to protect national security?

Arguments Favoring Fourth Amendment Limitations

Like most issues that deal with constitutional law, there is a battle between the rights of the people and power of the Government. Under very rare and certain circumstances, there is compelling state interest to limit the scope of constitutional protection.

This limitation of constitutional protection is easiest seen in the First Amendment and free speech. In the decision for *Schenck* v. *United States*, 249 U.S. 47 (1919), Justice Holmes wrote in the opinion of the Court:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.
>
> …

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the United States Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right (14).

Justice Holmes made it clear that even within a right as simple as freedom of speech, there is a line that the people cannot cross and still expect constitutional protection. Justice Holmes also noted that the line is subject to move during a time of war.

The *Schenck* decision sets a precedent that can easily be applied to the Fourth Amendment. While not engaged in a traditional war that consists of nation-on-nation fighting, the United States is engaged in a war with persons, both domestic and foreign, who are attempting to cause undue harm to America and its inhabitants. It would be a dereliction of duty for the United States not to perform its due diligence in attempting to thwart such attacks in the interest of National Security.

In *United States* v. *Verdugo-Urquidez,* 494 U.S. 259 (1990), the Court held six-to-three that "[t]he Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country." (15) This decision, in part, laid the groundwork for a memo written by John C. Yoo, Deputy Assistant Attorney General of the U.S. Department of Justice.

On March 14, 2003, Yoo wrote a memorandum for Wiliam J. Haynes II, General Counsel of the Department of Defense. Yoo wrote, "Indeed, drawing in part on the reasoning of *Verdugo-Urquidez*, as well as the Supreme Court's treatment of the destruction of property for the purposes of military necessity, our Office recently concluded **that the Fourth Amendment had no application to *domestic* military operations**." (16 p. 8)(Emphasis added)

As such, there appeared to be a compelling state interest to limit the scope of the Fourth Amendment to protect the people of America. By limiting the Fourth Amendment and restoring writs of assistance, the Government is in a better position to more effectively prevent terrorism on home soil. For example, being able to more thoroughly conduct taps of telephones lines could lead to the arrest of suspects trying to cause harm.

Arguments Against Fourth Amendment Limitations

The necessities for Fourth Amendment protection extend over half a millennia. History has shown repeatedly that when presented with the chance, government cannot and should not be trusted with voluntarily protecting the best interests of its people. Originally, the Fourth Amendment was designed to offer protection against the search of physical property in the name of collecting taxes. At the time, abusive use of writs of assistance helped propel a call to arms that ended with the birth of a new nation. America was formed because "[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations." (7)

However, with the advent of the Internet and other forms of non-tangible communication, it seems as if history is doomed to repeat itself. While the Framers designed the Fourth Amendment with a particular set of circumstances in mind, it should not be construed that this was the sole objective of the Amendment.

Like all Amendments, the intent of the Fourth Amendment was to limit the Government in all its forms - executive, judiciary, legislative, and, by extension, militarily as well, from causing intrusion into the lives of the people.

In the battle between the right of the people and the power of the Government, the Court has often shown that it favors the right of the people.

The "clear and present danger" test used in *Schenck* and referenced as cause to expand government powers in the previous argument was later overturned in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). In its opinion, the Court wrote, "Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (17)

This narrower limit on government power restored rights to the people and forced the Government to provide critical evidence to support its claims before it can suppress the rights of the Amendment.

In *United States* v. *U.S. District Court*, 407 U.S. 297 (1972), the Court ruled on the case involving a warrantless wiretap used for the purpose of "'gather[ing] intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government.'" (18) The United States argued that "wiretaps involving domestic security should be exempt from the warrant requirement of the Fourth Amendment because of the secrecy necessary

for successful intelligence gathering, the importance of domestic security, and the complexity and continuous nature of intelligence gathering." (2 p. 805) This case, which was argued in 1972, is similar in scope to what the United States Government is currently attempting to do in the name of National Security. In *United States* v. *U.S. District Court,* the Court held eight-to-zero (Justice Rehnquist did not take part in the consideration or decision of the case) that a warrant was needed for a wiretap, writing:

> But we do not think a case has been made for the requested departure from Fourth Amendment standards. The circumstances described do not justify complete exemption of domestic security surveillance from prior judicial scrutiny. Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech. Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent. We recognize, as we have before, the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment (18).

To see the Court vote unanimously on such the issue should only reaffirm the need to be ever vigilant in protecting the freedoms the Fourth Amendment offers.

Recently, the United States Justice Department rescinded its belief that “the Fourth Amendment had no application to domestic military operations.” (16 p. 8) In response to the Yoo memo, Justice Department spokesman Brian Roehrkasse said, "We disagree with the proposition that the Fourth Amendment has no application to domestic military operations. Whether a particular search or seizure is reasonable under the Fourth Amendment requires consideration of the particular context and circumstances of the search (19)."

Summary

It is the recommendation of this author that rights established in the Fourth Amendment be interpreted broadly. While this author recognizes the need for National Security, this author also realizes the dangers of ceding one's rights to government power.

It seems clear to this author that while the main intent of the Framers was to prevent government from performing abusive searches and seizure of a person's home and belongs in the name of tax collection, the Framers also intended the Fourth Amendment to prevent all forms of search and seizure, reasonable or not, without a proper warrant.

The warrant system is one of the many checks and balances employed by this great nation to ensure that no one person or organization has all the power. To allow the Government to suspend or eliminate the parts of the Fourth Amendment at will is no different from reinstating general warrants or writs of assistance.

To allow the United States to realize a time of general warrants or writs of assistance would be catastrophic and could lead to civil unrest.

In 1763, during a debate over a cider tax and its enforcement requirements that would have allowed a liberal search provision, William Pitt remarked, "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter; all his force dares not cross the threshold of the ruined tenement!" (2 p. 775)

The King is not above the law.

The President is not above the law.

The Constitution shall protect us.

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