



Fourth Amendment – Search and Seizure Common Interpretation

Barry Friedman and Orin Kerr

Imagine you're driving a car, and a police officer spots you and pulls you over for speeding. He orders you out of the car. Maybe he wants to place you under arrest. Or maybe he wants to search your car for evidence of a crime. Can the officer do that?

The Fourth Amendment is the part of the Constitution that gives the answer. According to the Fourth Amendment, the people have a right "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." This right limits the power of the police to seize and search people, their property, and their homes.

The Fourth Amendment has been debated frequently during the last several years, as police and intelligence agencies in the United States have engaged in a number of controversial activities. The federal government has conducted bulk collection of Americans' telephone and Internet connections as part of the War on Terror. Many municipal police forces have engaged in aggressive use of "stop and frisk." There have been a number of highly-publicized police-citizen encounters in which the police ended up shooting a civilian. There is also concern about the use of aerial surveillance, whether by piloted aircraft or drones.

The application of the Fourth Amendment to all these activities would have surprised those who drafted it, and not only because they could not imagine the modern technologies like the Internet and drones. They also were not familiar with organized police forces like we have today. Policing in the eighteenth and early nineteenth centuries was a responsibility of the citizenry, which participated in "night watches." Other than that, there was only a loose collection of sheriffs and constables,

who lacked the tools to maintain order as the police do today.

The primary concerns of the generation that ratified the Fourth Amendment were “general warrants” and “writs of assistance.” Famous incidents on both sides of the Atlantic gave rise to placing the Fourth Amendment in the Constitution. In Britain, the Crown employed “general warrants” to go after political enemies, leading to the famous decisions in *Wilkes v. Wood* (1763) and *Entick v. Carrington* (1765). General warrants allowed the Crown’s messengers to search without any cause to believe someone had committed an offense. In those cases the judges decided that such warrants violated English common law. In the colonies the Crown used the writs of assistance—like general warrants, but often unbounded by time restraints—to search for goods on which taxes had not been paid. James Otis challenged the writs in a Boston court; though he lost, some such as John Adams attribute this legal battle as the spark that led to the Revolution. Both controversies led to the famous notion that a person’s home is their castle, not easily invaded by the government.

Today the Fourth Amendment is understood as placing restraints on the government any time it detains (seizes) or searches a person or property. The Fourth Amendment also provides that “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.” The idea is that to avoid the evils of general warrants, each search or seizure should be cleared in advance by a judge, and that to get a warrant the government must show “probable cause”—a certain level of suspicion of criminal activity—to justify the search or seizure.

To the extent that a warrant is required in theory before police can search, there are so many exceptions that in practice warrants rarely are obtained. Police can search automobiles without warrants, they can detain people on the street without them, and they can always search or seize in an emergency without going to a judge.

The way that the Fourth Amendment most commonly is put into practice is in criminal proceedings. The Supreme

Court decided in the mid-twentieth century that if the police seize evidence as part of an illegal search, the evidence cannot be admitted into court. This is called the “exclusionary rule.” It is controversial because in most cases evidence is being tossed out even though it shows the person is guilty and, as a result of the police conduct, they might avoid conviction. “The criminal is to go free because the constable has blundered,” declared Benjamin Cardozo (a famous judge and ultimately Supreme Court justice). But, responded another Supreme Court justice, Louis Brandeis, “If the government becomes the lawbreaker, it breeds contempt for the law.”

One of the difficult questions today is what constitutes a “search”? If the police standing in Times Square in New York watched a person planting a bomb in plain daylight, we would not think they needed a warrant or any cause. But what about installing closed circuit TV cameras on poles, or flying drones over backyards, or gathering evidence that you have given to a third party such as an Internet provider or a banker?

Another hard question is when a search is acceptable when the government has no suspicion that a person has done something wrong. Lest the answer seem to be “never,” think of airport security. Surely it is okay for the government to screen people getting on airplanes, yet the idea is as much to deter people from bringing weapons as it is to catch them—there is no “cause,” probable or otherwise, to think anyone has done anything wrong. This is the same sort of issue with bulk data collection, and possibly with gathering biometric information.

What should be clear by now is that advancing technology and the many threats that face society add up to a brew in which the Fourth Amendment will continue to play a central role.

INTERACTIVE

CONSTITUTION

Fourth Amendment – Search and Seizure Matters of Debate

“What the Fourth Amendment Fundamentally Requires”

Barry Friedman, Jacob D. Fuchsberg Professor of Law and Affiliated Professor of Politics at New York University; Director of the Policing Project at NYU’s School of Law

In the Supreme Court’s decisions interpreting the Fourth Amendment, there are a lot of cross-cutting arguments.

For example, sometimes the Justices say that there is a strong preference for government agents to obtain warrants, and that searches without warrants are presumptively invalid. At other times they say warrants are unnecessary, and the only requirement is that searches be “reasonable.” At times the Justices say probable cause is required to support a search; at others they say probable cause is not an “irreducible minimum.”

This is your Fourth Amendment. It describes “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.” It is important for each American to focus on some basics and decide—separate and apart from what the Justices say—what this vital amendment means.

People say that the Fourth Amendment protects privacy, but that trivializes it. In this world you give up a lot of privacy, whether you wish to or not. Internet cookies, or data stored in web browsers, are just one example. But the Internet companies are not going to come take you away. The government might. What the Fourth Amendment protects is the right of the people to be secure. The Fourth Amendment is the means of keeping the government out of our lives and our property unless it has good justification.

In evaluating how the Fourth Amendment should be interpreted, it is essential to bear in mind the vast changes in policing since the time it was ratified. Whereas policing once was reactive, tasked with

identifying and catching criminals, today it has become proactive and is based in deterrence. Before, policing was mostly based on “suspicion,” it was aimed at people for whom there was cause to believe they had violated or were about to violate the law. Today, policing is aimed at all of us—from red light cameras to bulk data collection by intelligence agencies to airport security.

There are some basic principles that should govern searches and seizures.

First, no member of the Executive branch should be permitted to intervene in our lives without the say-so of at least one other branch. This is fundamental, and all the more important when that Executive actor engages in surveillance of the citizenry and can use force and coercion against them.

Second, a central purpose of the Fourth Amendment is preventing arbitrary or unjustified intrusions into the lives and property of citizens.

In light of these basic principles, certain interpretations of the Fourth Amendment follow:

No search or seizure is “reasonable” if it is not based on either legislative authorization or pursuant to rules that have some form of democratic say in their making. The police can write rules—all other agencies of executive government do—but absent a critical need for secrecy those rules should be public and responsive to public wishes.

Second, warrants are to be preferred. Policing agencies are mission-oriented. We want them to be—they have a vital role protecting public safety. But because they are mission-oriented, warrants should be obtained in advance of searching whenever possible so that a neutral judge can assess the need to intrude on people’s lives.

Third, we should distinguish between searches aimed at suspects and those aimed at society in general. When there is a particular suspect, the protections of a warrant and probable cause apply. But those protections make no sense when we are all the target of policing. In the latter instance the most important protection is that policing not discriminate among us. For example, at airport

security all must be screened the same unless and until there is suspicion—“cause”— to single someone out.

Finally, often today’s policing singles out a particular group. Examples include profiling (based on race, religion, or something else) or subjecting only workers in some agencies to drug tests. When policing is group-based, the proper clause of the Constitution to govern is the Equal Protection Clause. When discriminatory searching or seizing occurs, the government should have to prove two things: that the group it is selecting for unfavorable treatment truly is more likely to contain people worthy of the government’s attention, and that the incidence of problematic behavior is sufficiently great in that group to justify burdening everyone. Otherwise, the government should go back to either searching individuals based on suspicion, or search us all.

INTERACTIVE

CONSTITUTION

Fourth Amendment – Search and Seizure Matters of Debate

“The Future of the Fourth Amendment”

Orin Kerr, Fred C. Stevenson Research Professor of Law, George Washington University Law School

The biggest challenge ahead for the Fourth Amendment is how it should apply to computers and the Internet.

The Fourth Amendment was written over two hundred years ago. But today’s crimes often involve computers and the Internet, requiring the police to collect digital evidence and analyze it to solve crimes.

The major question is, how much power should the police have to collect this data? What is an unreasonable search and seizure on the Internet?

Consider the example of a Facebook account. If you log in to Facebook, your use of the account sends a tremendous amount of information to Facebook. Facebook keeps records of everything. What you post, what messages you send, what pictures you “like,” even what pages you view. Facebook gets it all, and it keeps records of everything you do.

Now imagine that the police come to Facebook and want records of a particular user. The police think the suspect used Facebook to commit the crime or shared evidence of the crime using the site. Maybe the suspect was cyberstalking and harassing a victim on Facebook. Or maybe the suspect is a drug dealer who was exchanging messages with another drug dealer planning a future crime. Or perhaps the suspect committed a burglary, and he posted pictures of the burglary for all of his Facebook friends to see.

Here's the hard question: What limits does the Fourth Amendment impose on the government getting access to the account records? For example, is it a Fourth Amendment "search" or "seizure" for the government to get what a person posted on his Facebook wall for all of his friends to see? Is it a search or seizure to get the messages that the suspect sent? How about records of what page the suspect viewed? And if it is a search or seizure, how much can the government seize with a warrant? Can the government get access to all of the account records? Only some of the account records? The courts have only begun to answer these questions, and it will be up to future courts to figure out what the Fourth Amendment requires. As more people spend much of their lives online, the stakes of answering these questions correctly becomes higher and higher.

In my view, courts should try to answer these questions by translating the traditional protections of the Fourth Amendment from the physical world to the networked world. In the physical world, the Fourth Amendment strikes a balance. The government is free to do many things without constitutional oversight. The police can watch people in the public street or watch a suspect in a public place. They can follow a car as it drives down the street. On the other hand, the police need cause to stop people, and they need a warrant to enter private places like private homes.

The goal for interpreting the Fourth Amendment should be to strike that same balance in the online setting. Just like in the physical world, the police should be able to collect some evidence without restriction to ensure that they can investigate crimes. And just like in the physical world, there should be limits on what the government can do to ensure that the police do not infringe upon important civil liberties.

A second important area is the future of the exclusionary rule, the rule that evidence

unconstitutionally obtained cannot be used in court. The history of the exclusionary rule is a history of change. In the 1960s and 1970s, the Supreme Court dramatically expanded the exclusionary rule. Since the 1980s, however, the Supreme Court has cut back on when the exclusionary rule applies.

The major disagreement is over whether and how the exclusionary rule should apply when the police violate the Fourth Amendment, but do so in “good faith,” such as when the law is unclear or the violation is only technical. In the last decade, a majority of the Justices have expanded the “good faith exception” to the exclusionary rule. A central question is whether the good faith exception will continue to expand, and if so, how far.