

THE FOURTH AMENDMENT

By 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.