

Speaking Out: Unreasonable search and seizure

By Christopher Slobogin

One purpose of National Constitution Day is to remind ourselves of how lucky we are to have a Constitution that has stood the test of time. This brief document—at 200-plus years one of the oldest of its kind—set down bedrock principles that have promoted democracy and freedom and helped ensure a stable government despite huge societal and economic change. The U.S. Constitution is truly a remarkable feat.

Among the most important provisions in the Constitution is the Fourth Amendment. Part of the “Bill of Rights,” the first ten amendments to the Constitution that were ratified along with the body of the Constitution, the Fourth Amendment states that the people of the United States shall be “secure in their persons, houses, papers and effects, against unreasonable searches and seizures,” and that search warrants must be based on “Oath or affirmation” and “probable cause.” For two centuries, the courts have construed this language to mean that, outside of emergency situations, police who want to conduct a search must usually convince a judge that their investigative action is likely to produce evidence of wrongdoing.

Although the Amendment is only one of many rights guaranteed in the Bill of Rights, it is a fundamental predicate for most of them. As Monrad Paulsen stated, “The basic ... problem of a free society is the problem of controlling the public monopoly of force. All the other freedoms, freedom of speech, of assembly, of religion, of political action, presuppose that arbitrary and capricious police action has been restrained. Security in one's home and person is the fundamental right without which there can be no liberty.”

Unfortunately, in the past three decades the U.S. Supreme Court has vastly reduced that security through a series of rulings interpreting the word “search” for Fourth Amendment purposes. In 1976, it held that the government does not engage in a “search” when it subpoenas a person's bank records and looks through them for evidence of wrongdoing. In 1979, it held the same with respect to phone records. In 1983, the Court concluded that no search occurs when police use a tracking device to follow a car for more than an hour. And in 2001, it indicated that even looking inside a house with binoculars or other gadgets that are “in general public use” is not a search if the observation takes place from a lawful vantage point.

The justification for these rulings is that we “assume the risk” of exposure in all of these situations, and therefore cannot reasonably expect privacy from government intrusion in any of them. When we “voluntarily” allow banks and phone companies to accumulate information about us, we assume the risk these institutions will hand the information over to the government. When we take to the public roads or leave our windows uncurtained we assume the risk government agents will take advantage of our failure to cover our tracks or adequately seclude ourselves.

Note that if the Court had held to the contrary in these cases, the Fourth Amendment would not have prevented police from accessing records, tracking our public movements or spying on us inside our homes. It would have merely required that the police act “reasonably” in these situations, which sometimes might require seeking a warrant based on probable cause (perhaps in the case of home surveillance and obtaining bank records) and at other times might simply require a demonstration of some level of suspicion (in the case of public tracking).

The full implications of the Supreme Court’s eagerness to narrow the scope of the Fourth Amendment’s protection have become clear in recent years, in the course of the “war on terror.” Operating without judicial supervision (and often, if the Department of Justice’s own investigation is to be believed, even in the absence of oversight from anyone in the executive branch), FBI field agents have used “National Security Letters” to obtain the financial records of between 30,000 and 50,000 individuals every year since 2001. Various government agencies, including the FBI, the Department of Defense and the Department of Homeland Security, have developed over 120 data mining programs that use computerized “searches” (in every sense but the Fourth Amendment’s) of personal records that might provide leads to terrorists or ordinary criminals. Although the most famous such program—initially dubbed “Total Information Awareness”—was shut down by Congress in 2003, several other programs have arisen Hydra-like in its stead, including something called ADVISE, which according to one report is designed “to troll a vast sea of information, including audio and visual, and extract suspicious people, places and other elements based on their links and behavioral patterns.”

Of the same ilk was the National Security Administration’s well-publicized effort to analyze hundreds of thousands and perhaps millions of American’s phone records, apparently in the hope it would detect suspicious “calling profiles.” And on a different front, millions of dollars have been spent in cities like Washington, D.C. and Chicago on sophisticated public camera systems, with zoom capacity and night vision, that allow operators to technologically stalk pedestrians and car drivers. Many of these cameras have the capacity to see inside homes, although operators are not supposed to use them for that purpose.

According to the Supreme Court, none of this implicates the Fourth Amendment, not even looking into homes with zoom cameras (which after all are generally available to the public). That means that the government not only does not need a warrant to carry these searches out, but that it can accumulate information on anyone it wants with no justification whatever as far as the Constitution is concerned.

“So what?” some might respond. “I have nothing to hide. And even if I did, catching terrorists and other bad guys is certainly more important than preventing a few dozen bureaucrats from discovering the content of my financial records or websites I visit, the identity of people I phone and email, and where I go on my lunch break.”

Unfortunately, the capacity of surveillance to nab the really bad guys is not proven. According to the New York Times, the NSA program produced zero terrorism-

related leads, and according to the Washington Post, Washington, D.C.'s multi-million dollar camera system had not produced a single arrest for a violent crime as of April, 2006. If there is a needle in these haystacks, it is a very small one.

In the meantime, surveillance techniques have allowed the government to keep tabs on other, relatively innocuous activities of Americans. Bank records detail one's finances (including tax irregularities), Internet accounts can reveal a penchant for viewing particular sites (including sexually explicit ones), and cameras can record all of our visits to out-of-the-ordinary places (including drug alleys, psychiatrists' offices, and lovers' apartments). All of this might be publically disclosed to the individual's disadvantage, sometimes in the form of an indictment under the ever-expanding and increasingly vague criminal codes, sometimes accidentally or as the result of bad data security, and sometimes as a way of embarrassing a person or organization the government doesn't like, something government has been doing with surveillance results at least since J. Edgar Hoover's vendetta against Martin Luther King.

To repeat Professor Paulsen's comment quoted above: "Security in one's home and person is the fundamental right without which there can be no liberty." On this Constitution Day, 2007, the Fourth Amendment should stand for more than it does.

Editor's Note: An abridged version of this op-ed was originally published in *The Gainesville Sun* on Sept. 16, 2007.

Christopher Slobogin occupies the Stephen C. O'Connell chair at the University of Florida Fredric G. Levin College of Law. His book, *Privacy at Risk: The New Government Surveillance and the Fourth Amendment*, will soon be published by the University of Chicago Press. To commemorate Constitution Day on Wednesday, Sept. 19, Slobogin will speak, from noon to 1 p.m., in the law school's Chesterfield Smith Ceremonial Classroom (Holland Hall, room 180) on "The Constitution and Surveillance by the Government."