Are Technological Advances Impeding our Fourth Amendment Rights?

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"A legal system is simply a mature and sophisticated attempt, never perfected, to institutionalize a sense of justice and to free man from the terror and unpredictability of arbitrary force."

—Earl Warren, Chief Justice of the US Supreme Court

"[T]he problem is simply the fact that the law moves slowly, while technology does not."

—Jay Stanley, Analyst at the American Civil Liberties Union

While the right to privacy is not concretely established in the Constitution, the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" is (Dershowitz 32). The problem, however, is that there are technological advancements and inventions that were never anticipated by the Framers of the Constitution—Global Positioning Systems, cell phones, and email. These are just a few of the technological advances, invented centuries after the penning of the United States Constitution, which have allowed the criminal justice system to circumnavigate our Fourth Amendment rights. The Fourth Amendment, specifically in regards to the privacy and security in one's home, should be fervently protected against the ever-slowing responsivity of the United States Supreme Court. Due to these unforeseen technological advances, the current judicial jurisprudence of the Fourth Amendment is in stark contrast with the original Founding Fathers' ideology in regards to protection of privacy, especially in one's own home.

> "…The excise-officers have power to enter your houses at all times, by night or day, and if you refuse them entrance, they can, under pretense of searching for exciseable goods, that the duty has not been paid on, break open your doors, chests, trunks, desks, boxes, and rummage your houses from bottom to top…" (Cogan 241).

This excerpt, taken from the *Maryland Journal*, is the typical castigatory retelling of behavior that the English, using their general warrants, displayed while in control of the American colonies. The laws that influenced searches in one's home during pre-Revolutionary War times, like many American laws, trace its roots back to English common law. The original idea, that a man should have a certain amount of privacy and security in his own home, was established in 1604, by Sir Edward Coke. It was in *Semayne's Case* that Coke said, "The house of an Englishman is to him as his castle." The *Semayne's Case* would establish precedent that the government—or in this case

the King—could still come in your house; however, "he ought to signify the cause of his coming, and to make request to open doors…" (Samaha 181).

The Fourth Amendment, no different than any other amendment in the Bill of Rights, was built on case law from both the English and American legal system. The most important of these case laws focused on general warrants. The two cases that laid the foundation in English case law were *Wilkes v. Wood (1763) and Entick v. Carrington (1765)* (Cogan 253,257). In both of these cases general warrants had been issued by the King; in both cases, those fulfilling the wishes of the King broke into the defendants' homes, leaving them in ruins. It was in *Wilkes v. Woods* where the action of carrying out a general warrants was likened to and described as "worse than the Spanish Inquisition" (Cogan 253).

In the American colonies, the general warrants, issued by King George II, led to an unregulated police state which abused its powers and infuriated the masses. The worst of these general warrants were known as 'writs of assistance.' Writs of assistance allowed British officials, themselves or by proxy, to search all the homes in a neighborhood in hopes of finding smuggled goods. They were called writs of assistance because the colonial magistrates could enlist local peace officers and residents to "assist" in the search for smuggled and untaxed items. The law upholding writs of assistance stated that they were valid until the death of the issuing King. Upon the death of the King, in this case King George II, the writs automatically expired within six months' time. If the writs of assistance were not renewed by the new King, they would be null and void. In hopes of preventing the renewal of the writs of assistance, James Otis, representing the colonist in what is now known as *Paxton's Case*, spoke out against the general warrants (Cogan 250). Otis

described the writs as “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book.”

James Otis was unsuccessful in preventing the issuing of new writs of assistance; however, John Adams, America’s second president and a Founding Father, believed that “American independence was then and there born” (Harris 159). Otis’ stand against general warrants led to all states establishing laws against unauthorized searches and seizures. In 1776, Virginia completed the Virginia Declaration of Rights, which included the prohibition of general warrants. The following, taken from the Virginia Declaration of Rights, would become the first American precedent for the Fourth Amendment:

> “That general warrants, whereby an 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” (Cogan 235).

In 1780, the Massachusetts Constitution included its own version prohibiting general warrants; however, the language of its requirements for a reasonable search and seizure supported the individuals’ protection against the abusive powers of the authorities carrying out said searches.

> “Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws” (Cogan 234).

The wordage and the principle that the importance of the individuals’ protection supersedes that of the police, contained in the Massachusetts Constitution, would be what James

Madison used when he wrote the Fourth Amendment. The fact that Madison chose the wording of the Massachusetts Constitution, over that of the Virginia Declaration of Rights, is "clear proof that Congress meant to give wide, and not limited, scope to this protection against police intrusion" (Harris 158).

In 1886, in *Boyd v. United States,* the Court limited the scope of the search of one's personal papers inside one's home. In 1914, in *Weeks v. United States* the Exclusionary Rule was born. Both *Weeks* and *United States v. Lefkowitz (1932*) established that items found during illegal searches and seizures were inadmissible in court (Hirschel 7). As early Supreme Court cases worked to protect the rights of the individual, especially in regards to the Fourth Amendment, it would not be long until those rights were slowly chiseled away. Cases such as *Hale v. Henkel (1906), Marron v. United States (1927), Shapiro v. United States (1948), Schmerber v. California (1966), and Warden Maryland Penitentiary v. Hayden (1967)* all stripped away the protections which were originally guaranteed in the Fourth Amendment. However, the case most damning to the structure of the Fourth Amendment was *Harris v. United States (1947)*.

In *Harris v. United States*, an arrest warrant had been issued for George Harris. As part of his arrest, the FBI carried out a five-hour search of his home. As part of this search they found a sealed folder marked "George Harris, personal papers" (Harris 185). Inside this envelope was another sealed envelope with evidence in it that would implement Harris in another crime. In *Harris v. United States* the Court upheld the admissibility of evidence of one crime, which was found by officers during a proper, but warrantless search, for evidence of another unrelated crime. In Justice Felix Frankfurters' dissent he describes the following problematic scenario:

"The protection of the Fourth Amendment extends to improper searches and seizures, quite apart from the legality of an entry…It would hardly be suggested that such a search could be made without warrant if Harris had been arrested on the street. How, then, is rummaging a man's closets and drawers more incidental to the arrest because the police chose to arrest him at home?…To find authority for ransacking a home merely from authority for the arrest of a person is to give a novel and ominous rendering to a momentous chapter in the history of Anglo-American freedom. Authority to arrest does not dispense with the requirement of authority to search" (Harris 190).

Justice Frankfurter claims that the Court now "permits rummaging throughout a house without a search warrant on the ostensible ground of looking for the instruments of a crime for which an arrest, but only an arrest, has been authorized" (Harris 156). Moreover, the Court's decision "achieves the novel and startling result of making the scope of a search without warrant broader than an authorized search" (Harris 165). It would not be until *Maryland v. Buie (1990)* that the Court would change their position and enforce a properly limited sweep in conjunction with an in-home arrest.

As mentioned at the beginning, there are problematic decisions that have arisen due to technological advances. This is contributed to the fact that the justice system moved slowly, whereas technology changes rapidly. Jay Stanley, a Senior Policy Analyst of the American Civil Liberties Union, states that "in the time it takes a case to go from initial complaint to Supreme Court ruling, entire sectors of the tech industry can rise and fall" (Stanley 1). If one is familiar with the fact that the 'gears of justice move slowly' and that Moore's law has proven that technology will continue to become faster, there is an obvious magnetic repelling force that continues to push the justice system and technology further and further apart.

The first case that would show the aforementioned separation between the justice system and technology was *Olmstead v. United States (1928)*. In this case, the Court upheld that wiretaps were not protected by the Fourth Amendment. Chief Justice William H. Taft concluded that "The

amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants" (Olmstead 463). The Court's 5-4 decision was hardly unanimous and Justice Louis Brandeis wrote a dissenting opinion that would speak volumes against the injustice of wiretapping and its direct violation of the Fourth Amendment.

"When the Fourth and Fifth Amendment were adopted, 'the form that evil had theretofore taken,' had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination…It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of 'the sanctities of a man's home and the privacies of life' was provided in the Fourth and Fifth Amendments by specific language. . . . But 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet…The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home" (Olmstead 438).

Justice Brandeis believed that wiretapping was wrong because there was "no difference between the sealed letter and the private telephone message" (Olmstead 475). Brandeis quoted Judge Frank H. Rudkin, Justice of the Ninth Circuit Court, explaining that "True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed, but these are distinctions without a difference" (Olmstead 475). Justice Brandeis referred to wiretapping as an "evil incident to invasion" and remarked on how "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping" (Olmstead 476). This Supreme Court Justices' great dissent would be the foreshadowing of a century of injustices and Fourth Amendment violations to come.

Forty years. That is length of time between justice and technology. It would be almost forty years before the judicial system would overturn *Olmstead v. United States* (Stanley 1). In 1967, *Katz v. United States* rectified the Court's earlier decision to allow wiretapping. It established a ruling that the individuals' protection from unreasonable searches and seizures, based on one's "reasonable expectation of privacy." However, it has been shown that a "reasonable expectation of privacy" is not definitive and changes with the majority, leaving the minorities' rights unprotected.

There is another form of verbal communication that has been left unprotected by the Supreme Court. In *United States v. White (1971)*, the Court decided that conversations recorded by someone wearing a wire, even in one's own home, are not protected by the Fourth Amendment. The reasoning behind this decision was that the law "gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations" (White 752). This sharing of information, left unprotected by the Fourth Amendment, would lead to what is known as the "third party doctrine." The third party doctrine is fully explained in *United States v. Miller (1976)*:

> "[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed" (Kerr 563).

In *United States v. Miller*, the Court, using the logic from *United States v. White*, upheld that conversations and information shared with banks were not private papers and that there was no legitimate "expectation of privacy" (Urofsky 1020). Therefore, bank records are not protected under the Fourth Amendment (Zarr 24). In *Smith v. Maryland (1979)*, the Court held that one's phone conversation was private; however, the numbers dialed into the phone are not. Because a

person relays numbers to the phone company to place the phone calls, the "petitioner voluntarily conveyed numerical information to the telephone company" (Smith 736). By doing so a person making a phone call cannot have a “reasonable expectation of privacy” of the numbers dialed.

The Framers and Founding Fathers kept their own financial records, medical records, and correspondences in their homes (Stanley 6). When these men wrote and ratified the Constitution, they never could have foreseen that all of our personal information would be entrusted to computer servers and third-party middlemen. In Justice William J. Brennan’s dissent in *United States v. Miller*, he stated that new technology and its ability to invade privacy is “equally devastating” as the original “violent searches and invasions” of one’s home (Stanley 14). Along with Justice Brandeis, Justice Brennan also had fears of technology and how it would be further used to violate privacy:

> “Development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently, judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices” (Stanley 14).

While the “third party doctrine” continues along an intrusive path, the more concerning issue is the eroding definition of “reasonable expectation of privacy.” In multiple cases technology has helped subvert what normalcy would define as private. One would incorrectly assume to have privacy in their backyard, behind a ‘privacy fence’ (Urofsky 1021). In *California v. Ciraolo (1986)*, the Court upheld that aerial surveillance into a person’s backyard was not a violation of the Fourth Amendment. The majority, written by Chief Justice Warren Burger, concluded that there was no reasonable expectation because commercial and private pilots passed over the property, and that

the Fourth Amendment “does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye" (California 261).

In recent years, the American people have endured the constant threat of surveillance from our own government through programs such as TrapWire, unmanned drones patrolling the skies, the recent findings that the IRS can sift through your old emails, and the current Cyber Intelligence Sharing and Protection Act bill—which has been approved by the House and is waiting for Senate approval. With programs such as these, there is no “reasonable expectation of privacy” anymore. TrapWire is a network of surveillance cameras that feeds the images it captures to a server; TrapWire then uses special software to analyze images for suspicious activity. Daniel Botsch, a TrapWire executive, explains how it will involve law enforcement in its program:

> “Any patterns detected – links among individuals, vehicles or activities – will be reported back to each affected facility. This information can also be shared with law enforcement organizations, enabling them to begin investigations…” (Botsch).

In 2011, the Supreme Court ruled in *Kentucky v. King* that the police can conduct warrantless searches in exigent circumstances. In this particular case the police were chasing a suspect that fled into an apartment. When the police smelled marijuana and “heard noise consistent with the destruction of evidence,” they kicked down the door to the wrong apartment and found a man sitting on his sofa engaged in the use of drugs. The individual was arrested and they searched his apartment. In that same year, in *The People v. Gregory Diaz*, California Supreme Court ruled that upon arrest, the police can now conduct a “warrantless search of the text message folder on an arrested person’s phone…as incident to a lawful custodial arrest” (Minkevitch). In recent news, an IRS handbook has surfaced that informs government employees of their ability to search through the publics’ old emails, without a warrant. The IRS believes that

email is not protected because people who use the internet, as a whole, do not "have a reasonable expectation of privacy in such communications" (FoxNews.com).

Now that TrapWire has a network of cameras recording and relaying our every move, the IRS is monitoring our emails, the police have the right to break down our doors if they hear what sounds like the "destruction of evidence," and the Senate may pass a bill which "will allow private sector firms to search personal and sensitive user data of ordinary U.S. residents to identify 'threat information,' which can then be shared with other opt-in firms and the U.S. government — without the need for a court-ordered warrant" (ZDNet), it sounds as if there is no longer any reasonable expectation of privacy.

With the changes and quick advancement of technology, it is becoming harder for the judicial system to stay in tandem. With the Patriot Act, Protect America Act of 2007, Electronic Communications Privacy Act, and other intrusive government programs and laws, privacy has become a fond memory and the Fourth Amendment is becoming a hollow shell. If a way to combat the fast pace of technology against the slow pace of the justice system is not found soon, Justice Brennan's cries of "Big Brother is Watching You!" may be truer than he ever believed (Urofsky 1022).

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